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Appeal.

Appeal by special leave by Clifford W. L. Callwood from an order of the Federal Supreme Court of the West Indies (Hallinan, C.J., Rennie and Archer, JJ.), dated July 22, 1958, dismissing (save as to the quantum of damages) the appellant's appeal from an order of the Supreme Court of the Windward Islands and Leeward Islands (Lewis, J.), dated June 14, 1957, whereby the appellant was ordered to give possession of Great Thatch Island in the British Virgin Islands to the respondent, Else E. Callwood on Sept. 30, 1957, and to pay $2,880 B.W.I. for the use and occupation of Great Thatch Island. The Federal Supreme Court reduced the damages to $840 B.W.I. The facts are set out in the judgment of the Board.

J. G. Foster, Q.C., Mark Littman and *C. A. Brodie* for the appellant.

J. G. Le Quesne and *M. Heald* for the respondent.

LORD JENKINS: This appeal arises out of a dispute concerning the ownership of Great Thatch Island in the British Virgin Islands. The rival claimants are the plaintiff (now respondent), Else E. Callwood, the widow of Richard Edward Clifford Callwood (hereinafter called " the testator ") and the defendant (now appellant), Clifford W. L. Callwood, the only son of the plaintiff and the testator. The testator was born in 1862 in Tortola, one of the British Virgin Islands, and was, accordingly, a British subject by birth. He retained his British nationality all his life, but, at the age of fourteen, he went to live in the Island of St. Thomas in the Virgin Islands, which was then a Danish colony under Danish law, and lived there until 1913 when he went to live in Germany, where he remained until his death in 1917. He married the plaintiff in London in 1905, and it is common ground that, at the time of his marriage and thereafter down to his death, he was domiciled in St. Thomas. Great Thatch Island had formerly belonged to the testator's father, on whose death intestate in 1902 it devolved on the testator as his heir at law under the English law of inheritance then in force with respect to freehold land. At the time of the testator's death, Great Thatch Island was still (to use a neutral expression) vested in him. There were two children of the testator's marriage to the plaintiff, namely, a daughter Waldfriede who was born in 1906 and died in 1939, and the defendant who was born in 1908, and who, as the only son of the testator, became, on the testator's death, entitled as his heir at law to any freehold property devolving on the intestacy of the testator under the English law of inheritance then in force.

No settlement of the property of either spouse was made on their marriage, and, in view of this and of the testator's domicil in the Island of St. Thomas, it is common ground that (it may be with exceptions not relied on before their Lordships as material in the present case) the marriage had the effect under Danish law of subjecting to the Danish system of community of property between spouses (which appears to have been wholly or partially codified by a Danish Royal Ordinance of May 21, 1845) all movable property wherever situate, and all immovable property situate in St. Thomas, belonging to either spouse at the time of the marriage or subsequently acquired during, or in certain circumstances after the termination of, the marriage. The question whether, so far as immovable property is concerned, the Danish system of community in the eye of Danish law extended also to immovable property (such as Great Thatch Island) belonging to one of the spouses but situated outside St. Thomas, and in the territory of a foreign sovereign state, whose own laws did not include the Danish or any other system of community of property between spouses, is a cardinal issue in the present appeal. It is also common ground that, with the important qualifications mentioned below, the application of the Danish system of community in any given case had the effect of making the joint property divisible on the death of either spouse between the surviving spouse and the children of the marriage. But this general proposition was qualified under the Ordinance of 1845 (a) by the reservation to the husband, should he be the survivor, of the right to retain the whole of the joint property undivided until his death or re-marriage, with power to dispose (within certain limits) of capital as well as income, thereby postponing and (to the extent of any legitimate expenditure of capital) defeating the interests of the children; and (b) by the reservation to the husband of a power to confer by will on the wife if she survived him the same right to retain the whole joint property undivided until her death or re-marriage.

By way of assertion and exercise of the right and testamentary power so reserved to the testator by the Ordinance of 1845, he and the plaintiff, on Apr. 25, 1911, made a joint will which provided (inter alia) as follows:

> " Paragraph 1
>
> " I, Richard Edgar Clifford Callwood, reserve the right accruing to me as husband in accordance with Royal Ordinance of May 21, 1845, para. 18, s. 1, say to retain, if I am the survivor, our whole joint estate undivided with our joint children, as long as I do not marry again.
>
> " Paragraph 2
>
> " I, Richard Edgar Clifford Callwood, do hereby give and grant to my said wife, Mrs. Elsa E. Callwood, if she is the survivor, the same right as mentioned sub. para. 1 of retaining our joint estate undivided with our joint children as long as she does not marry again.
>
> "As however both of us consider it to be the benefit and welfare of all concerned, that the said right of retaining our joint estate undivided should be given me, Mrs. Elsa E. Callwood, under certain restrictions, I Richard Edgar Clifford Callwood and I, Mrs. Elsa E. Callwood do hereby decide, that the said right is given with the following restrictions.
>
> " It shall be obligatory for me, Mrs. Elsa E. Callwood, immediately at the death of my husband to deposit all cash money, bonds, shares and securities, belonging to the joint-estate and only to draw the interest of same. In case of unforeseen events, which will make it necessary to withdraw the money or to make a change of the securities, this can only be done with the consent of Mr. Jakob Peiffer, living at Biebrich of Rhein, or in the case of his death with the consent of Mr. Otto Zwanziger of Biebrich of Rhein or the person to whom the surviving of these gentlemen may transfer the said authority."

Paragraph 2 went on to require the plaintiff to pay or provide for certain annuities as therein mentioned, and concluded as follows:

> " Finally, if Mrs. Elsa E. Callwood's retaining of our joint estate should cease only $\frac{1}{3}$ say one third part of our whole joint estate should accrue to me, Mrs. Elsa E. Callwood, while the balance of $\frac{2}{3}$ say two third parts shall accrue to our joint children share and share alike, as their paternal inheritance."

Paragraph 3 contained provisions with respect to thirteen properties in the town of Charlotte Amalie on the Island of St. Thomas, all recorded in the name of the testator's sister Mrs. Peiffer " but of which the greater part belongs to us " (sc. to the testator and the plaintiff as part of their joint estate). According to a list of these properties given in para. 3, one of them, known as No. 38 Dronningensgade, Charlotte Amalie, belonged beneficially to the testator and Mrs. Peiffer in equal shares, two others belonged beneficially as to one-third to Mrs. Peiffer and as to two-thirds to the testator, and the whole beneficial interest in the remaining ten belonged to the testator, but it is clear that the beneficial interests attributed to the testator were regarded by para. 3 as part of the joint estate. Put very A shortly, the effect of the provision of para. 3 with respect to these properties was that Mrs. Peiffer should convey the legal title to the plaintiff but should take a beneficial life interest in all of them on certain conditions. It is to be observed that the will contained no specific reference to Great Thatch Island and, therefore, only purported to deal with it if it could be considered as included in the general references to "our whole joint estate" and "our joint estate" contained in the will. B

The Danish Virgin Islands were ceded to the United States of America on Mar. 31, 1917, but Danish law remained in force there until July 1, 1921.

On Apr. 23, 1951, judgment was given in the United States Court of Appeals in *Callwood* v. *Kean* (1), which was an action originally brought by the plaintiff against her former agent Osmond Kean for an account of the proceeds of the sale of No. 38 Dronningensgade, but which, on the intervention of the present C defendant, developed into a contest as to the title to such proceeds. It appears that, after the testator's death, Mrs. Peiffer, as contemplated by para. 3 of the will (and with the concurrence of her husband who predeceased her), made over to the plaintiff all the thirteen properties in Charlotte Amalie, and, in particular, No. 38 Dronningensgade, retaining in all of them a life interest which she continued to enjoy down to her death on July 11, 1947. It further appears that D No. 38 Dronningensgade was sold in 1946 by Osmond Kean, purporting to act as attorney for both the parties to the present action. In these circumstances, the question which was raised for decision between the present plaintiff and defendant in the United States Court of Appeals (on appeal from the District Court of the Virgin Islands) was, in effect, whether the entire net proceeds of sale of No. 38 were, as contended by the plaintiff, her absolute property, or, as contended by the E present defendant, belonged as to the half share acquired by the plaintiff from Mrs. Peiffer to the plaintiff absolutely, and as to the other half share formed part of the joint estate and were subject, accordingly, to the provisions of the Danish law of community and of the joint will made by the testator and the plaintiff under those provisions. The United States Court of Appeals decided this question in the sense contended for by the present defendant, in substance affirming the F decision of the District Court. Their Lordships have thought it right to refer at some length to the subject-matter of this earlier litigation in view of the use which, as will shortly appear, was made in the present action of the exposition of the Danish law of community contained in the judgment of the Court of Appeals, directed though it was to the destination under that law of the proceeds of sale of immovable property admittedly situated in territory subject to that law, and G in no way concerned with the question whether, in circumstances such as those of the present case, the Danish system of community in force in the Island of St. Thomas at the material time was, in the eye of Danish law, applicable to immovable property situated in British territory and subject to English law.

On or about Aug. 14, 1948, Osmond Kean, purporting to act as agent for the plaintiff, granted to the defendant a lease of Great Thatch Island for twenty-five H years from that date at the yearly rent of $50. This lease was admittedly invalid because (assuming that Osmond Kean had authority to grant such a lease) it was not executed under seal and was not recorded in the Register of Titles of the Presidency of the Virgin Islands as required by law. The defendant, however, entered into possession of Great Thatch Island on the strength of this invalid lease, and has remained in such possession ever since without payment of rent. I

In these circumstances, the plaintiff, by writ dated Apr. 15, 1955, commenced the present action in the Supreme Court of the Windward Islands and Leeward Islands, claiming a declaration that Great Thatch Island was, by virtue of the joint will of herself and the testator, the property of the plaintiff; possession of Great Thatch Island; and damages for use and occupation. By her statement of claim, the plaintiff alleged (inter alia) (i) that she was the widow of the testator; (ii) that the testator was the owner (on the death of his father intestate in 1902) of Great Thatch Island and continued as such owner until the date of his death in 1917; (iii) that by the joint will it was agreed by the plaintiff and the testator that she should have the right to retain their joint estate in accordance with the Royal Danish Ordinance of May 21, 1845, c. 18, s. 1, under the Danish laws then in force in the Island of St. Thomas; and (iv) that the plaintiff had elected in accordance with the said law to retain Great Thatch Island as her property, and not to divide the same with her son, the defendant. The plaintiff went on to allege the facts already mentioned concerning the invalid lease, and concluded by claiming the relief already described. By his defence (para. 2), the defendant made no admission of any right in the plaintiff to Great Thatch Island as her property and alleged:—(i) that the will of the testator was ineffective in so far as it related to real property situate in the British Virgin Islands and consequently the testator died intestate as regards Great Thatch Island; and (ii) that on the death of the testator Great Thatch Island devolved on the defendant who was the only child (sc. son) of the testator. By para. 3, he admitted the facts alleged concerning the invalid lease, but said he entered into it in the mistaken understanding that the plaintiff was entitled to Great Thatch Island for life.

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(1) (1951), 189 F. 2d 565.

The case was tried at first instance by LEWIS, J. The only evidence of Danish law before the court consisted of an affidavit of a Mr. James August Bough, an attorney and counsellor at law practising in the Island of St. Thomas, and the judgment of the United States Court of Appeals already mentioned, to which reference was made in such affidavit. Omitting formal parts, the affidavit was in these terms:

> " 1. I am an attorney and counsellor at law, and have practised as such in the Virgin Islands of the United States of America from the year 1934, except between 1946 and 1954 when I served with the Department of Trusteeship of the United Nations, at New York City. The Virgin Islands of the United States of America were up to Mar. 31, 1917, a colony of Denmark, and it was common practice for persons to be married there under the Danish law of community property. In my practice the question as to what is the Danish law as to community property has often arisen.
>
> " 2. I have read carefully the opinion of the court delivered by MARIS, J., in the United States Court of Appeals for the Third Circuit in the case of *Callwood* v. *Kean* No. 10310, of Jan. 29, 1951 (2). I can state categorically that the law on this question is as stated in that opinion. The copy of the joint will of Richard Edgar Clifford Callwood and Else E. Callwood, printed in said judgment is a true and correct copy of the joint will under which the plaintiff Else E. Callwood claims in this action."

Their Lordships strongly deprecate this mode of providing evidence of foreign law. The discussion of the Danish law of community in the United States Court of Appeals was directed to the particular matter in hand, viz., the destination in view of that law of the proceeds of sale of a particular piece of immovable property admittedly situated in territory which, at the material time, was Danish territory and, accordingly, subject to Danish law. The judgment of the United States court accordingly provides no answer to the vital question whether, in the eye of Danish law, the property of spouses to which the rules of community attached on their marriage included immovable property such as Great Thatch Island, not situated in Danish territory but in the territory of a foreign sovereign state whose own law with respect to immovable property so situated did not include the Danish or any other system of community. The judgment of the United States court was likewise not concerned with, and, therefore, expressed no opinion on, the rights of spouses subject to the Danish system of community as regards the enjoyment or disposal of the joint property during the continuance of the marriage.

Their Lordships think it desirable to quote at some length from the discussion of the Danish law of community contained in the judgment of the United States court delivered by MARIS, J., inasmuch as the views therein expressed, as approved by Mr. Bough, provide the only evidence of the Danish law of community adduced in the case. The learned judge says this (3):

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(2) (1951), 189 F. 2d 565.

> " Since the will involves the title to real estate in St. Thomas it is to be construed in accordance with the rules of law in force in that island when the will went into effect on Jan. 17, 1917, the date of the testator's death. At that time the law in force in St. Thomas was that of Denmark. The Danish law in force when the island was one of the Danish West Indies remained in force, after the change of sovereignty, until July 1, 1921, when it was superseded by the Code of Laws of the Municipality of St. Thomas and St. John which substituted for the Danish law rules of law based upon the common law of England as understood in the United States.
>
> " Under the Danish law from very early times husband and wife held their property in community, unless otherwise provided by marriage settlement. Moreover one of the provisions of the Danish law was that upon the death of a spouse the surviving spouse could, under certain circumstances, continue to hold their entire joint estate in community until his or her death or re-marriage, thereby postponing the rights of children or other heirs in the community property. This right appears to have been established by, and certainly was recognised by, the Ordinance of May 21, 1845, which was in force in the Danish West Indies. Section 18 of that ordinance, referred to in the will here in question, provides that a husband after the death of his wife is not obligated to divide the property with their common children, whether they have attained their majority or not, so long as he does not re-marry unless marriage contracts or other binding determinants create the necessity for such a division. The section further authorizes the husband by testamentary disposition to confer on his wife the same right to retain the whole property undivided. Section 19 of the ordinance stipulates that the right of the surviving spouse to remain in community property as authorized by s. 18 ceases when the spouse re-marries.
>
> " It will be observed that the right thus given by the Danish law to a husband by his will to authorize his widow to remain in possession of their community property or joint estate was exercised by the testator here who, by para. 2 and para. 3 of the will, expressly authorized his wife, the plaintiff, to retain the whole of their joint estate undivided and to the exclusion of their children until her re-marriage. It appears that under the Danish law a surviving spouse who thus retained possession of the community property was entitled to sell or mortgage it or otherwise to deal with and dispose of it as absolute owner, although perhaps under a duty to compensate their children as heirs for any undue diminution in the aggregate value of their inheritance. Accordingly if the testator here had not imposed upon the plaintiff the restrictions upon alienation to which we have already referred, and the validity of which we will presently discuss, she would unquestionably have had the right to sell, mortgage or otherwise dispose of the real estate in St. Thomas belonging to the joint estate of the testator and herself and also the right to take possession of and invest or otherwise dispose of the proceeds, being responsible at the most merely to compensate their children for any undue diminution, as the result of gifts made by her, in the value of their share of the joint estate upon her re-marriage or death or the earlier division of the property.
>
> " The rights thus given by the Danish law to the surviving spouse who retains the joint estate in community cannot be described in terms of common law concepts since those rights are quite foreign to the common

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(3) (1951), 189 F. 2d at p. 573.

A law. Specifically they cannot be described as those of trustee and beneficiary, as the district court suggested in its opinion. Nor is it necessary for us to attempt to classify them under the common law. It is sufficient to note the rights which the Danish law conferred upon a widow under these circumstances and to point out that these rights vested in the plaintiff upon the death of the testator with respect to the property in St. Thomas B which they held in community, subject only to such restrictions as the testator by his will validly imposed upon her."

And (4):

"As we have said, under the Danish law, a surviving spouse retaining possession of the community property is ordinarily entitled to sell or C mortgage it or otherwise to deal with it as absolute owner. In the present case, however, as we have seen, the testator by his will placed definite restrictions upon the right of the plaintiff as surviving spouse to deal with the property. Thus he provided that it might only be sold or mortgaged with the consent of Jacob Peiffer or Otto Zwanziger and then only in case of unforeseen events which might make it necessary for the plaintiff to use principal or to make a change in the properties in which the joint estate D was invested. Moreover he provided that she should deposit in banks to be designated by Jacob Peiffer or Otto Zwanziger all money and securities belonging to the joint estate, including the proceeds of the sale of any properties."

And again (4):

E "It appears that under the Danish law a husband who by his will conferred upon his surviving wife the right to possession of the community property had also the right to stipulate that she could dispose of that property only with the consent of an individual who in Danish is called a 'Tilsynsvaerge' which may perhaps best be rendered in English as 'guardian'."

And (5):

F "Accordingly when the testator named Jacob Peiffer and Otto Zwanziger in his joint will as persons whose consent was required to the sale or other disposition of the joint property by his widow he was exercising a right which the law then in force in St. Thomas gave to him. His appointment of these individuals successively to assume the duties of guardian for his widow was accordingly entirely valid."

G Their Lordships have thought it sufficient to cite these passages from the text of the judgment, as representing the conditions drawn by the court from the sources referred to in the supporting footnotes, to which (and the full judgment as reported) reference may be made.

Before LEWIS, J., at first instance, counsel for the plaintiff put the essence of his case in this way: he said:

H "Plaintiff's case briefly is that her rights arise under the joint will and that under that joint will Great Thatch Island was devised to her notwithstanding it was not specifically mentioned therein. Paragraph 1 of joint will refers to 'whole joint estate'."

Counsel for the defendant on the other hand stated his leading argument thus:

I "Plaintiff must satisfy court as to the meaning of the words 'joint estate' in Danish law, and secondly show that Thatch Island fell within this expression. Evidence as to what Danish law was at the relevant date in regard to community of property is insufficient. The affidavit of James August Bough is inadequate in this point."

In the course of his judgment (delivered on June 14, 1957) LEWIS, J., said:

"... in the absence of any evidence by the defendant to contradict or put in issue Mr. Bough's opinion I find as a fact that the plaintiff and the

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(4) (1951), 189 F. 2d at p. 577.

(5) (1951), 189 F. 2d at p. 578.

> testator held their property in community when they were married as it has been admitted by both sides that there was no marriage settlement which provided otherwise."

Later he said:

> " . . . it [i.e., Great Thatch Island] is property which accrued to the testator before his marriage to the plaintiff and would form part of the community property unless specifically excluded therefrom by a marriage settlement . . .
>
> " It is admitted that there was no marriage settlement and as Great Thatch Island was owned by the testator at the date of his marriage it would, in the absence of any evidence to the contrary form part of the joint estate, and I accordingly hold that it does form part of the joint estate.
>
> " Counsel for the defendant has argued that it is for the plaintiff to show that the words ' our whole joint estate ' in para. 1 of the will included joint estate elsewhere than in St. Thomas. These words are in my opinion sufficiently comprehensive to include all property held by the testator and the plaintiff at the time of their marriage wherever it may be situate and I find as a fact that the expression ' our whole joint estate ' included Great Thatch Island although it is not specifically mentioned in the will."

The learned judge went on to hold that the joint will was in a form apt to include land in the British Virgin Islands under the Wills Act c. 26 there in force, and expressed his conclusion on the question of title in these terms:

> " In the result I am of the opinion that the plaintiff is entitled under the provisions of the will to retain Great Thatch Island as owner to the exclusion of the defendant and I accordingly declare that she is the owner thereof."

He accordingly made an order on the defendant to give up possession of Great Thatch Island on Sept. 30, 1957, and to pay mesne profits at the rate of $40 per month for the six years ending on that date.

On appeal by the defendant to the Federal Supreme Court of the West Indies (SIR ERIC HALLINAN, C.J., RENNIE and ARCHER, JJ.), that court in a judgment delivered by HALLINAN, C.J., on July 21 and 22, 1958, in which the other members of the court agreed, accepted LEWIS, J.'s conclusions both as to inclusion of Great Thatch Island in the joint estate and the efficacy of the joint will, and dismissed the appeal, save that the mesne profits were reduced to a total of $840, representing $84 per annum for a period of ten years. The learned chief justice observed:

> " I consider that the trial judge had sufficient evidence before him to hold that the joint will comprised and destined the lands in question."

From that judgment the defendant has now appealed to this Board.

Counsel appearing for the defendant based his argument in support of the appeal primarily on the submission that there was no evidence on which it could be held that the property to which the Danish system of community attached on the marriage of the testator and the plaintiff included in the eye of Danish law Great Thatch Island, situated as it was in British territory and subject to English law. If that submission is well founded, the present appeal must, in their Lordships' opinion, clearly succeed. The plaintiff's case is that, according to Danish law, Great Thatch Island formed part of the joint property to which the Danish system of community attached on the marriage of testator and the plaintiff, and devolved on the death of the testator in accordance with that system to the exclusion of the lex situs in the shape of English law. It is for her to prove that, in this matter of community, the Danish law as it stood in the island of St. Thomas at the material time arrogated to itself this extra-territorial effect. The question is one of fact to be proved by evidence, and the onus is on the plaintiff to prove it. As their Lordships have already observed, the only evidence of the Danish law of community adduced by the plaintiff

A consists of the judgment of the United States Court of Appeals as approved by Mr. Bough in his affidavit. Their Lordships are satisfied that there is nothing in this judgment, which can be regarded as evidence that the Danish system of community in force in the Island of St. Thomas at the material time applied in the eye of Danish law to land situate in foreign, or in particular British, territory. It is true that, in various parts of the judgment, general references B are to be found (for example) to "the property", "the entire joint estate" and "the community property" without qualifying words restrictive of their locality; but this, in their Lordships' opinion, is not enough. The law of one country concerning the devolution of land cannot, and prima facie is not intended to, affect the devolution of land situated in the territory of another. The learned judges in the United States Court of Appeals were not directing C themselves to the application of the Danish community system in the case of land situated outside Danish territory, and their Lordships find it impossible to assume that, if the question whether Great Thatch Island was, according to Danish law, to be regarded as part of the testator's and the plaintiff's joint estate under the Danish system of community had been before the United States court, it would have been answered in the affirmative.

D It is to be observed that, in *Re De Nicols, De Nicols* v. *Curlier* (6), where KEKEWICH, J., held that the contract imputed by the French system of community to spouses domiciled in France and marrying without any express contract (as to which, see *De Nicols* v. *Curlier* (7)), had the same effect as an express contract in like terms, and was enforceable in England against freehold and leasehold property situated there, the learned judge had before him expert E evidence to the effect that the term "immeubles" was not confined to immovables in France, but applied equally to immovables in other countries. He said this (8):

> "The difficulty which arose was whether the term comprised immovables abroad—that is, beyond France. The words of the code are, apparently, wide enough to cover all, wherever situate, and, if it could be treated as an F English instrument which the court is competent to construe, it would be impossible to avoid the conclusion that this is its real meaning. But to arrive at a conclusion respecting the construction of the code in this particular is beyond the competence of the court. It is a matter of fact with which the court can only deal according to the testimony of those qualified to give it."

G If the learned judge's view as to the construction which an English court would place on the French code if competent to construe it turned merely on the absence of any express restriction of its provisions to immovables situated in France, their Lordships take leave to doubt its correctness, but they entirely agree with the learned judge in holding that the question whether the French code did, on its true construction, include immovables outside France was a question of French law, and as such, "a matter of fact with which the court can only H deal according to the testimony of those qualified to give it". Again, in *Chiwell* v. *Carlyon* (9), the first question put by STIRLING, J., for the opinion of the Supreme Court of the Colony was whether certain immovable property in England fell within the community created under the law of the colony by the marriage of spouses domiciled in the colony; and the Supreme Court of the Colony held that this question should be answered in the affirmative.

I These cases indicate that the question whether the system of community in force in a given country is regarded by the law of that country as applying to immovables situated outside it is, for the purposes of proceedings in an English court, a question of foreign law, and, therefore, of fact, to be determined by competent evidence as to the law of the foreign country concerned. True it is that in *Re De Nicols* (6) the French system, and in *Chiwell* v. *Carlyon* (9) the

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(6) [1900] 2 Ch. 410. (7) [1900] A.C. 21. (8) [1900] 2 Ch. at p. 414.
(9) (1897), 14 S.C. 61.

Cape of Good Hope system, were proved to extend to immovables situated in another country; but this of course affords no evidence at all on the question whether the Danish system of community in force in the Island of St. Thomas during the period material to the present case purported to include immovables situated in other countries.

Counsel for the plaintiff contended that there were concurrent findings of fact by both courts below to the effect that the community here in question included immovables situated in the territory of a foreign state, such as Great Thatch Island. Their Lordships cannot agree. It appears to their Lordships that both courts erroneously regarded the judgment of the United States court, as approved by Mr. Bough in his affidavit, as affording evidence that the Danish system of community in force in the Island of St. Thomas during the material period included Great Thatch Island, notwithstanding that it was situated in the territory of a foreign country. For the reasons already stated, their Lordships are of opinion that the affidavit and judgment afforded no such evidence. It further appears to their Lordships that, basing themselves on this, as their Lordships think erroneous, view of the evidence, the courts below went on to hold that, inasmuch as the community property according to the relevant Danish law included Great Thatch Island, the general references in the joint will to "our whole joint estate" and "our joint estate" must be construed accordingly as including Great Thatch Island, a conclusion from which, had there been evidence that, according to the relevant Danish law, the community property did include Great Thatch Island, their Lordships would not have been disposed to dissent. The next step in the reasoning of the courts below appears to have been that, inasmuch as the joint will was in point of form and execution adequate to pass land situated in British territory (a matter which their Lordships are content to assume in favour of the plaintiff without deciding it), the joint will should be recognised by English law as effectively entitling the plaintiff to the beneficial interest it purported to give her in Great Thatch Island as part of the joint estate. This seems to their Lordships to be an over-simplification of the problem. Even if there had been proof of the inclusion of Great Thatch Island in the joint estate according to the relevant Danish law, and granting the adequacy of the joint will, in point of form and execution, to create with respect to Great Thatch Island, as part of the joint estate, the beneficial interest which it purported to confer on the plaintiff, there would still have remained the difficult question whether it would have been proper in the circumstances of this case to resolve the conflict between English law and Danish law with respect to the devolution of Great Thatch Island otherwise than by applying the lex situs (i.e., English law) in accordance with the general rule: (see, for example, *Welch* v. *Tennent* (10)). Their Lordships are much indebted to counsel for their full and careful argument on this question; but, as it appears to their Lordships that the case is concluded against the plaintiff by her failure to prove that Great Thatch Island formed part of the joint estate under the relevant Danish law, no useful purpose would be served by debating it further.

For these reasons, their Lordships will humbly advise Her Majesty that the appeal should be allowed, that the judgments of the Supreme Court of the Windward Islands and Leeward Islands and of the Federal Supreme Court of the West Indies should be set aside, and that the action should be dismissed. The respondent must pay the costs in the courts below and the costs of this appeal.

Appeal allowed.

Solicitors: *Herbert Smith & Co.* (for the appellant); *Zeffertt, Heard & Morley Lawson* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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(10) [1891] A.C. 639.

HASSANALLY AND ANOTHER *v.* CASSIM AND OTHERS.

[PRIVY COUNCIL (Viscount Simonds, Lord Tucker, Lord Jenkins, Lord Morris of Borth-y-Gest and Mr. L. M. D. de Silva), January 14, 18, March 7, 1960.]

Privy Council—Ceylon—Land subject to fidei commissum—Lease to lessee ignorant of fidei commissum—Bona fide improvements to land made by lessee—Whether lessee entitled to compensation for improvements.

A lessee of land in Ceylon, who has acted bona fide and in ignorance of the existence of a fidei commissum subject to which the lessor held as fiduciary at all material times, is entitled, as against all the fidei commissarii, to compensation, on his lease being prematurely terminated by sale of the land in a partition action, for improvements that he has made to the land, notwithstanding that the lease was granted by a lessor who, while purporting to act as sole owner, was fidei commissary owner only of a share in the land.

Soysa v. *Mohideen* ((1914), 17 N.L.R. 279) overruled.

Bellingham v. *Bloometje* ((1874), Buch. 36) and *Rubin* v. *Botha* ([1911] S.A.L.R. App. Div. 568) applied.

In 1945 Z.U., who under a fidei commissum created in 1871 was entitled to four-eighths of certain land at Colombo, purporting to act as sole owner of the land, leased the land to D. for thirty years from Jan. 1, 1946, on a lease by which D. covenanted to build on the land. D. entered and built on the land in accordance with the covenant. In a partition action children of Z.U.'s sister (who were entitled to the other four-eighths of the land beneficially) claimed a declaration of title to the land and its sale. D. having died, his executors claimed that, if the property were sold and the lease accordingly were terminated, compensation for the improvements of the land by D.'s erection and buildings thereon should be paid.

Held: the property should be sold in the partition action and compensation should be paid to D.'s executors out of the proceeds of sale in priority to the beneficial interests of other parties.

Appeal allowed.

Cases referred to:

Appuhamy v. *Doloswala Tea & Rubber Co., Ltd.*, (1923), 25 N.L.R. 267.
Bellingham v. *Bloometje*, (1874), Buch. 36.
De Beers Consolidated Mines v. *London & South African Exploration Co.*, (1893), 10 Juta 359.
Fletcher v. *Bulawayo Waterworks Co., Ltd.*, [1915] S.A.L.R. App. Div. 636.
Government Agent, Central Province v. *Letchiman Chetty*, (1922), 24 N.L.R. 37.
Hevawitarane v. *Dangan Rubber Co., Ltd.*, (1913), 17 N.L.R. 49.
Jasohamy v. *Podihamy*, (1943), 44 N.L.R. 385.
Parkin v. *Lippert*, (1895), 12 S.C. 179; 5 Digest (Repl.) 1000, *4472*.
Rubin v. *Botha*, [1911] S.A.L.R. App. Div. 568.
Soysa v. *Mohideen*, (1914), 17 N.L.R. 279.

Appeal.

Appeal by Hussenabai Hassanally and Yahyabhai Akberally from a judgment and decree of the Supreme Court of the Island of Ceylon (H. N. G. FERNANDO, J., and T. S. FERNANDO, J.), dated Sept. 5, 1957, allowing an appeal by the first respondent, Mohamed Muheeth Mohamed Cassim, from a judgment and decree of the District Court of Colombo (G. C. T. A. DE SILVA, A.D.J.), dated May 20, 1955, in a partition action instituted by the first respondent. The appellants were the executors and trustees of the estate of Akbarally Abdulhussan Davoodbhoy, who was originally the fifth defendant in the action. On his death, they were substituted for him as defendants. The other respondents (all of whom were also defendants in the action) were Abdul Rahiman Zaneera Umma, Mohammed Muheeth Mohamed Fausz, Mohamed Muheeth Abdul Majeed, Mohamed Muheeth Ayunul Wadooda, and Abdul Hameed Sitty Hajira, Abdul Hameed Mohamed Muheeth and Abdul Hameed Umma Shiffa (minors, by their guardian ad litem, Mohamed Muheeth Ayunul Wadooda). The facts are set out in the judgment of the Board.

E. F. N. Gratiaen, Q.C., and *Walter Jayawardene* (both of the Ceylon Bar) for the appellants.

The respondents did not appear and were not represented.

VISCOUNT SIMONDS: This appeal from a judgment of the Supreme Court of the Island of Ceylon raises a question of considerable importance. It has involved an examination of a body of case law in which their Lordships have had the advantage of the assistance of learned counsel for the appellants, who, appearing without an opponent, has impartially directed attention to all material authority. The facts which are not in dispute can be shortly stated.

The appellants are the executors and trustees of the estate of one Akbarally Abdulhussan Davoodbhoy, who was originally the fifth defendant in the action out of which this appeal arises. On his death, they were substituted for him as defendants. He will for convenience sometimes be referred to as the fifth defendant. The action was concerned with certain land situated in New Moor Street, Colombo, which, at the date of her death, was held by one Rahumath Umma subject to a fidei commissum created in 1871 in favour of her descendants. She died in 1921, leaving as her heirs two daughters, Umma Shiffa and the second respondent Zaneera Umma, each of whom became entitled to a half share of the property subject to the fidei commissum. Umma Shiffa died in March, 1938, leaving as heirs her four children, the youngest of whom, Mohamed Cassim, became the plaintiff in the action and is a respondent to this appeal, and the others were defendants in the action and are also respondents to this appeal. The position, then, was that the second respondent was entitled to 4/8th shares of the property and the other four respondents who have been mentioned to 1/8th share each, all such shares being subject to the fidei commissum. For this reason, there were added as defendants certain children of one of the children of Umma Shiffa who are also respondents to this appeal. It was in these circumstances that the plaintiff (the first respondent) brought his action under the provisions of the Partition Act (No. 16 of 1951) claiming a declaration of title to the property and a sale under the Act. But for the reason which will now be stated, he made defendants not only the persons who were interested with him under the fidei commissum but also the fifth defendant whose interest arose in a different way. It is not disputed that the latter's interest was such that he was a proper and necessary party to the suit.

On Dec. 11, 1945, the second respondent Zaneera Umma, who was entitled to 4/8th shares of the property by a deed of that date granted to the fifth defendant in consideration of the sum of Rs.2,700 and of the covenants and conditions therein contained a lease of the property for thirty years from Jan. 1, 1946, at the yearly rent of Rs.180 for the first fifteen years and thereafter at the yearly rent of Rs.240. The deed contained a covenant by the lessee that he would

> "within a reasonable time lay out and expend at his own expense in erecting and completing fit for habitation with proper materials of all sorts upon the said ground dwelling-houses, tenements, shops, boutiques or factories"

as therein provided. It was further provided that the lessee having completed the erection of the buildings as therein mentioned should continue to exercise, use and enjoy the rights, benefits, interest and income of the premises and the buildings erected thereon during the pendency of the term of thirty years demised by the lease and, further, that the lessee should keep the said buildings in proper order and condition and at the end of the term deliver up the whole of the premises to the lessor free of payment of any kind whatever. The fifth defendant

A as lessee entered on the demised land and duly constructed on it the buildings for which the lease stipulated. The learned district judge (G. C. T. A. DE SILVA, A.D.J.) held that the second respondent Zaneera Umma held herself out as the sole owner of the land and that the fifth defendant constructed the buildings in the bona fide belief that she was, in fact, the sole owner. He further held that the plaintiff in the action and the other heirs of Umma Shiffa made no protest
B but stood by and acquiesced in the improvement of the land by the fifth defendant. The Supreme Court did not concur in this last finding, but their Lordships do not think that this is material. In these circumstances, the fifth defendant by his amended statement of claim in the action (inter alia) claimed that, in the event of a sale of the property being ordered in terms of the Partition Act, the sum of Rs.35,000 as compensation for the buildings erected and other
C improvements effected by him should be paid to him out of the proceeds of sale.

The learned district judge in the first place directed that the property should be sold subject to the right of the sixth and seventh defendants (the present appellants), who had by then been substituted for the fifth defendant, to remain in possession of a half share of the premises and the entirety of the buildings thereon for the full term of thirty years demised by the lease. This part of the
D order has not been supported by the appellants and need not further be considered. The learned judge, however, further held that, in the event of his order not being upheld, the appellants were entitled to compensation out of the proceeds of sale for improvements effected by the fifth defendant. He fixed the quantum of compensation at Rs.25,122.45, and this figure is not in dispute. It is this part of the decision which was rejected by the Supreme Court on appeal and
E the appellants now seek to maintain. The Supreme Court, in deciding that the respondents are entitled to enjoy the fruits of the fifth defendant's labour and expense without paying any compensation therefor, were largely influenced by a decision of the Supreme Court in *Soysa* v. *Mohideen* (1). But before examining this case, their Lordships think it right to refer to certain authorities which, had they there been referred to, might well have led to a different conclusion.
F Their immediate purpose in doing so is to show that hitherto no distinction had been drawn between the case of an improver whose bona fide occupation had rested on a purported lease and that of any other improver who had assumed to be in lawful possession, but that, on the contrary, the right of the improver to compensation rests on the broad principle that the true owner is not entitled to take advantage, without making compensation, of the improvements
G effected by one who makes them in good faith believing himself to be entitled to enjoy them whether for a term or in perpetuity.

Reference may first be made to textbooks of high authority. In WILLE'S PRINCIPLES OF SOUTH AFRICAN LAW (4th Edn). at p. 479, it is said

> " A very common application of the doctrine of unjust enrichment occurs in cases where improvements or additions to landed property have been
> H made, without the express or implied consent of the owner of the property, by a person in possession of the property. A person who expends money or labour in improving property with the intention of doing so for his own benefit, whereas in fact he had no right or title to the property, in consequence of which the improvements are acquired by the owner of the property by virtue of accession, is entitled to claim from the latter the amount by
> I which the property has been enhanced in value.
>
> " Improvements of this nature are effected, as a rule, to the land of one person by a bona fide possessor of the land, such as a fiduciary, or by a person who believes that he is a fidei commissary. A bona fide occupier of land, such as a person occupying land under the mistaken belief that he has a lease of the property, has the same right to compensation as a bona fide possessor."

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(1) (1914), 17 N.L.R. 279.

Earlier editions of this work had substantially the same statement. In THE SOUTH AFRICAN LAW OF OBLIGATIONS by LEE AND HONORÉ (1950), para. 713 at p. 189 runs as follows: A

> " Preservation and improvement of property. A person who preserves the property of another from loss, deterioration or destruction, or who, acting on his own behalf, improves the property of another, in the belief that it is or will be his own (or, in some cases, that it belongs to a third person) may claim compensation from the owner for necessary and useful expenses thereby incurred, not exceeding the value of the benefit accruing to the owner." B

For this proposition numerous cases were cited, to some of which their Lordships will now refer. Before doing so, they observe that, in the present case, the often troublesome questions whether the improver has acted bona fide or mala fide and whether he is entitled to remain in occupation of the land until compensation has been paid do not arise. The bona fides of the fifth defendant is admitted, and the appellants do not in a partition action claim to remain in possession. C

In 1874, *Bellingham* v. *Bloometje* (2) was decided by VILLIERS, C.J., in the Supreme Court of the Cape of Good Hope. It must be examined at length because it goes to the root of the matter and it has not been fully appreciated in the Supreme Court of Ceylon. The headnote so far as material is as follows: D

> " Where a person has bona fide built upon land not his own, he is entitled to compensation for useful expenses incurred by him to the extent to which the value of the land has been enhanced by the building."

The defendant acting in good faith and the belief that he had a lease of certain land, which in fact did not form part of land leased to him, built on it a house and a dam. The true owners sought to evict him. It was held that he was entitled to compensation for the amount by which the value of the land was enhanced by the house and dam. The Chief Justice says (3): E

> " I am of opinion that the appellant had not sufficient reasons to believe he was building on another man's ground, but that he was the bona fide occupier of the land . . . All the Roman-Dutch authorities are agreed that, where a bona fide occupier has built upon land belonging to another he is entitled to compensation for the useful expenses incurred by him, that is to say, for the expenses to the extent to which the value of the land has been enhanced by the building." F

For this proposition, the learned judge cites a wealth of authority, including VOET and GROTIUS, and then goes on to discuss the rights of a mala fide possessor, which are not now relevant. But the salient fact is that, in this case, the improver, who was held to be entitled to compensation, thought that he was, but in fact was not, the lessee of the land which he had improved. It was because he bona fide thought that he was entitled to occupy the land and in that belief improved it, that his claim to compensation arose. Nothing turned on the fact that he was truly the lessee of the adjoining land, or that his bona fide mistake was about the boundaries of the land demised. He was a bona fide occupier. G H

In *Parkin* v. *Lippert* (4), the facts were somewhat complicated but the case illustrates the importance of bearing in mind the distinction between improvements effected by a lessee whose lease endures for the stipulated term and those effected by a lessee whose term is prematurely determined by operation of law. The material part of the headnote is as follows: I

> " Where a lessor takes advantage of the law which puts premature end to a lease upon the insolvency of the lessee he is liable, in the absence of any stipulation to the contrary, to the trustee of the lessee's estate for the value of improvements made by such lessee in contemplation of the lease being allowed to run its full term, and to a sub-lessee, to whom the lessee had

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(2) (1874), Buch. 36. (3) (1874), Buch. at p. 38. (4) (1895), 12 S.C. 179.

> legally sublet the land before his insolvency, and who in contemplation of the lease continuing to its end had made such improvements."

The same learned judge having invoked the principle (5) that

> "the presumption against forfeiture of property in any shape or form lies at the root of the well-known maxim of our law, that no one shall be enriched at the expense of another"

observed (6) that there was no difference in principle, although there might be in degree, between the case of a lease being abruptly terminated by the operation of a special law and that of a bona fide possessor making improvements in the belief that he will have the permanent enjoyment of them. Here, then, was the case of an improver who, lawfully occupying under a lease and in that capacity making improvements, was entitled to compensation because his occupation was prematurely determined.

In *Rubin* v. *Botha* (7), the essential facts closely resembled those of the present case and the decision derives special importance from the fact that it was that of LORD DE VILLIERS, C.J., INNES, J., and MAASDORP, J.P. There the plaintiff and defendant entered into an agreement of lease under which the plaintiff was to have the use and occupation of a portion of the defendant's farm for ten years without payment of rent, and was to erect a building thereon which, at the expiration of that period, was to become the property of the defendant. After the plaintiff had erected the building and been in occupation of the building for three years, the defendant gave him notice to quit on the ground that the agreement was null and void as not having been executed as required by the Transvaal law. It was held that the plaintiff was entitled to be paid for the improvements to the extent to which the value of the defendant's farm had been improved thereby, less the value of the plaintiff's use and occupation for three years. There was a difference of opinion as to the quantum of compensation which does not arise in the present case, but there was unanimity on the right to some compensation. Some passages may be quoted from the judgment of the Chief Justice with whom MAASDORP, J.P., agreed. He said (8):

> "The present case differs from the many cases in the Cape Supreme Court relating to the compensation payable to the owner of land by the person effecting improvements thereon in this respect, that the improvements were made by a person who knew that he was not the owner and intended that the buildings should become the property of the owner, but believed that he would, as lessee, enjoy the use and occupation for the full period contemplated by the lease executed between him and the owner. That lease proved to be null and void by reason of its not being notarial, and the question to be determined is what should be the basis of the compensation admittedly payable by the defendant to the plaintiff."

The learned Chief Justice then referred to his decision in *Bellingham* v. *Bloometje* (9), which has already been cited, and to the authority of GROENEWEGEN on which it had been decided, and said (10):

> "Lessees, as has often been pointed out in the Cape cases, especially in *De Beers Consolidated Mines* v. *London & South African Exploration Co.* (11), stand on a different footing from other occupiers as their rights have been defined by special legislation. Where, however, as in the present case, the relation of lessor and lessee does not exist between the owner and the occupier by reason of the agreement of lease proving null and void, there is no valid reason why the basis of compensation applicable to lessees should be applied to improvements made by the occupier."

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(5) (1895), 12 S.C. at p. 189.
(6) (1895), 12 S.C. at p. 190.
(7) [1911] S.A.L.R. App. Div. 568.
(8) [1911] S.A.L.R. App. Div. at p. 574.
(9) (1874), Buch. 36.
(10) [1911] S.A.L.R. App. Div. at p. 575.
(11) (1893), 10 Juta 359.

Then after referring to the already cited case of *Parkin* v. *Lippert* (12), the Chief Justice said (13):

> "The plaintiff was not a 'possessor' in the strictly juristic sense of the term, but he was a bona fide occupier, who believed he had the right, not only of occupation, but of erecting the buildings on the land so occupied. True it is that he intended that the building should become the property of the defendant, but only upon the expiration of the ten years during which the occupation was to last. The defendant took advantage of the law which, by declaring the lease to be void, frustrated the true intentions of both parties, and there appears to me to be no reason in the world why he should not be subject to the equitable rule of the Dutch law that no one should be enriched to the detriment and injury of another."

Then a little later (14):

> "The defendant in the present case took advantage of the law, which declared his agreement to be void, and he cannot insist upon compensation being payable as if the lease had been a valid one."

Their Lordships have referred at length to this case, both because it appears to them to apply in an unimpeachable way the cardinal principle of Roman-Dutch law in regard to unjust enrichment and because it was ignored in the leading case of *Soysa* v. *Mohideen* (15) to which they will presently recur. But before doing so, they will mention *Fletcher* v. *Bulawayo Waterworks Co., Ltd.* (16). In that case again, the defendants had leased a piece of land but had by mistake sunk a well beyond its boundary within the plaintiffs' land. The plaintiffs bringing an action for ejectment, the defendants claimed compensation for the improvement effected by the sinking of the well. The court (consisting of INNES, C.J., SOLOMON, J.A., and MAASDORP, J.A.) considered and applied *Rubin* v. *Botha* (17), and held that they were entitled to it. There is much in the judgments of all three judges which illuminates the principle, but their Lordships think it sufficient to cite a single passage from the judgment of the Chief Justice (18):

> "But it [*Rubin* v. *Botha* (17)] certainly did decide that a person who had made improvements upon the land of another, not as possessor, but under the mistaken idea that he was a lessee was entitled to compensation on the same basis as a possessor, subject to an equitable deduction necessitated by the special circumstances."

Why, then, it must be asked, did the court in the present case deny to the fifth defendant the right to compensation, thereby depriving him of the fruit of his labours and expense and permitting the unjust enrichment of the co-heirs? The answer is found in *Soysa* v. *Mohideen* (15) which, rightly perhaps, appeared to them to be a binding authority. It must, therefore, be closely examined. Two important points were raised in the case, only one of which is relevant to the present question, and the facts can be shortly stated. A parcel of land which was subject to a fidei commissum had been occupied by the defendant in the action as lessee of one of the fiduciarii who was entitled to one half of the property and had agreed to pay him half the value of the buildings on the termination of the lease. The plaintiffs, the fidei commissarii (the fiduciarii having died), successfully challenged the validity of the lease, whereupon the defendant claimed to retain possession of the land until the plaintiffs paid him half the cost of his improvements. This claim was rejected by the court, and once again their Lordships must cite considerable passages of the judgment, pointing out with respect how error has found its way into their conclusions. At a first hearing before LASCELLES, C.J., that learned judge said (19):

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(12) (1895), 12 S.C. 179.
(13) [1911] S.A.L.R. App. Div. at p. 576.
(14) [1911] S.A.L.R. App. Div. at p. 577.
(15) (1914), 17 N.L.R. 279.
(16) [1915] S.A.L.R. App. Div. 636.
(17) [1911] S.A.L.R. App. Div. 568.
(18) [1915] S.A.L.R. App. Div. at p. 647.
(19) (1914), 17 N.L.R. at p. 281.

> " I think that there can be no doubt that under the Roman-Dutch law a lessor had not the jus retentionis which would entitle him to remain in possession against a successful claimant until he has been compensated for improvements. The occupation of a lessee is not possessio civilis, for he does not occupy the property in the belief that it is his own. On the contrary, his interest in the property is defined and limited by the terms of the lease."

The learned Chief Justice thought that the uncertainty which existed on that branch of the law should be set at rest and adjourned the case for re-argument before the Collective Court. The observation that has been cited proved to be the basis of the judgment of that court. The Chief Justice himself added little to his previous judgment. De Sampayo, A.J., opens the relevant part of his judgment with the words (20) " A lessee is not a bona fide possessor, and is therefore not entitled to compensation for improvements on that footing ". Their Lordships observe that he, like the Chief Justice, assumes that he is dealing with a claim by a lessee, whereas the very basis of the claim is that the lease has been repudiated and that he cannot claim under it. In the words of Lord de Villiers (21), he was not a possessor in the strict juristic sense but he was a bona fide occupier who had effected improvements in the mistaken belief that he would enjoy them for the term of the lease. The learned judge proceeded to distinguish other cases on which their Lordships do not think it necessary to pronounce. His judgment was, in their Lordships' view, vitiated by the original erroneous assumption. None of the cases in the South African courts, to which reference has been made, were noticed by the court. Pereira, J., fell into the same errors. After stating (22) that it was well settled law in the colony that, in order to be entitled to compensation for improvements, a person should have had not only possession of the property but bona fide possession of it, and that by " possession " is here meant what is known to the civil law as the possessio civilis as distinguished from the possessio naturalis, he held that a lessee has not possessio civilis of the land that he enjoys under the lease, for he knows that the land he enjoys does not belong to him; therefore, he is not entitled to compensation for improvements. The question whether or not the possession of a lessee is possessio civilis may be open to argument. But in this context it is beside the point. For, as already stated, the claim made by the defendant in the case under review (like the claim made by the appellants in the present case) was not made qua lessee but in respect of the bona fide occupation of land under a lease which had been repudiated. It would, as their Lordships think, be difficult to imagine a clearer violation of the moral principle on which the rule against unjust enrichment rests, than that an owner, who has, for whatever reason, prematurely brought a lease to an end, should at once deny to the lessee the rights which the lease or the common law gives him as lessee and, because he was a lessee, deny also his claim to compensation for improvements. Their Lordships must, accordingly, pronounce that this case was wrongly decided and have the less reluctance in doing so because, long though the decision has stood, no questions of title can be affected by a contrary view of the law.

But, though this decision has stood for so many years, there have been in the courts of the Island of Ceylon cases which, in principle, are not easy to reconcile with it. Thus, in *Hevawitarane* v. *Dangan Rubber Co., Ltd.* (23) (a case decided shortly before *Soysa* v. *Mohideen* (24)), it was held that a " bona fide possessor " need not necessarily be the owner of the property possessed, nor need he have a legal right to possess it but that it is sufficient if his possession is the result of an honest conviction in his mind of a right to possess. These words were quoted with approval by Wood Renton, A.C.J., from Pereira's Right to Compensation for Improvements, and were not dissented from by the same Pereira, J., who was a party to the decision in the later case. It would seem that a discrimination between these two cases can only rest on a confusion as to the capacity in which a person, who thought he occupied under a valid lease but did not, claims.

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(20) (1914), 17 N.L.R. at p. 284.
(21) See [1911] S.A.L.R. App. Div. at p. 576.
(22) (1914), N.L.R. at p. 285.
(23) (1913), 17 N.L.R. 49.
(24) (1914), 17 N.L.R. 279.

A case which usefully illustrates the spirit in which the principle has been developed is *Government Agent, Central Province* v. *Letchiman Chetty* (25). There the relevant facts (taken from the headnote) were that the Government Agent took steps to acquire a swamp under the Land Acquisition Ordinance, but suspended it. On the outbreak of plague, he entered into possession under the Plague Regulations and, in anticipation of the conclusion of the acquisition proceedings, improved the land by filling it and draining it with drains which extended out of the land. No formal order of possession was obtained under the Land Acquisition Ordinance. At this stage the scheme was modified, and the old proceedings under that ordinance were abandoned, and new proceedings started. The question, then, was whether the land should be valued as at the date of the award in those proceedings, or whether the Government Agent was entitled to compensation for improvements effected by him while he was in possession. He was held to be so entitled on the ground that he was a bona fide possessor. For a person who takes possession of land and executes improvements on it in expectation of a formal title, which in good faith he believes himself certain to obtain, may be such a possessor. Bertram, C.J., in a weighty and learned judgment treats of the development of the law, observing (26):

> " In my opinion it would be a most unfortunate position if the law had not developed principles which would enable it to deal justly with such a case."

In that case, the question was mainly whether the possession was mala fide or bona fide. No doubt appears to have been entertained that, if there was bona fides, a valid claim to compensation was established. Again, it appears to their Lordships that, on any equitable principles, it is unjustifiable to deny to an evicted lessee compensation which is awarded to one who has no title at all, however firm may be his belief that he will get one.

Reference must now be made to *Appuhamy* v. *Doloswala Tea & Rubber Co., Ltd.* (27). In that case, there was much discussion of the rights of a lessee in respect of improvements, and Garvin, A.J., said (28):

> " It is well settled law that in Ceylon a lessee who has improved his leasehold cannot maintain a claim for compensation in respect of these improvements against a third party who establishes a title superior to that of his lessor from a source other than the lessor. The law was declared in this sense in the case of *Soysa* v. *Mohideen* (29). Since the decision of that case nothing new has been discovered in the writings of the jurists."

The learned judge then referred to the two South African cases which have already been examined, *Bellingham* v. *Bloometje* (30) and *Rubin* v. *Botha* (31) and said (28):

> " In neither of these cases was compensation granted to the improver in his character of lessee of the property improved. Indeed, it was the circumstance that he was not in law the lessee of the premises which enabled him to contend that he was a possessor who entered upon the premises bona fide, and with the intention of holding and enjoying the premises, if not as owner, at least for a specified period of time, and entitled in equity to a measure of compensation assessed on that footing."

It is difficult to understand why the acknowledged principle of those cases did not apply to the case before the learned judge. But at least he did not dissent from it, and the high authority of Garvin, J., may be said to reinforce that of the distinguished South African judges who affirmed the right to compensation in such a case.

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(25) (1922), 24 N.L.R. 37.
(26) (1922), 24 N.L.R. at p. 40.
(27) (1923), 25 N.L.R. 267.
(28) (1923), 25 N.L.R. at p. 269.
(29) (1914), 17 N.L.R. 279.
(30) (1874), Buch. 36.
(31) [1911] S.A.L.R. App. Div. 568.

In *Jasohamy* v. *Podihamy* (32), the right of compensation for improvements was extended to a usufructuary who made improvements with the consent and acquiescence of the owner. The interest of the case lies in the fact that KEUNEMAN, J., cites from WILLE'S PRINCIPLES OF SOUTH AFRICAN LAW (1937 Edn.), p. 353, the passage which has already been quoted. It will be observed that the generality of the statement of the relevant law in this citation does not exclude the case of a person who occupies land and improves it in the mistaken belief that he is a lawful lessee. This view is enforced by the fact that the learned judge then refers without disapproval to *Rubin* v. *Botha* (33) and *Fletcher* v. *Bulawayo Waterworks Co., Ltd.* (34).

Learned counsel referred their Lordships to many other cases in which, as he contended, the courts of Ceylon had sought to mitigate the rigour of the law as laid down in *Soysa* v. *Mohideen* (35) by means of the doctrine of acquiescence or otherwise. But they think it unnecessary to examine them and will return to the case under appeal. As already observed, the judges of the Supreme Court founded their judgment on *Soysa* v. *Mohideen* (35) and, in particular, on the passages that have already been cited from the judgment of PEREIRA, J. H. N. G. FERNANDO, J., concludes the relevant part of his judgment by saying (36) that, having considered many of the cases subsequent to *Soysa* (35), he would hold that none of them had in any way qualified the principle therein laid down that the rights, if any, arising from a contract between the lessor and lessee cannot be enforced by the lessee as against the fidei commissary owners who were not parties to the contract. This passage serves to emphasise in the clearest way the error which permeates *Soysa's* case (35) and the case under appeal. In that case, as in this, the claim of the improver was based not on contractual rights under the lease but on an equitable principle which is an application of the cardinal rule against unjust enrichment. It is beside the mark to discuss whether the possession of a lessee is civilis or naturalis, for it is not as lessee that the claim is made. It is, on the contrary, because he is denied his contractual rights by the premature termination of the lease, that he asserts his claim to compensation. Their Lordships entertain no doubt that, in allowing it, they follow the line of development of an important equitable principle, and derive some satisfaction from the fact that the law of Ceylon will thus be brought into harmony with that established in South Africa nearly a century ago.

As they take this view on the main question that was argued, their Lordships do not think it necessary to discuss an alternative claim, which was founded on the view that the lessor, Zaneera Umma, was entitled to compensation as between herself and her co-heirs and that, by subrogation, the fifth defendant and, therefore, the appellants are entitled to the benefit of her claim. This is a matter which may in some other case call for determination. It is unnecessary and would be inexpedient to deal with it now.

Their Lordships are satisfied that the final adjustment of the rights of the parties including the party claiming compensation as an improver can and should be made in the partition suit. The amount of compensation, if payable, has not been disputed, nor has any equitable plea been advanced for its reduction.

Their Lordships will, therefore, humbly advise Her Majesty that the order of the Supreme Court should be set aside, that the order of the District Court should be restored so far as it directed the sale of the property in accordance with the provisions of the Partition Act, 1951, and the bringing of the proceeds of sale into court to abide further order and the payment of costs, but that provision should be made by such further order for paying the sum of Rs. 25,125.45 thereout to the appellants in priority to the beneficial interests of other parties. The respondents must pay the costs of the appellants in the Supreme Court and of this appeal.

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(32) (1943), 44 N.L.R. 385.
(33) [1911] S.A.L.R. App. Div. 568.
(34) [1915] S.A.L.R. App. Div. 636.
(35) (1914), 17 N.L.R. 279.
(36) (1957), 59 N.L.R. at p. 164.

Appeal allowed.

Solicitors: *Fisher, Dowson & Wasbrough* (for the appellants).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

PATTERSON *v.* SOLOMON.

[PRIVY COUNCIL (Viscount Simonds, Lord Denning and Lord Jenkins), February 15, 16, March 21, 1960.]

Privy Council—Appeal—Jurisdiction—Membership of a colonial legislative council—Order in Council providing for reference by legislative council of colony to supreme court—Finality of court's determination—Absence of jurisdiction over such questions save on reference from legislative council—Office as minister similarly outside jurisdiction—Trinidad and Tobago (Constitution) Order in Council, 1950 (*S.I.* 1950 *No.* 510), *s.* 40 (1), *as substituted by Trinidad and Tobago* (*Constitution*) (*Amendment*) *Order in Council,* 1956 (*S.I.* 1956 *No.* 835), *s.* 27.

The respondent had been returned as a member of the Legislative Council of Trinidad and Tobago, had been elected to be a member of the Executive Council and had been appointed by the Governor to be Minister of Education and Culture. The appellant sued in the Supreme Court of Trinidad and Tobago for an injunction to restrain the respondent from acting as Minister and as a member of the Executive Council and a member of the Legislative Council on the ground that his seat in the Legislative Council had become vacated by his having been party to a certain contract without disclosure. By the Trinidad and Tobago (Constitution) Order in Council, 1950, s. 40 (1)*, as substituted by the Trinidad and Tobago (Constitution) (Amendment) Order in Council, 1956, all questions which might arise as to the right of any person to be or remain an elected member of the council had to be referred to the Supreme Court of the colony. By s. 30 the Governor could, in effect, appoint an elected member of the Executive Council as a minister. The application for the injunction was dismissed on the ground that action did not lie and that the question of a right to remain an elected member could be determined only by the Supreme Court on a reference made by the Legislative Council. On appeal from the Full Court of the Supreme Court of the colony to the Judicial Committee, special leave to appeal having been granted by Her Majesty, the appellant abandoned his claim to relief except in relation to the respondent's office of minister.

Held: appeal did not lie for the following reasons—

(i) the determination of the Supreme Court on a reference to it under s. 40 of the Order in Council was final, because s. 40 did not provide for the decision of ordinary civil rights but created an entirely new jurisdiction in the court, with the council's consent, for determining the status of persons claiming to be members of the council.

Dictum of LORD CAIRNS, L.C., in *Théberge* v. *Laudry* ((1876), 2 App. Cas. at p. 106); *De Silva* v. *A.-G. for Ceylon* ((1949), 50 N.L.R. 481); and *Senanayake* v. *Navaratne* ([1954] 2 All E.R. 805) applied.

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* The terms of s. 40 are printed at p. 23, letter A, post.

(ii) similarly, no appeal lay from a determination of the Supreme Court in relation to the same subject-matter in other proceedings than on such a reference; neither did appeal lie from the decision that the court had not jurisdiction otherwise than on such a reference.

(iii) by abandoning his claims concerning the respondent's membership of the Executive Council and Legislative Council the appellant omitted essential links in the chain of reasoning by which he sought to support his claim to an injunction against the respondent's acting as minister; neither, therefore, was he entitled to an injunction against the respondent's so acting.

Per Curiam: although special leave to appeal had been granted by Her Majesty, it was open to the respondent to take the objection that no appeal lay (see p. 24, letter A, post).

Appeal dismissed.

[As to the incompetence of appellants to appeal against such questions as those considered in the present case, see 9 Halsbury's Laws (3rd Edn.) 394, para. 922; and for cases on the subject, see 8 Digest (Repl.) 806, 807, *570-578*.

As to the withholding of leave to appeal, see 9 Halsbury's Laws (3rd Edn.) 381, para. 886.

As to the constitution of the colony of Trinidad and Tobago, see 5 Halsbury's Laws (3rd Edn.) 622-624, paras. 1340-1343.]

Cases referred to:

De Silva v. *A.-G. for Ceylon*, (1949), 50 N.L.R. 481.

Senanayake v. *Navaratne*, [1954] 2 All E.R. 805; [1954] A.C. 640; [1954] 3 W.L.R. 336; 3rd Digest Supp.

Théberge v. *Laudry*, (1876), 2 App. Cas. 102; 46 L.J.P.C. 1; 35 L.T. 640; 8 Digest (Repl.) 806, *572*.

Appeal.

Appeal by special leave by Augustus Patterson from an order of the Full Court of the Supreme Court of Trinidad and Tobago (Sir J. L. Mathieu-Perez, C.J., Camacho and Archer, JJ.), dated Nov. 13, 1957, affirming an order of the Supreme Court of Trinidad and Tobago (Watkin-Williams, J.), dated June 11, 1957, whereby he dismissed the appellant's application for an injunction to restrain the respondent, Dr. Patrick Vincent Joseph Solomon, from claiming to be or in any way acting as (i) Minister of Education and Culture in the Government of Trinidad and Tobago, (ii) a member of the Executive Council of the Colony of Trinidad and Tobago, and (iii) a member of the Legislative Council of the Colony of Trinidad and Tobago. The facts are set out in the judgment of the Board.

D. N. Pritt, Q.C., and *S. N. Bernstein* for the appellant.
Dingle Foot, Q.C., and *R. Millner* for the respondent.

VISCOUNT SIMONDS: This appeal arises out of proceedings instituted in the Supreme Court of Trinidad and Tobago by the appellant, a mattress maker and registered elector in that colony. On May 31, 1957, he was granted leave by the court to issue a notice of motion for an injunction restraining the respondent from claiming to be or in any way acting as (a) Minister of Education and Culture in the Government of the Colony, (b) a member of the Executive Council of the Colony and (c) a member of the Legislative Council of the Colony. Notice was duly served on the respondent and supported by an affidavit of the appellant in which the grounds of the relief sought were stated. They were that the seat of the respondent in the Legislative Council of the Colony had become vacant under the provisions of s. 38 (3) (e) of the Trinidad and Tobago (Constitution) Order in Council, 1950, as amended by the Trinidad and Tobago (Constitution) (Amendment) Order in Council, 1956, (1), by reason of his having become a party to a contract with the government of the Colony for or on account of the public service without first having disclosed to the legislature his intention of becoming a party to the said contract and without having first obtained from the legislature exemption from the consequences of becoming a party to such a contract. The details of the contract were then set out. It is not necessary to refer to them, for the merits of the case have not to be examined. In the courts of the Colony and before their Lordships, the issue has turned on questions of jurisdiction and procedure. The remaining facts that need to be stated are that the respondent was duly returned as member of the Legislative Council of the Colony for the constituency of Port of Spain South and took his seat on Oct. 26, 1956, that on the same day he was elected to be a member of the Executive Council and was subsequently charged by the Governor with the administration of the Ministry of Education and Culture and assumed that office.

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(1) S.I. 1950 No. 510, as amended by S.I. 1956 No. 835.

It will be convenient now to refer to the relevant provisions of the operative Order in Council. They will be stated in the terms of the Order in Council of 1950, as amended, where amended, by the Order in Council of 1956, (1). Section 4 provides that there shall be an Executive Council for the Colony which, subject to the provisions therein mentioned, shall consist of the Governor as Chairman, a Chief Minister, two ex officio members and seven elected members. Section 6, s. 7 and s. 8 provide for the election of the Chief Minister, for the ex officio members and for the election of the elected members, and s. 9 for the tenure of office of members of the Executive Council. Section 10 provides that all questions which may arise as to the right of any person to be or remain a member of the Executive Council shall be referred to the Governor and shall be determined by the Governor acting in his discretion. Section 20 provides that the Governor, acting in his discretion, may by his directions in writing declare which other departments or subjects, not including the subject of finance, may be assigned to members of the Executive Council other than ex officio members, and, on the advice of the Chief Minister, charge any member of the Executive Council, other than an ex officio member, subject as therein mentioned, with the administration of any other department or subject. Section 29 provides that there shall be a Legislative Council for the Colony which should consist of thirty-one members, namely, two ex officio members, five nominated members and twenty-four elected members, with a proviso in regard to the Speaker of the council. Section 37 provides for disqualification for nomination or election of members. The grounds of such disqualification are numerous but need not be set out for they are substantially repeated in s. 38, which provides for the tenure of office of nominated or elected members of the Legislative Council, or, in other words, for disqualification after nomination or election. Subsection (3) of s. 38 is the immediately relevant provision. It provides that the seat of a nominated or elected member of the council shall become vacant on a number of grounds which include (a) on his death, or (b) if, in the case of a nominated member, he shall be absent from the sittings of the Legislative Council as therein mentioned, or (c) if, being a nominated member, he is nominated as a candidate in any election of a member to the Legislative Council, or, being an elected member, is appointed as a nominated member, or (d) if he shall cease to be a British subject, or take such oath, or do such act as therein mentioned, or (e) if he shall become a party to any contract with the Government of the Colony for or on account of the public service, with a proviso for exemption by the Governor of any nominated member and by the Legislative Council of any elected member in the circumstances therein mentioned, or (f) if he shall be adjudged or otherwise declared bankrupt under any law in force in any part of Her Majesty's Dominions, or (g) if he shall be sentenced by a court in any part of Her Majesty's Dominions to death or imprisonment (by whatever name called) for a term exceeding twelve months, or on divers other grounds which need not be enumerated. Section 40—the most material clause—is as follows:

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(1) S.I. 1950 No. 510, as amended by S.I. 1956 No. 835.

> " (1) All questions which may arise as to the right of any person—(i) not being an elected member of the Legislative Council to be or remain a member of the Legislative Council as Speaker, or (ii) to be or remain an elected member of the Legislative Council, shall be referred to the Supreme Court of the Colony in accordance with the provisions of any law in force in the Colony.
>
> " (2) All questions which may arise as to the right of any other person to be or remain a member of the Legislative Council shall be referred to the Governor and shall be determined by the Governor acting in his discretion."

It would appear to their Lordships that the words " to be " refer to the initial nomination or election which is dealt with by s. 37, and the word " remain " to the grounds of subsequent disqualification dealt with by s. 38. They further note that the Order in Council of 1950 provided that all questions as to the right of any person to be or remain an elected member of the council should be referred to *and determined by* the Supreme Court of the Colony in accordance with the provisions of any laws in force in the Colony, whereas, in the amending Order of 1956, the italicised words have dropped out. The explanation of this is not obvious; it is possible that it was intended to emphasise that the function of the Supreme Court is advisory rather than determinative, whereas the questions which are referred to the Governor are still to be determined by him. It only remains to refer to s. 67 which provides that:

> " (1) Any person who . . . (b) shall sit or vote in the Legislative Council after his seat therein has become vacant or he has become disqualified from sitting or voting therein, knowing, or having reasonable grounds for knowing, that . . . his seat has become vacant . . . shall be liable to a penalty not exceeding ninety-six dollars for every day upon which he so sits or votes. (2) The said penalty shall be recoverable by action in the Supreme Court of the Colony at the suit of the Attorney-General."

On the motion coming before WATKIN-WILLIAMS, J., in the Supreme Court of the Colony, certain objections were taken in limine for the respondent. They were (i) that the procedure adopted by the appellant was not proper in that he had applied for an injunction on the footing that the procedure by way of quo warranto had been abolished in the Colony, and (ii) that the proceedings were not maintainable because (a) the offices held by the respondent were not subject to an order by way of injunction or quo warranto and (b) the appellant had not shown any sufficient interest entitling him to take proceedings. These objections were substantially overruled by the learned judge, who, nevertheless, refused the motion on the ground that the question of the right of the respondent to remain an elected member of the Legislative Council could only be entertained by the Supreme Court on a reference made to it by the Legislative Council itself and that the appellant was incompetent to bring proceedings against the respondent. The appellant appealed to the Full Court of the Supreme Court. It is noteworthy in view of the admission made by counsel on appeal to Her Majesty in Council that the same relief was sought as in the original motion. No distinction was made between the respondent's position as member of the Legislative Council, member of the Executive Council and Minister of Education and Culture. The Full Court dismissed the appeal in a judgment which their Lordships may be permitted to say is clear, cogent and exhaustive. The court found it necessary to deal only with the competence of the appellant to maintain the proceedings, and, affirming the learned judge, held that s. 40 of the Order in Council contemplated a reference to the Supreme Court by the Legislative Council only and that the appellant could not maintain the proceedings. On appeal to Her Majesty in Council, the appellant abandoned his claim to relief so far as it related to the respondent's membership of the Legislative and Executive Councils, maintaining it only in relation to his office of Minister. It is that issue which their Lordships are invited by the appellant to determine.

At once, on the opening of the appeal, learned counsel for the respondent took the objection that no appeal lay to Her Majesty in Council from the decision of the Supreme Court of the Colony in a matter affecting membership of the Legislative Council and consequently affecting also membership of the Executive Council and the office of Minister. It was open to him to do so notwithstanding that special leave to appeal had been granted. This objection can conveniently be examined on the footing that the appellant's claim had been maintained in its entirety. On this footing, it appears to their Lordships that it must be sustained. Adapting the words of LORD CAIRNS, L.C., in *Théberge* v. *Laudry* (2), they are of opinion that, on a fair construction of the Order in Council, it does not provide for the decision by the Supreme Court of mere ordinary civil rights, but creates an entirely new jurisdiction in a particular court of the Colony for the purpose of taking out of the Legislative Council with its own consent and vesting in that court the very peculiar jurisdiction which had existed in the council itself of determining the status of those who claim to be members of the council. If so, it follows that the determination of that court is final, and that from it no appeal lies. Nor does this rest on the validity of the assumption that, apart from s. 40 of the Order in Council, the question could be determined by the council itself. In *De Silva* v. *A.-G. for Ceylon* (3), it was made clear that the same principle applies whether or not the jurisdiction vested in the particular court had previously been exercised by the legislative body. As was said in that case (4), the dispute is one which

> " concerns the rights and privileges of a legislative assembly, and, whether that assembly assumes to decide such a dispute itself or it is submitted to the determination of a tribunal established for that purpose, the subject-matter is such that the determination must be final, demanding immediate action by the proper executive authority and admitting no appeal to His Majesty in Council."

It is, therefore, unnecessary to consider whether, apart from the Order in Council, the Legislative Council could itself have determined such a dispute. It is sufficient that the dispute is of such a character that the decision of the court to which it is referred must be final. To this effect, also, is the decision of this Board in *Senanayake* v. *Navaratne* (5).

If, as their Lordships hold, an appeal would not lie from a determination of the Supreme Court on a reference under s. 40 of the Order in Council, equally it cannot lie from a determination of that court on the same subject-matter otherwise than on such a reference. Their Lordships do not entertain any doubt on the correctness of the decision of the Supreme Court that the appellant could not competently maintain the proceedings in any form. They only add that, if he could, no appeal would lie. They find it unnecessary to add any observations on the somewhat cryptic words in s. 40 of the Order " in accordance with the provisions of any law in force in the Colony ". They cannot afford any assistance to the appellant.

As has already been said, learned counsel for the appellant, faced by a difficulty which he might well regard as insuperable, abandoned his claim for relief in regard to the respondent's membership of the Legislative and Executive Councils. But, while thus admitting that, so far as these proceedings were concerned, he could not claim that the respondent had ceased to be such a member, he nevertheless insisted that he was entitled to an injunction restraining him from acting as Minister of Education and Culture. This claim is clearly not tenable. The respondent is, until the contrary is competently determined, a member of the Legislative Council. He is, until the Governor otherwise determines under s. 10 of the Order in Council, a member also of the Executive Council. It is only if he " ceases to be " such a member that he can no longer hold the office of minister to which he has been appointed. The appellant cannot, by omitting a necessary link in the chain of his argument and assuming that to be proved which he cannot even try to prove, arrive at the conclusion at which he aims. But that is what he invited their Lordships to do. The disqualifying event, he urged, was an event susceptible of proof like any other event and, being proved, led automatically to disqualification, and disqualification led in its turn to incompetence to hold office. And (so their Lordships understood the argument to proceed) so long as the object of the proceedings was not disqualification but its sequel, s. 40 had no application. The argument was enforced by illustrations from other proceedings in which it might be necessary to prove that a particular person was, or was not, at a given time a member of the Legislative Council, e.g., in order that he might qualify as a beneficiary under a will or settlement. Their Lordships cannot accept this argument. Whether the purpose of the proceedings is directly to challenge the right of a person to be a member of the Legislative Council or to challenge his right only for some ulterior purpose, he is confronted by s. 40 and, if there is in fact a question to be determined, he is arrested in his argument until the Supreme Court, on a proper reference, has determined it, or, perhaps it should be better said, has advised on it. No doubt in most cases, as, for example, if the event disqualifying the person concerned is his death, such a reference would be regarded as unnecessary, and in other cases it could be merely formal. But, where as here the proceedings are controversial, there is no escape from the explicit terms of s. 40. Unless and until the fact of disqualification has been established in the only manner permissible, it is not possible to argue its consequences.

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(2) (1876), 2 App. Cas. 102 at p. 106.
(3) (1949), 50 N.L.R. 481.
(4) (1949), 50 N.L.R. at p. 483.
(5) [1954] 2 All E.R. 805; [1954] A.C. 640.

Their Lordships, therefore, reach these conclusions: (i) that the Supreme Court was right in deciding that the appellant could not maintain his action in the form in which it was presented to it, (ii) that he cannot escape from the consequences of that decision by dropping his claim so far as it relates to membership of the Legislative and Executive Councils and (iii) that, if on a proper reference the Supreme Court had come to a determination, whatever form it might take, no appeal would lie to Her Majesty in Council. For these reasons, their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors: *A. L. Bryden & Williams* (for the appellant); *T. L. Wilson & Co.* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

BURTON v. WEST SUFFOLK COUNTY COUNCIL.

[COURT OF APPEAL (Sellers, Ormerod and Upjohn, L.JJ.), March 10, 11, 1960.]

Highway—Non-repair—Liability of local authority—Non-feasance—Drainage work done by authority—Work properly done but inadequate—Motorist injured owing to car skidding on icy patch.

Highway—Negligence—Icy patch on road—Whether highway authority under duty to give warning of danger.

In 1922, the defendants, a local authority, took over a road part of which was frequently flooded during heavy rain. The defendants had not constructed the road. In March, 1954, the defendants carried out some drainage work on the road, but, although the work effected some improvement, was properly carried out and constituted no danger, it was inadequate and the road was still liable to flood after heavy rain. It was the defendants' practice to have warning flags or lamps put out on the road when there was likelihood of danger to vehicles due to flooding. On the night of Dec. 11, 1954, as the plaintiff was driving his motor car along the road, the car skidded on a patch of ice, ran off the road into a tree and was damaged, and the plaintiff was injured. At the time of the accident there was no flooding; the thin coating of ice which caused the skid was on a part of the road which tended to keep damp owing to the inadequate drainage. There were no warning lights on the road at the time, but there was no evidence that the defendants ever gave any warning of an icy road. The plaintiff claimed damages against the defendants on the grounds (a) that, as the highway authority, they were guilty of misfeasance in that they had attempted to improve the drainage but had not completed the work adequately and the road was still dangerous, and (b) that they were negligent in failing to have the warning lights placed on the road on the night of the accident.

Held: the defendants were not liable in damages to the plaintiff for the following reasons—

(i) the fact that the drainage work done by the defendants was inadequate was not misfeasance on their part.

McClelland v. *Manchester Corpn.* ([1912] 1 K.B. 118) distinguished.

Wilson v. *Kingston-upon-Thames Corpn.* ([1948] 2 All E.R. 780) approved; *Quinn* v. *Ministry of Commerce and Armagh County Council* ([1954] N.I. 131) applied.

(ii) there was no duty on the defendants to give warning of ice on the road.

Appeal dismissed.

[As to the liability of a highway authority for non-feasance and misfeasance in the repair of a highway, see 19 HALSBURY'S LAWS (3rd Edn.) 149-152, paras. 228, 229; and for cases on the subject, see 26 DIGEST 401-408, *1256-1290*.]

Cases referred to:

Drake v. *Bedfordshire County Council*, [1944] 1 All E.R. 633; [1944] K.B. 620; 113 L.J.K.B. 328; 170 L.T. 351; 108 J.P. 237; 2nd Digest Supp.

McClelland v. *Manchester Corpn.*, [1912] 1 K.B. 118; 81 L.J.K.B. 98; 105 L.T. 707; 76 J.P. 21; 26 Digest 404, *1270*.

Moul v. *Tilling (Thomas), Ltd.*, (1918), 88 L.J.K.B. 505; sub nom. *Moul* v. *Croydon Corpn.*, 119 L.T. 318; 82 J.P. 283; 26 Digest 401, *1260*.

Quinn v. *Ministry of Commerce and Armagh County Council*, [1954] N.I. 131; 3rd Digest Supp.

Sheppard v. *Glossop Corpn.*, [1921] 3 K.B. 132; 90 L.J.K.B. 994; 125 L.T. 520; 85 J.P. 205; 26 Digest 393, *1197*.

Wilson v. *Kingston-upon-Thames Corpn.*, [1948] 2 All E.R. 780; *affd.* C.A., [1949] 1 All E.R. 679; 113 J.P. 184; 2nd Digest Supp.

Appeal.

The plaintiff, Peter Smith Burton, appealed from a judgment of SALMON, J., given on Oct. 21, 1958, in an action claiming damages against the defendants, West Suffolk County Council, for personal injuries, loss and damage sustained by the plaintiff as a result of a motor car accident on Dec. 11, 1954, on the Haverhill to Cambridge Road. The defendants were the highway authority responsible for the care and maintenance of the road, and the plaintiff alleged that the accident was the result of nuisance and/or negligence and/or misfeasance of the defendants. SALMON, J., found that the plaintiff's accident was caused by his car skidding on an icy patch on the road and that the drainage of the road at the time of the accident was inadequate, but he held that the defendants were not liable in damages to the plaintiff, because this was a case of non-feasance and not of misfeasance on their part. The facts are fully stated in the judgment of SELLERS, L.J.

Stephen Chapman, Q.C., and *Eric Myers* for the plaintiff.
Martin Jukes, Q.C., and *D. E. Hill-Smith* for the defendants.

Mar. 11. The following judgments were read.

SELLERS, L.J.: Shortly before 9 p.m. on Dec. 11, 1954, the plaintiff was driving his motor car along the Cambridge to Haverhill Road, from west to east that is, when he ran on to a patch of ice which caused the car to skid off the road into a tree. The car was damaged and the plaintiff was injured. In this action to recover damages against the highway authority responsible for the road, SALMON, J., found that the plaintiff was driving at a reasonable speed on the crown or just over the crown of the road, and that he was in no way to blame for the skid or its consequences as no reasonable prudent driver would have been able to control it. Judgment was, however, entered for the defendants as the learned judge held that no misfeasance on the part of the defendants had been established.

In support of the plaintiff's appeal it has been submitted, first, that the findings of the learned judge showed misfeasance, and, secondly, that the defendants negligently failed to warn the plaintiff of the danger of the ice patch on the road. The ice had formed across the road for a distance of about fifty-eight feet at the lowest part of the road, where flooding frequently took place at the time of heavy rain. The land slopes from the south to the road, and, as the road has a camber, the water generally collected on the south side of the road, but the passage of vehicles and the percolation of some of the water kept the north side of the road damp too. When flooding took place so as to be a danger to vehicles, it was the practice of the defendants' roadman to put out red flags by day and red lights by night, but precisely where they were put is not in evidence. On Dec. 8, 9 and 10, flags and lights had been exhibited on account of the flooding, but by the morning of the Saturday, Dec. 11, the day of the accident, the water had subsided and the experienced roadman thought that the flags and lights were no longer necessary. A slight frost had set in early on Saturday, Dec. 11. At 6 a.m. the temperature was 31·3 degrees, at 9 a.m. 30·4 degrees, but by noon it had risen to 38 degrees. In the evening the temperature had fallen to 30·7 degrees at 6 p.m. and 32·1 degrees at 9 p.m. The ice which was on the road at the time of the accident was described as a paper-thin coating. It was not, therefore, due to any appreciable flooding on that day, but it was on a part of the road which tended to keep damp from the water which ran off the adjoining land and had no adequate outlet through road drains. The judge found the road drainage to be inadequate and this has not been challenged. I understand that better drainage has been undertaken since 1954. In the course of his judgment the learned judge said this:

> "No one can be certain, but in my view the strong probability is that, if the road had been properly drained at the time, there would have been no ice at this point where the accident occurred when the plaintiff passed."

On those facts which I have briefly outlined, has the plaintiff established liability on the defendants? It appears that the West Suffolk County Council, the defendants, took over this highway in 1922. They did not construct the road. They contend rightly that they are not liable for non-feasance. The plaintiff has sought to rely on the defendants' liability in damages for active misfeasance by which the highway was made dangerous. The submission was, in effect, that, if a highway authority undertakes the repair of a road but does not complete it sufficiently and adequately so that its condition still left a danger to road users, then that is misfeasance. The only repair work relied on was that in March, 1954, the defendants did some drainage work on the part of the road in question. The judge has found that the defendants improved the drainage. Precisely what they did is not clear, but it served to take some of the water off the road and so made the road somewhat less liable to flooding and less unsafe than it had been before. There was clearly nothing which the defendants did then which created any danger, actual or potential. Such work as was done was properly done. All that can be said is that enough was not done, which seems to be a clear case of non-feasance.

The skilful and, if I may say so, bold argument of counsel for the plaintiff was based mainly on observations of Lush, J., in *McClelland* v. *Manchester Corpn.* (1), from which I will cite only one short passage. Lush, J., a great authority on the common law, said (2):

> " If a highway authority, therefore, leaves a road alone and it gets out of repair, there is, of course, no doubt that no action can be brought, although damage ensues. But this doctrine has no application to a case where the road authority have done something, made up or altered or diverted a highway, and have omitted some precaution, which, if taken, would have made the work done safe instead of dangerous. You cannot sever what was omitted or left undone from what was committed or actually done, and say that because the accident was caused by the omission therefore it was non-feasance."

The views of Lush, J., in that case were incorporated by him in a later case, in 1918, *Moul* v. *Thomas Tilling, Ltd.* (3), where, in the course of a judgment given in the Divisional Court on appeal from the county court, Lush, J., said this (4):

> " If the damage was caused—I may use the words I used in *McClelland's* case (1)—because they chose to do nothing at all to the road, they are not liable. I endeavoured to make it clear in that case that it may be true to say that damage resulted through the highway authority doing work badly, although the immediate cause of the accident was their omission to take some steps which they ought to have taken. A highway authority make up a road, and, to make it safe, a certain thing requires to be done; they do not do that thing, and the road is unsafe in consequence—in one sense it is true to say that the accident happens through that omission to take the necessary steps, but in truth and in substance through their not properly completing the work they have done. In a case like that they are guilty of misfeasance, notwithstanding it was an omission to do a certain act which was the immediate cause of the accident. That is all I meant to say, and what I thought I said, in *McClelland's* case (1)."

Then there was a passage at the very end of the judgment (5) which was relied on in argument:

> " I wish to guard myself against saying that, if a highway authority choose to make up or repair a road, or a section of a road, there may not be a case of liability if they leave one spot, one part of the road which they do repair, in a dangerous condition. The case put during the argument as an

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(1) [1912] 1 K.B. 118.
(2) [1912] 1 K.B. at p. 127.
(3) (1918), 88 L.J.K.B. 505.
(4) (1918), 88 L.J.K.B. at p. 508.
(5) (1918), 88 L.J.K.B. at p. 509.

> illustration, that, if a highway authority do choose to maintain a road in repair and do work on that road, a case may arise in which it may be necessary to consider whether, if, deliberately leaving one hole open and confining their repair to another, doing one half of the road and not the other, they can shelter themselves under this doctrine that it is a case of mere non-feasance as regards the hole they do not repair. I express no opinion in regard to that, because this case was not put on any such ground. I do not quite see how it could have been. I have only added this, because I did not wish it to be thought that, in my opinion, it necessarily follows that a road authority is justified in making up one half of a road and leaving the other half in a dangerous condition."

McClelland v. *Manchester Corpn.* (6), on which reliance was placed, and the observations particularly of Lush, J., were referred to in the course of the judgments in *Sheppard* v. *Glossop Corpn.* (7). Bankes, L.J., said (8):

> "*McClelland's* case (6) was decided by Lush, J., on the same principle, although I think the headnote to the report does not sufficiently explain the decision. The defendants in that case had taken over an existing highway at the end of which there was a kind of ravine. They had made up the road and had placed lights in it. There was apparently beyond the ravine another street, and they had made up this street also and placed lights in it. The jury came to the conclusion that by so making up the two streets with the ravine intersecting them the defendants had in effect set a trap for passers-by, and that by lighting the streets at night they had made the trap more dangerous because a passenger seeing a continuous row of lights would assume that there was no interruption of the highway. In answer to questions put by the learned judge the jury found that the road as made up and constructed was a danger to persons lawfully using it; that the ravine which was unfenced was a hidden trap to persons using the road . . ."

That is the decision in *McClelland's* case (6), and it was, on those facts, a clear case of misfeasance.

The only other authority relied on was *Drake* v. *Bedfordshire County Council* (9). Cassels, J., decided that case, and it turned mainly on another point. In so far as the learned judge found misfeasance, the facts—perhaps not fully reported—do not seem to me to establish any active creation of a danger. I entirely agree with what Salmon, J., said with regard to it (10).

The observations of Lush, J., have apparently never been applied in the way argued by counsel for the plaintiff and they could be, as it appears on their face, very far-reaching. There is an authority in this country, that of Morris, J., in *Wilson* v. *Kingston-upon-Thames Corpn.* (11), and an Irish case, *Quinn* v. *Ministry of Commerce and Armagh County Council* (12), before Lord MacDermott, C.J., which are both authorities contrary to the view expressed by Lush, J. In

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(6) [1912] 1 K.B. 118. (7) [1921] 3 K.B. 132. (8) [1921] 3 K.B. at p. 140.

(9) [1944] 1 All E.R. 633; [1944] K.B. 620.

(10) The following is the relevant passage concerning *Drake* v. *Bedfordshire County Council* in Salmon, J.'s judgment, delivered at Suffolk autumn assizes on Oct. 21, 1958, in *Burton* v. *West Suffolk County Council:* "In [*Drake* v. *Bedfordshire County Council* (9)] there had been during the course of the last war some bomb damage adjoining the highway and the railings which separated the highway from the somewhat lower ground had been demolished. The highway authority employed a contractor to clear up the débris. The contractor cleared up the débris but left a hole in the railings, and the plaintiff came by and went straight through the hole in the railings and met with severe injuries. In that case it was held first, that the hole in the railings or the failure to repair the hole in the railings was misfeasance and not non-feasance, and, secondly, that, in any event, as the action was brought against the contractors and they had been negligent they could not claim the immunity of the highway authority. It follows therefore that the first point which was alluded to by the learned judge in that case was not necessary for his decision. I am bound to say that, if it had been, I should have had grave doubts whether I should have been able to follow it."

(11) [1948] 2 All E.R. 780. (12) [1954] N.I. 131.

Wilson v. *Kingston-upon-Thames Corpn.* (13), a similar argument was advanced by learned counsel and was treated by the learned judge in this way (14):

> " Counsel for the plaintiff submitted that, if he has shown that some repairs were done at that point, but that those repairs were done badly, the defendants should be liable, for, he says, if the repairs were done properly the accident would not have happened. Counsel further relied on *McClelland* v. *Manchester Corpn.* (15). That authority has, however, to be read in the light of the observations made by the Court of Appeal in *Sheppard* v. *Glossop Corpn.* (16)."

MORRIS, J., held that the lack of repair of the highway arose from non-feasance and not from misfeasance in repairing the road negligently, and, therefore, there was no liability.

The kindred case which came before the courts in Northern Ireland arose from circumstances where the plaintiff, after dark, was riding a pedal cycle on the main road leading from Newry to Dublin, and he was thrown from his bicycle owing to the presence of a pothole in the carriage way. In the course of his judgment, which turned on other matters as well as this particular point, LORD MACDERMOTT, C.J., said (17):

> " In this respect the case is very much on all fours with that of *Wilson* v. *Kingston-upon-Thames Corpn.* (13). There an asphalt road had been repaired on two occasions by the highway authority, the second repair being of a temporary nature and consisting of putting tar-macadam into the hole. This wore or worked out and the plaintiff whilst cycling over the hole was thrown and severely injured. MORRIS, J. . . . held that this was non-feasance. In the course of his judgment he said (14): ' The injury to the plaintiff was not caused by the exercise on the part of the defendants of their duty to repair. It was not because they effected some temporary repair . . . that this accident happened. The accident happened because the roadway was out of repair. Were I to accede to the submission made on behalf of the plaintiff, I would be not merely straining but also going in the face of the established law on this matter.' I respectfully agree and am quite unable to discern any material distinction between that case and the present one."

I feel no doubt that this court would be going in the face of the established law on this matter if we accepted the plaintiff's argument, and, like the learned judge, I have no hesitation in rejecting it.

The second point regarding the failure to exhibit red lights avails the plaintiff no better. The roadman seems to have been right when he concluded that there was no flooding and no necessity for lighting. There was no evidence that the defendants ever gave warning of a frosty or icy road in any way. But if the defendants did fail to assist road users in a way which was their practice (although I am not sure what the lights would convey to one unfamiliar with the road), there was no duty on them to light or give warning.

In *Sheppard* v. *Glossop Corpn.* (16), a similar point had been taken in regard to lighting. SCRUTTON, L.J., said (18):

> " Mr. Eastham admitted that the appellants were not bound in the first instance to light the borough at all. Then if they have once begun to light, are they bound to continue? Mr. Eastham answered, Yes. I am unable to agree. It is left to their discretion to light or not to light; therefore they need not light at all; if for a time they light they may discontinue either

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(13) [1948] 2 All E.R. 780. (14) [1948] 2 All E.R. at p. 782.
(15) [1912] 1 K.B. 118. (16) [1921] 3 K.B. 132. (17) [1954] N.I. at p. 136.
(18) [1921] 3 K.B. at p. 145.

wholly or partially in point of time or in point of space, and the mere discontinuance is no breach of duty. That is, of course, subject to this; that if they place an obstruction in the highway they must by lighting or warning, or by watchmen or fences or other reasonable means, guard against the danger they have themselves created."

That case was considering the position under the Public Health Act, 1875, but those observations fit this case and I can see no breach of duty in respect of that matter brought home against the defendants. I would dismiss the appeal.

ORMEROD, L.J.: I agree, and I would add only a few words. Counsel for the plaintiff in the course of his argument made two submissions. His first and main submission was that the defendants, as a highway authority, were liable in this case because they were guilty of misfeasance. The second was that they were liable because the roadman had been guilty of negligence on the day of the accident by failing to put out warning flags or lamps, and the defendants were thereby liable.

The second submission was argued before the learned judge, but he made no reference to it in his judgment, and it may well be that he did not attach importance to it. The evidence was that this particular piece of road was liable to flood after heavy rain, and the defendants had caused warning flags or lamps to be put in the road when it was flooded. On the days previous to the accident the road had been flooded and flags and lamps had been put out; but on the day of the accident, when the roadman left his work at midday, the floods had gone, and, apart from a little dampness in the road, it was in a normal condition, and the roadman had in consequence decided not to put out any warnings. I find it difficult to see any breach of duty in these circumstances. The defendants had been in the habit of warning road users of floods, but there is no evidence that it was their practice to put out warnings in time of frost, and in my judgment there was no duty on them to do so.

As to the first point, counsel for the plaintiff based his submission on the evidence that in 1954 the defendants had done some work on the road by making further inlets for surface water from the road to the drains, which work was inadequate to prevent flooding in time of heavy rain. He submitted that in these circumstances they were guilty of misfeasance. He agreed, of course, that, if a highway authority does nothing to remedy a defect in a road, there is no civil liability. A highway authority cannot be made liable in a civil action for non-feasance. But he argued that, if an authority set out to do something to a highway, be it effecting a repair or curing a danger, then they are no longer a non-feasant authority, but, if they do badly that which they set out to do, either by omission or commission, then they are liable. To apply that submission to the facts of this case, counsel for the plaintiff argued that, once the defendants began to improve or attempt to improve the drainage on the road by constructing additional inlets, they became liable for misfeasance if in the final result the drainage was inadequate. It was not suggested that the work was badly done or that it added an additional danger to the road in any way. Indeed, it was admitted that the additional drainage had effected some improvement.

The case on which counsel for the plaintiff relied particularly was *McClelland* v. *Manchester Corpn.* (19), and particularly the passage from the judgment of LUSH, J., to which reference has already been made by my Lord (20). The facts of that case were very different, and there seems no doubt that, on the facts as found by the jury, a danger on the road had been created, and that was a case where the local authority was guilty of an act of misfeasance. That was the view of the case taken by this court in *Sheppard* v. *Glossop Corpn.* (21), where

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(19) [1912] 1 K.B. 118. (20) [1912] 1 K.B. at p. 127; see p. 28, letter F, ante.
(21) [1921] 3 K.B. at p. 140.

Bankes, L.J., referred to it in his judgment, and reference has already been made to that. There can be no doubt that, if the defendants, to use the words of Lush, J., in *McClelland* v. *Manchester Corpn.* (22) had " omitted some precaution, which, if taken, would have made the work done safe instead of dangerous ", the defendants would have been liable. But there is no evidence that the work done was dangerous; the contrary is the case.

I think that the rule is clear. If a highway authority does work on a road by way of repair or reconstruction, it must be done properly and in such a way as not to cause a danger on the road. That does not mean, in my judgment, that, in a case like the present one, where some work has been done and done properly to improve the drainage of the road, the defendants should be held liable for failing to do further work which would result in further improvement of the drainage, although without further work the road may still be liable to flooding. To hold otherwise would, in my judgment, be extending the rule as to misfeasance to a point far beyond that established by authority. I would dismiss the appeal.

UPJOHN, L.J.: I agree. The facts are not in dispute. The section of the road in question was liable to flooding after heavy rain. The defendants, as the highway authority, did some drainage work on the road with a view to improving the conditions there. The works which they did were properly carried out in the sense that they were executed in a proper and efficient manner, and those works in themselves constituted no danger whatever to users of the road. The works apparently did improve conditions in the road from the point of view of flooding, but they did not cure it. The road was still liable to flood after heavy rain and the drainage was properly described as still inadequate. The argument of counsel for the plaintiff was really that, if a highway authority undertake to improve dangerous conditions in a road, they will be liable for misfeasance if they do not by their works substantially cure the danger. Thus, in this case, to make the road safe and no longer liable to flooding, the authority should have put in more surface drains and, in particular, a surface drain in the lowest part of the road. This they did not do, and so it is argued that they are liable for misfeasance.

I am quite unable to accept the argument that this is a misfeasance on the part of the highway authority. By drainage works in themselves proper, the authority decreased the danger on the road, but they had not made it a completely safe road in times of heavy rain. They have done nothing improper, and have brought no dangers to users of the road which were not there before. It would be a most extraordinary situation if a highway authority, by improving dangerous conditions in a road, thereby assume an obligation to make the road completely safe from, for example, flooding. The learned judge said that he would require very clear authority to persuade him that the law would work in such a ridiculous fashion, and I agree with him. I am satisfied that there is no such authority. True it is that Lush, J., used some wide words in *McClelland* v. *Manchester Corpn.* (22) which have already been read by Sellers, L.J. But it must be remembered that those words must be read in reference to the facts of that case, and the facts of that case were really very plain. The corporation had by its works created a trap for users of the road. The observations of Lush, J., must also be read in the light of the observations (to which reference has already been made) of Bankes, L.J., and Scrutton, L.J., in the later case of *Sheppard* v. *Glossop Corpn.* (23). In my view, the words of Lush, J., properly understood, do not afford any support for the argument in the present case which seems to me entirely contrary to principle.

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(22) [1912] 1 K.B. at p. 127.

(23) [1921] 3 K.B. 132.

On the second point taken by counsel for the plaintiff, namely, that the defendants were in breach of duty in failing to put out lamps and flags in accordance with their usual practice, it seems to me clear that they were under no such duty: see *Sheppard* v. *Glossop Corpn.* (24). But, in fact, their practice was only to warn against flooding, and on the night in question there was no flooding on the road. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Ward, Bowie & Co.*, agents for *Rustons & Lloyd*, Newmarket (for the plaintiff); *Berrymans* (for the defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re NEELD (*deceased*). CARPENTER *v.* INIGO-JONES AND OTHERS.

[CHANCERY DIVISION (Cross, J.), February 24, 25, 26, March 1, 2, 3, 4, 1960.]

Will—Condition—Certainty—Condition subsequent—Name and arms clause—"Use surname upon all occasions"—Clause extending to husband of married woman—Commencement of period from which time began to run—"Actual receipt of rents and profits" of residue or of specifically devised realty—Administration not yet completed—Widow's application for family provision pending.

A testator, who died on Oct. 3, 1956, devised and bequeathed his net residuary estate on trusts under which R.C. (a brother of the testator) was life tenant, subject to a name and arms clause (cl. 14). The testator specifically devised certain lands on trusts under which H. (a grandson of the testator) became entitled in equity to a life interest subject to a similar name and arms clause (cl. 17). These lands were settled in tail on the sons of H., who had two sons, and on failure of his issue on trust for the testator's daughter for life and for her issue in tail male. Clause 14 (the name and arms clause relevant to the life interest in residue) made applicable a name and arms clause contained in a will of 1855. Except that this extended so as to require husbands of female beneficiaries to assume the name and arms, it was similar in terms to cl. 17 of the testator's will which, so far as relevant, provided as follows—" . . . any person (with the exception of my daughter . . .) who under the trusts of this my will shall become entitled to the actual receipt of the yearly rents and profits [of the property] and who shall not then use the surname of . . . [shall] within the space of one year . . . take upon himself and *use upon all occasions* the surname of . . . only and quarter the arms of . . . with his or her own family arms . . . and in case any of the said persons (with the exception only of my daughter . . .) shall refuse or neglect or discontinue to take or use such surname and arms . . . then after the expiration of the said space of one year the . . . estate hereby limited to [that] person . . . and also the limitation hereinbefore contained to the use of the said trustees . . . during the life of such person in case he or she shall be tenant for life [of the property] shall absolutely cease and immediately [the property] shall go over " to those who would be entitled if the defaulting beneficiary were dead. Neither R.C. nor H. had complied with the requirements of cl. 14 or cl. 17. The administration of the testator's estate had not been completed. Moreover an application by the testator's widow, to whom he had given no benefit by his will, was pending under the Inheritance (Family Provision) Act, 1938, as amended, and on this application provision might be made for her that would absorb the whole or some part of the rents and profits of the land specifically devised to H. for life. On questions of the validity of cl. 14 and cl. 17 and of the forfeiture of the interests of R.C. and of H.,

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(24) [1921] 3 K.B. 132.

Held: (i) the name and arms clauses were valid for the following reasons—

(a) the words " use upon all occasions " in cl. 14 of the testator's will meant that the beneficiary must use the surname on all occasions when he would ordinarily use a surname, and the words were sufficiently certain for the purposes of a condition subsequent of defeasance.

Re Drax ((1906), 75 L.J.Ch. 317) applied.

Re Bouverie ([1952] 1 All E.R. 408) and *Re Wood's Will Trusts* ([1952] 1 All E.R. 740) distinguished.

(b) though it was remotely possible that a married woman's husband might be required by cl. 14 to change his name on pain of his wife's benefits under the testator's will being defeated if he did not, the fact that the clause might be invalid as against public policy in so far as it purported to produce this result did not render the clause invalid in its application to male or spinster beneficiaries.

Re Kersey ((1952), 96 Sol. Jo. 851) distinguished.

(ii) the life interest of R.C. in the testator's residuary estate had not been forfeited since the year, within which he might take the name and arms, did not begin to run until the administration of the estate was completed.

Re Varley ((1893), 68 L.T. 665) distinguished.

(iii) the life interest of H. in the realty specifically devised was forfeited, although he might not yet be entitled to require a vesting assent to be executed in his favour, because he became entitled in equity on the testator's death to receive the rents and profits as they accrued and were received by the executor, so that the year within which the name and arms must be assumed ran from the testator's death.

Re Varley ((1893), 68 L.T. 665) applied.

[As to name and arms clauses, see 29 HALSBURY'S LAWS (2nd Edn.) 789-792, paras. 1097, 1098; and for cases on the subject, see 35 DIGEST 705-709, 711, 712, *55-80*, *95-98*.]

Cases referred to:

Bouverie, Re, Bouverie v. *Marshall*, [1952] 1 All E.R. 408; [1952] Ch. 400; 3rd Digest Supp.

Clayton v. *Ramsden*, [1943] 1 All E.R. 16; [1943] A.C. 320; 112 L.J.Ch. 22; 168 L.T. 113; 2nd Digest Supp.

Corbett v. *Inland Revenue Comrs.*, [1937] 4 All E.R. 700; [1938] 1 K.B. 567; 107 L.J.K.B. 276; 158 L.T. 98; 28 Digest (Repl.) 335, *1488*.

Drax, Re, Dunsany v. *Sawbridge*, (1906), 75 L.J.Ch. 317; 94 L.T. 611; 35 Digest 706, *62*.

Duncombe, Re, Wrixon-Becher v. *Faversham*, [1932] All E.R. Rep. 588; [1932] 1 Ch. 622; 101 L.J.Ch. 280; 146 L.T. 412; Digest Supp.

Kersey, Re, Alington v. *Alington*, (1952), 96 Sol. Jo. 851; [1952] W.N. 541; 3rd Digest Supp.

Murray, Re, Martins Bank, Ltd. v. *Dill*, [1954] 3 All E.R. 129; [1955] Ch. 69; [1954] 3 W.L.R. 521; 3rd Digest Supp.

Petre's Settlement Trusts, Re, Legh v. *Petre*, [1910] 1 Ch. 290; 79 L.J.Ch. 145; 101 L.T. 847; 40 Digest (Repl.) 594, *981*.

Sifton v. *Sifton*, [1938] 3 All E.R. 435; [1938] A.C. 656; 107 L.J.P.C. 97; 159 L.T. 289; Digest Supp.

Simson, Re, Simson v. *National Provincial Bank, Ltd.*, [1949] 2 All E.R. 826; [1950] Ch. 38; 2nd Digest Supp.

Varley, Re, Thornton v. *Varley*, (1893), 62 L.J.Ch. 652; 68 L.T. 665; 35 Digest 708, *74*.

Wood's Will Trusts, Re, Wood v. *Donnelly*, [1952] 1 All E.R. 740; [1952] Ch. 406; 3rd Digest Supp.

Adjourned Summons.

The name of the testator, Lionel William Neeld, was originally Lionel William Inigo-Jones. He changed it to Neeld in 1941 on inheriting the Grittleton estate settled by the will of Joseph Neeld made on May 28, 1855, which contained a name and arms clause. The testator had one child, now Mrs. Whiting. By her first marriage she had one son, Ian Spencer Horne, who had three children, two sons and a daughter, who were infants. The testator had two brothers, Ralph Christopher Inigo-Jones and Henry Christopher Inigo-Jones. The former had a son Ralph William, and the latter had a son John Richmond. All these relatives survived the testator. He died on Oct. 3, 1956, having, by cl. 3 of his will, dated Jan. 12, 1952, devised certain freehold property on the following trusts:

> " (i) as to the Foscote Farms and Woodlands upon trust subject as hereinafter mentioned for my grandson Ian Spencer Horne . . . during his life and after his death upon trust for his first and other sons successively . . . in fee tail male . . . and upon failure of such issue upon trust for my daughter [Mrs. Whiting] . . . for life and on her death upon trust for her other sons . . . in fee tail male with remainder and upon failure of such issue upon the trusts declared to and concerning my residuary estate.
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> " (ii) As to Crowdown upon trust for my daughter [Mrs. Whiting] during her life and after her death upon trust subject as hereinafter mentioned for my grandson, the said Ian Spencer Horne during his life "

and after his death in the same manner as Foscote Farms and Woodlands. The words " subject as hereinafter mentioned " referred to the name and arms clause in cl. 17 of the will. By cl. 14 of his will the testator devised all the residue of his estate both real and personal (including properties to which he became entitled on the death of Sir Dudley Dallas Neeld) subject to the payment out of his personal estate, or in the case of deficiency thereof out of his real estate, of his funeral and testamentary expenses and debts and the legacies and the annuities bequeathed by his will or any codicil thereto and all death duties upon trust if he should have no male issue (and he had no male issue) for his brother, Ralph Christopher Inigo-Jones, during his life with remainder to Ralph William Inigo-Jones for life with remainder to the sons of Ralph William Inigo-Jones in tail male with divers remainders over under which the daughters of Mrs. Whiting might become entitled. Clause 14 expressly provided

> " that the name and arms clause contained in the will of the said Joseph Neeld shall be applicable to this my will so far as my residuary estate is concerned and shall apply to any person taking the income of my net residuary estate."

The name and arms clause in the will of Joseph Neeld was in the following terms:

> " Provided also that every person who under the trusts of this my will shall become entitled to the actual receipt of the yearly rents and profits of the said manors and other freehold premises hereinbefore devised and who shall not then use the surname of ' Neeld ' and bear the arms of ' Neeld ' and the respective husbands of such of them as are or shall be females shall within the space of one year next after he or she shall so become entitled as aforesaid or if an infant shall so become entitled then within the space of one year next after he or she shall have attained the age of 21 years take upon himself or herself and use upon all occasions the surname of ' Neeld ' only and quarter the arms of ' Neeld ' with his or her own family arms and shall within the space of one year next after the periods hereinbefore prescribed apply for and endeavour to obtain an Act of Parliament or a proper licence from the Crown or take such other means as may be requisite to enable him or her to take use and bear the surname of ' Neeld ' only and

> arms of ' Neeld ' and in case any of the said persons shall refuse or neglect or discontinue to take or use such surname and arms and to take such means as may be requisite for the purpose of taking or using the same then after the expiration of the said space of one year the use and estate hereby limited to the person who or whose husband shall so refuse neglect or discontinue as aforesaid and also the limitation hereinbefore contained to the use of the said Inigo William Jones and John Warre Tyndale their executors administrators and assigns during the life of such person in case he or she shall be tenant for life of the said manors and other freehold premises shall absolutely cease and immediately thereupon the said manors and freehold premises shall go over to the uses and in the manner to and in which the same would have gone if the person who or whose husband shall so refuse neglect or discontinue as aforesaid and being tenant for life of the said manors and freehold premises were then actually dead or being tenant or tenants in tail male or in tail general were then dead and without heirs inheritable under the same entail."

Clause 17 of the will of the testator contained the name and arms clause which he desired to be applicable to the property settled by cl. 3 on trusts primarily for his grandson Ian Spencer Horne and his issue. Clause 17 read as follows:

> " I expressly direct that any person (with the exception of my daughter the said Margaret Evelyn Whiting) who under the trusts of this my will shall become entitled to the actual receipt of the yearly rents and profits of the Foscote Farms and Woodlands and or to Crowdown and who shall not then use the surname of Inigo-Jones or if an infant shall so become entitled then within the space of one year next after he or she shall have attained the age of twenty-one years take upon himself and use upon all occasions the surname of Inigo-Jones only and quarter the arms of Inigo-Jones with his or her own family arms and shall within the space of one year next after the period hereinbefore prescribed apply for and endeavour to obtain a proper licence from the Crown or take such other means as may be requisite to enable him or her to take use and bear the surname of Inigo-Jones only and arms of Inigo-Jones and in case any of the said persons (with the exception only of my daughter the said Margaret Evelyn Whiting) shall refuse or neglect or discontinue to take or use such surname and arms and to take such means as may be requisite for the purpose of taking or using the same then after the expiration of the said space of one year the use and estate hereby limited to the person who shall so refuse neglect or discontinue as aforesaid and also the limitation hereinbefore contained to the use of the said trustees their executors administrators and assigns during the life of such person in case he or she shall be tenant for life of the said Foscote Farms and Woodlands and or Crowdown shall absolutely cease and immediately thereupon the said Foscote Farms and Woodlands and or Crowdown shall go over to the uses and in the manner to and in which the same would have gone if the person who shall so refuse or neglect or discontinue as aforesaid being tenant for life of the Foscote Farms and Woodlands and or Crowdown were then actually dead or being tenant or tenants in tail male were then dead without heirs inheritable under the same entail but I direct that this provision shall not apply if the Foscote Farms and Woodlands and or Crowdown shall devolve on any person then entitled to my residuary estate as hereinbefore appearing."

The administration of the estate had not yet been completed and no payment on account of income had been made to the testator's brother Ralph Christopher and no assent had been made. An application by the testator's widow, who took no benefit under his will, was pending under the Inheritance (Family Provision) Act, 1938, as amended. In March, 1958, the testator's grandson, Ian Spencer Horne, received £800 on account of the net income and rents of the Foscote Farms. The surviving executor of the testator's will applied to the court by originating summons dated May 7, 1959, for the determination of the following, among other, questions:

> " 1 (a) Whether the provisions contained in cl. 14 of the testator's will with reference to his residuary estate incorporating the name and arms clause contained in the will of Joseph Neeld deceased were binding on the defendant, Ralph Christopher Inigo-Jones, or whether they were void for uncertainty or as being contrary to public policy or otherwise.
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> " (b) If they were valid and binding, whether on the true construction of the testator's will the periods therein prescribed commenced with the date of the testator's death or the date of an assent to the said defendant or with some other and if so what date.
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> " 2 (a) Whether the provisions contained in cl. 17 of the testator's will with reference to the Foscote Farms and Woodlands as to the assumption of the name and arms of Inigo-Jones were binding on the defendant, Ian Spencer Horne, or whether they were void for uncertainty, perpetuity or as being contrary to public policy or otherwise.
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> " (b) If the provisions were valid and binding, within what period commencing at what date was the defendant Ian Spencer Horne bound to comply with them.
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> " (c) If the provisions were valid and binding and commenced at the date of the testator's death, whether in the events which have happened the interest of the defendant Ian Spencer Horne in the Foscote Farms and Woodlands had or had not absolutely determined."

The defendants to the originating summons were, so far as relevant, (i) Ralph Christopher Inigo-Jones, the testator's brother, (ii) Ralph William Inigo-Jones, son of the first defendant, (iii) Ian Spencer Horne, grandson of the testator, (iv), (v) and (vi) the three children of the third defendant, (vii) Evelyn Margaret Whiting, the daughter of the testator and mother of the third defendant.

Nigel Warren, Q.C., for the plaintiff, the executor of the will.

J. Bradburn for the first and second defendants, Mr. Ralph Christopher Inigo-Jones and his son.

Robert S. Lazarus, Q.C., and *T. A. C. Burgess* for the third defendant Mr. Ian Spencer Horne (on questions other than questions 2 (b) and 2 (c)), the fourth, fifth and sixth defendants, his infant children, and the seventh defendant, Mrs. Whiting.

J. L. Knox for the third defendant on questions 2 (b) and 2 (c).

CROSS, J.: The first two questions in this originating summons relate to the validity and the effect of the name and arms clauses contained in the will dated Jan. 12, 1952, of the late Lionel William Neeld who died on Oct. 3, 1956. [HIS LORDSHIP stated the facts, read the relevant clauses of the testator's will and the name and arms clause of the will of Joseph Neeld and continued:] It is clear that cl. 17 is substantially a reproduction of the " Neeld " name and arms clause with the substitution of Inigo-Jones for Neeld; but after the words " the surname of Inigo-Jones " in cl. 17 there are no words corresponding to the words " and bear the arms of Neeld and the respective husbands of such of them as are or shall be females shall within the space of one year next after he or she shall so become entitled as aforesaid " which appear in the Neeld name and arms clause. The omission of the reference to husbands is, of course, reasonable enough since there are no female beneficiaries under cl. 3 other than Mrs. Whiting who is expressly excluded from the operation of the name and arms clause. Counsel for Mrs. Whiting and her issue has argued that the omission of the other words makes cl. 17 unintelligible and that I cannot supply the missing words. On the other hand, counsel for the testator's brother Ralph Christopher and his son has argued that the clause is in fact intelligible as it stands and I think that this is so. In any case it seems to me that it is quite obvious what the missing words are and that I can supply them from the Neeld clause. In *Re Murray, Martins Bank, Ltd.* v. *Dill* (1), Sir Raymond Evershed, M.R., pointed out (2) that it would not be right for the court to read words into a forfeiture clause in order to effect a forfeiture if it felt any doubt as to the words which should be read in, and that it could and should do so only if it felt no doubt. Here, supposing in fact it is necessary to read words in to make sense of the clause I have not the least doubt what the words are. Another point of difference between the two wills which has been relied on is that whereas in the Neeld clause the plural " periods " is used, in the sentences referring to the obtaining of an Act of Parliament or licence from the Crown in cl. 17 the singular " period " is used. It was suggested that the use of the plural in the Neeld clause made it uncertain whether the beneficiaries had one or two years within which to take the name and arms in question. In my judgment, it is clear that only one period of twelve months is referred to in either clause. The use of the plural in the Neeld clause can readily be explained because in the case of adults the one year period runs from the date of their becoming entitled in possession whereas in the case of infants it runs from the attainment of twenty-one. Therefore, in my judgment, it is just as sensible and accurate to use the plural as the singular, and I do not think that this difference between the two clauses is really material.

A further question of construction which was the subject of some discussion is whether a forfeiture under these clauses is only caused by a discontinuance of user within the one year period or whether a discontinuance at any time would work a forfeiture. The former constructions would be so ridiculous that even apart from authority I think that I would have held that the clause covered a discontinuance at any time although the words " or immediately after such discontinuance as the case may be " which appear in Davidson's Concise Precedents in Conveyancing, Vol. 4, p. 337, do not appear after the words " after the expiration of the said space of one year " in the clauses. But in *Re Drax, Dunsany* v. *Sawbridge* (3), where the name and arms clause was substantially in the same terms as the clauses which I have to consider, this very point was raised, and Swinfen Eady, J., held that discontinuance of user at any time even after the one year period would work a forfeiture.

I must therefore now consider whether either clause as I have construed it is invalid. The authorities on the subject are in a most unsatisfactory state. Name and arms clauses in much the same form as these were of frequent occurrence in the nineteenth century settlements of landed estates and no one challenged their validity. Recently, however, partly, I think, because of the decisions of the Privy Council in *Sifton* v. *Sifton* (4), and of the House of Lords in *Clayton* v. *Ramsden* (5), which emphasised the necessity for certainty and precision of language in defeasance clauses, and partly, I think, because the name and arms clause seems to be a relic of a bygone age, judges of first instance have sometimes held void a clause which judges of an earlier period would probably have regarded as free from ambiguity and unquestionable. Examples are the decisions of Vaisey, J., in *Re Bouverie, Bouverie* v. *Marshall* (6), of Wynn-Parry, J., in *Re Wood's Will Trusts, Wood* v. *Donnelly* (7), and of Danckwerts, J., in *Re Kersey, Alington* v. *Alington* (8). Then in *Re Murray* (1), to which I have referred, Upjohn, J., held that a name and arms clause in a somewhat unusual form was valid, and the Court of Appeal, though it reversed his decision by reason of some ambiguity in the particular words of that clause, pointedly refrained from expressing either approval or disapproval of the three other decisions to which I have referred. The position, therefore,

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(1) [1954] 3 All E.R. 129; [1955] Ch. 69.
(2) [1954] 3 All E.R. at p. 134; [1955] Ch. at pp. 79, 80.
(3) (1906), 75 L.J.Ch. 317.
(4) [1938] 3 All E.R. 435; [1938] A.C. 656.
(5) [1943] 1 All E.R. 16; [1943] A.C. 320.
(6) [1952] 1 All E.R. 408; [1952] Ch. 400.
(7) [1952] 1 All E.R. 740; [1952] Ch. 406.
(8) (1952), 96 Sol. Jo. 851.

A is that if the clauses before me are indistinguishable from those considered in those three cases, then I ought to hold them void. On the other hand, I have no encouragement from the Court of Appeal to extend those cases to cover clauses which are distinguishable from those which were there considered.

The first objection to these clauses which is taken in reliance on the cases to which I have referred, is that the words " use " and " discontinue to use " B are not sufficiently precise. In *Re Bouverie* (9) VAISEY, J., held that the word " disuse " was not of the high degree of certainty and precision which was required in a condition subsequent, and in *Re Wood's Will Trusts* (10) WYNN-PARRY, J., held that if the word " disuse " was too vague the phrase " discontinue to use " must equally be too vague. But here the wording is not " use " simpliciter but " use upon all occasions ". I think that the latter words " discontinue to C use " obviously refer back to the earlier use of the word " use " and mean " discontinue to use on all occasions ". Even apart from authority I should have no doubt that the expressions " use upon all occasions " and " discontinue to use on all occasions " were sufficiently certain but, in fact, in my judgment, the point again is covered by the decision of SWINFEN EADY, J., in *Re Drax* (11) to which I have referred. There the words in question were

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> " take upon . . . herself and use in all deeds and writings to which . . . she shall be a party or which . . . she shall sign and upon all other occasions the surnames of Erle and Drax . . ."

There SWINFEN EADY, J., held that those words meant that the surname must be used on all occasions when a surname is ordinarily used. He pointed out that E that would not compel the beneficiaries to use the surname when he or she would ordinarily use a Christian name.

Counsel for the testator's brother, Ralph Christopher, and his son, submitted to me that I ought to draw a distinction between that case and this case. There the words were " use in all deeds ", etc., " and upon all other occasions ". So that an ejusdem generis construction might be possible, whereas here the words were F " use upon all occasions ". But that, in my judgment, is altogether too great a refinement. I do not think that SWINFEN EADY, J., would have come to any different conclusion in that case if the words had been " upon all occasions ". In this case I think it simply means that the beneficiary must use the surname on all occasions when he ordinarily would use a surname.

The second objection which is taken to the validity of the clause, cl. 14 of the G will, is based on DANCKWERTS, J.'s decision in *Re Kersey* (12). There the beneficiary who was immediately affected by the clause was a married woman, and the clause extended to husbands of married women and purported to require them to change their names. DANCKWERTS, J., held that a provision requiring the husband of a married woman to change his name under penalty of his wife losing some property was contrary to public policy. Of course, I would follow that H decision without hesitation if I thought that it applied to this case, but here the beneficiary who is immediately affected is the first defendant, Ralph Christopher Inigo-Jones, and it is only in very improbable and remote contingencies that any female can possibly be affected at all. I do not think the fact that a clause may be invalid so far as it applies to married women and their husbands is any sufficient reason for holding it totally void as applied to males I or spinsters.

In this connexion I observe that the clause in *Re Murray* (13) which UPJOHN, J., held to be valid applied to married women although the beneficiary who was actually affected at the time was a male. UPJOHN, J., evidently did not consider that the circumstance that the clause extended to a married woman made it void even against male beneficiaries. It is true that the Court of Appeal reversed his judgment, but they did that on quite different grounds, and there is no suggestion in their judgment that UPJOHN, J., was wrong in not holding the whole clause void because of its possible application to married women.

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(9) [1952] 1 All E.R. 408; [1952] Ch. 400. (10) [1952] 1 All E.R. 740; [1952] Ch. 406.
(11) (1906), 75 L.J.Ch. 317. (12) (1952), 96 Sol. Jo. 851.
(13) [1954] 3 All E.R. 129; [1955] Ch. 69.

I have no particular affection for name and arms clauses. If some higher court is prepared to say that nowadays no such clauses are capable of having any legal effect, I shall not shed any tears, but I could not take so robust a course myself even if I wanted to do so. I have to be satisfied that the particular clauses before me, reasonably construed, are open to some real and not fanciful objection either on the ground of uncertainty or public policy. So far as concerns uncertainty, *Re Bouverie* (14) and *Re Wood's Will Trusts* (15) are plainly distinguishable, whereas *Re Drax* (16), in my judgment, is indistinguishable. I myself can see no real uncertainty in these clauses, and, as I have said, I am not prepared to hold that the Neeld clause is wholly bad on grounds of public policy because of the remote possibility of a married woman becoming entitled to an interest in the residuary estate. Therefore, I declare in answer to questions 1 (a) and 2 (a) that these clauses are valid.

[After hearing argument by counsel for the testator's brother, Ralph Christopher, and by counsel for the infant defendants, grandchildren of Mrs. Whiting, HIS LORDSHIP gave judgment on question 1 (b).]

CROSS, J.: The question which now arises is whether the first defendant, the testator's brother Ralph Christopher, has forfeited his life interest in the residuary estate by failing to take the name and arms of Neeld within one year from the testator's death. Under cl. 14 of the will the testator devised and bequeathed all the residue of his estate both real and personal, subject to the payment out of his personal estate, or in case of deficiency thereof out of his real estate, of his funeral and testamentary expenses and debts and the legacies and the annuities bequeathed by his will or any codicil thereto and all death duties upon trust for the first defendant for life. On the death of the testator all his property both real and personal vested in the surviving executor, Mr. John Frederick Slade Carpenter. The administration of the estate is not yet completed and so far no payment on account of income has been made to the first defendant. In due course, no doubt, after the administration has been completed, the executor will make an assent in favour of Mr. Ralph Christopher Inigo-Jones in respect of the residuary realty and an assent in respect of the residuary personalty in favour of the trustees. But all that is in the future. The proviso in cl. 14 which introduces the name and arms clause provides that the clause contained in the will of Joseph Neeld shall be applicable to the testator's will. The opening words of the Neeld clause are

> "Provided also that every person who under the trusts of this my will shall become entitled to the actual receipt of the yearly rents and profits of the said manors and other freehold premises hereinbefore devised and who shall not then use the surname of 'Neeld' . . ."

Applying that clause mutatis mutandis to the gift of residue I think that an obligation is imposed on Mr. Ralph Christopher Inigo-Jones to take the name and arms within one year from the time when he becomes entitled to receive the income of the net residuary estate. The question is has he yet so become entitled? I think not.

Counsel for the infants, grandchildren of Mrs. Whiting, has referred me to *Re Varley, Thornton* v. *Varley* (17). There the testator specifically devised certain real property to his trustees on trust to manage and receive rents and to permit his wife to reside in the mansion-house, and, subject thereto, to stand possessed of the estate in question in trust for a certain life tenant with remainder over, and he directed that every person who, under the foregoing

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(14) [1952] 1 All E.R. 408; [1952] Ch. 400. (15) [1952] 1 All E.R. 740; [1952] Ch. 406.
(16) (1906), 75 L.J.Ch. 317. (17) (1893), 68 L.T. 665.

A trusts, should become entitled as tenant for life or in tail to the actual possession of the rents and profits of the estate, and who should not then use and bear the name of Varley, should within one year after he should so become entitled take on himself and use the surname of Varley together with his or her own family surname. In that case, NORTH, J., held that the year in question began to run against the life tenant of the specifically devised property on the death of B the testator. But that was a case of a specific devise before the Land Transfer Act, 1897, and I do not think that the same considerations apply to a composite gift of residuary realty and personalty subject to the payment of debts, legacies, and so on. In such a case I do not think that the life tenant of residue can be said to be entitled to the residue of the income of the net residuary estate until the residue has been ascertained in due course of administration.

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[Argument was then addressed to the court on question 2 (b) and (c). On these questions the third defendant, Ian Spencer Horne, was separately represented.]

CROSS, J.: By the two name and arms clauses contained in cl. 14 and cl. 17 of his will the testator provided that Mr. Ian Spencer Horne and Mr. Ralph D Christopher Inigo-Jones must make up their minds whether or not to comply with the conditions imposed within a year from the time when they should respectively become entitled under the trusts of the will to the actual receipt of the rents and profits or income of the properties in which they were respectively given life interests.

E The property of which Mr. Ralph Christopher Inigo-Jones was given the income for his life was and is described by the testator in cl. 14 as being the net residuary estate. The net residue has not yet been ascertained and being non-existent cannot produce any income. When the administration is completed Mr. Ralph Christopher Inigo-Jones may become entitled to be paid by the executor some sum in respect of income received by the executor during the administration period, but such income is not income to which he has any legal or equitable F title as it accrues (see *Corbett* v. *Inland Revenue Comrs.* (18)). Accordingly, as I have already said, I do not think that there can as yet be any question of Mr. Ralph Christopher Inigo-Jones having forfeited his life interest by failure to comply with the name and arms clause. The position of Mr. Horne is very different, since he is given an equitable life interest in possession in the Foscote Farm and Woodlands under a specific devise. There can, I think, be no doubt G that had the law remained the same as it was before the Land Transfer Act, 1897, Mr. Horne would have become on the death of the testator entitled to the actual receipt of the rents and profits of the properties in question within the meaning of the name and arms clause (see *Re Varley* (19)). The legal estate would have passed on the death of the testator to the trustees under the specific devise, and the life tenant would have at once acquired a right in equity to be H paid the rents and profits. It is true that the creditors of the testator could have taken administration proceedings for the purpose of making the specifically devised realty available for the payment of their debts, but this possibility would not have prevented the equitable life tenant from becoming on the death entitled to the actual receipt of the rents and profits.

The question which I have to decide is whether the same result ensues today I in view of the changes which have been made in the law since *Re Varley* (19) was decided. On the death of the testator in 1956 the legal estate in the specifically devised property vested in the executor who could have sold it, if necessary, for the payment of debts. Mr. Horne is a tenant for life within the meaning of the Settled Land Act, 1925, and subject to the executor's rights and powers for the purpose of administration the executor must, when required to do so, execute a vesting assent in Mr. Horne's favour (see the Settled Land Act, 1925, s. 6 (b) and s. 8 (3) (a)). The fact that all estate duty payable on the testator's death in respect of the property has not yet been paid does not justify the executor in refusing to execute an assent if reasonable arrangements can be made for indemnifying him against any liability for them (see the Settled Land Act, 1925, s. 8 (3) (b) and the Administration of Estates Act, 1925, s. 36 (9) and (10)). In this case it is not suggested that there was ever any likelihood of the specifically devised property being required for the purpose of paying debts. But it is said that there are two circumstances which have hitherto made it impossible for Mr. Horne to insist on having a vesting assent made in his favour. The first is that until I answered question 3 of this summons the executor did not know what property was included in the specific devise. The second is that there is pending an application under the Inheritance (Family Provision) Act, 1938, by the widow of the testator who takes no benefit under his will, and that it is possible that the court may make some provision for her out of the rents of the specifically devised property—indeed theoretically at least a provision for her which would absorb the whole of the rents.

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(18) [1937] 4 All E.R. 700; [1938] 1 K.B. 567.

(19) (1893), 68 L.T. 665.

The first point does not appear to me to be of any substance. The fact that there was some doubt as to the extent of the devise would not, I should have thought, have disentitled Mr. Horne from having an assent made in his favour in respect of the property which was undoubtedly comprised in it. The second point, however, is of more weight. Under s. 3 (1) of the Inheritance (Family Provision) Act, 1938 (as amended by the Intestates' Estates Act, 1952), where an order is made under the Act the will is to be deemed to have effect as from the deceased's death subject to such variations as may be specified in the Act, and in *Re Simson, Simson* v. *National Provincial Bank, Ltd.* (20), VAISEY, J., stated that when an application under this Act was pending executors ought to be cautious in parting with assets to the beneficiaries since the court might subsequently wish to have resort to such assets for the purpose of making provision for the applicant. I think that the learned judge was probably thinking rather of the payment of legacies of capital sums than of the execution of a vesting assent in respect of settled real estate. But counsel for the testator's daughter and her grandchildren was disposed to agree in all the circumstances that Mr. Horne has not yet become entitled to require a vesting assent to be executed in his favour, and I am prepared to assume that this is so.

The question then narrows itself to this: does a life tenant of realty specifically devised by a modern will only become entitled to the actual receipt of the yearly rents and profits within the meaning of such a clause as this when he becomes entitled to require the executor to execute a vesting assent in his favour, or does he become entitled on the death as he would have become entitled under the old law? In my judgment the modern property legislation has not altered the position so radically as counsel for Mr. Horne has contended. On the death of the testator the position of Mr. Horne with regard to the rents of the specifically devised property was totally different from that of Mr. Ralph Christopher Inigo-Jones with regard to the income of residue. Mr. Horne became equitably entitled to the rents as they accrued and were received by the executor. It is true that his title to them was not indefeasible. They might be needed to pay debts or to satisfy some provision to be made under the Inheritance (Family Provision) Act, 1938, if any application under that Act was made. But subject to these possibilities of defeasance he had a vested interest to the rents as from the death. His title to them was not contingent. Counsel for Mr. Horne relies strongly, of course, on the words " actual receipt " in the name and arms clause in support of the view that nothing short of a present right to insist on the rents being paid to him will start the period running. It hardly lies in Mr. Horne's mouth to say that he was not entitled to require payment of the rents to himself since by letter of Feb. 3, 1958, addressed to the executor's solicitors his solicitors

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(20) [1949] 2 All E.R. 826 at p. 828; [1950] Ch. 38 at p. 42.

A demanded payment of rents collected by the executor which they said were due to their client, and in response to that demand the executor paid over £800 on account of such rents. In any case, I think that counsel for Mr. Horne lays too much stress on the adjective " actual ". Apparently this word only came to be added by conveyancers to the words " possession " or " receipt of the rents and profits " in order to preclude the suggestion that a title in reversion might B be included as well as a title in possession (see *Re Petre's Settlement Trusts, Legh* v. *Petre* (21)). If the words here had been not " who is under the trusts of this my will entitled to the actual receipt of the rents " but " who is in actual receipt of the rents " the position might possibly have been different (see *Re Duncombe, Wrixon-Becher* v. *Faversham* (22)). But in the phrase with which I have to deal, I do not think that the word " actual " does more than show that only life C tenants who under the trusts of the will have a title in possession to the rents are affected by this clause. It appears from *Re Varley* (23) that the existence of a mortgage, the interest on which absorbs all the rents, would not preclude the life tenant in possession from being entitled to " actual possession and receipt of the rents " within the meaning of this clause. If, therefore, I awarded the widow an annual sum which absorbed all these rents, that would not, I think, D prevent Mr. Horne from being " entitled to the actual receipt of the rents " within the meaning of this clause. It would be very curious if the fact that the executors are not obliged to make an assent pending the hearing of the application can alter the position if the making of an order in the widow's favour would not itself do so.

Declarations accordingly.

Solicitors: *Church, Adams, Tatham & Co.*, agents for *Carpenter & Carpenter*, Bath (for the plaintiff); *Mawby, Barrie & Letts*, agents for *Bell, Pope & Bridgwater*, Southampton (for the first and second defendants); *Arthur Taylor & Co.*, agents for *Titley, Long & Co.*, Bath (for the third, fourth, fifth, sixth and seventh defendants).

[*Reported by* E. Cockburn Millar, *Barrister-at-Law.*]

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(21) [1910] 1 Ch. 290 at p. 296. (22) [1932] All E.R. Rep. 588; [1932] 1 Ch. 622.
(23) (1893), 68 L.T. 665.

INLAND REVENUE COMMISSIONERS *v.* COLLCO DEALINGS, LTD. A

INLAND REVENUE COMMISSIONERS *v.* LUCBOR DEALINGS, LTD.

[COURT OF APPEAL (Lord Evershed, M.R., Pearce and Harman, L.JJ.), March 8, 9, 10, 1960.] B

Income Tax—Exemption—Removal of exemption—A person entitled under any enactment to an exemption—Application to resident in Eire—Dividend stripping—Finance (No. 2) Act, 1955 (4 *&* 5 *Eliz.* 2 *c.* 17), *s.* 4 (2).

Statute—Operation—Effect to be given to plain words notwithstanding international treaty. C

The taxpayer company was registered and resident in Eire and not resident in the United Kingdom. It bought the whole of the ordinary issued share capital in two English companies and in 1957 received two dividends thereon. These dividends were wholly paid out of profits made by the companies before their shares were so acquired, and they were paid less United Kingdom income tax. The taxpayer company sought to recover the tax under the D Income Tax Act, 1952, s. 349 and Sch. 18, Part 1, setting out the agreement for the avoidance of double taxation in the case of the Republic of Ireland. The Crown claimed that the exemption did not apply by virtue of s. 4 (2)* of the Finance (No. 2) Act, 1955, which removed the exemption in cases of " dividend stripping ".

Held: the taxpayer company was " a person entitled under any enactment E to an exemption from income tax " within the meaning of s. 4 (2) of the Finance (No. 2) Act, 1955, since those words unambiguously referred to any United Kingdom Act of Parliament including s. 349 of the Act of 1952; effect must be given to them, even if qualifying the exemption under the double taxation agreement with Eire, and accordingly s. 4 (2) removed the exemption otherwise conferred by the double taxation agreement and F the taxpayer company was not entitled to recover the tax deducted.

Decision of VAISEY, J. ([1959] 3 All E.R. 351) affirmed.

[As to legislation concerning dividend stripping, see 20 HALSBURY'S LAWS (3rd Edn.) 201, para. 356; and as to the removal of tax exemption in cases of dividend stripping, see ibid., p. 602, para. 1177.

As to relief against double taxation with the Republic of Ireland, see 20 G HALSBURY'S LAWS (3rd Edn.) 461, para. 866, et seq.

As to the duty to follow the plain meaning of statutes, see 31 HALSBURY'S LAWS (2nd Edn.) 498, para. 636.

For the Income Tax Act, 1952, s. 349, Sch. 18, Pt. 1, see 31 HALSBURY'S STATUTES (2nd Edn.) 336, 544; and for the Finance (No. 2) Act, 1955, s. 4 (2), see 35 HALSBURY'S STATUTES (2nd Edn.) 294.] H

Cases referred to:

R. v. *Manchester JJ.*, (1855), 5 E. & B. 702; 20 J.P. 341; 119 E.R. 643; sub nom. *R.* v. *Maude*, 25 L.J.M.C. 45; sub nom. *R.* v. *Price*, 26 L.T.O.S. 195; 7 Digest 549, *278*.

R. v. *Wilson*, (1877), 3 Q.B.D. 42; 48 L.J.M.C. 37; sub nom. *Re Wilson*, 37 L.T. 354; 41 J.P. 708; 24 Digest (Repl.) 989, *9*. I

Appeal.

The appellant taxpayer company appealed against a decision of the Special Commissioners of Income Tax refusing to grant exemption from United Kingdom income tax in respect of certain dividends received by the company from English companies. The company was at all times resident in Eire and not in the United Kingdom and it claimed exemption from British tax under s. 349 of, and para. 1 (a) of the first agreement set out in Part 1 of Sch. 18 to, the Income Tax Act, 1952. The refusal was based on s. 4 (2) of the Finance (No. 2) Act, 1955, and the question for the commissioners' decision was whether the company was " a person entitled under any enactment to an exemption from income tax " within the meaning of that enactment, or did not come within such words because it was a resident of Eire.

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* The terms of s. 4 (2) of the Finance (No. 2) Act, 1955, so far as relevant, are set out at p. 48, letter G, post.

The company was incorporated in Eire on May 29, 1957, and at all material times had been resident there and not in the United Kingdom. On Oct. 31, 1957, it bought from Matrim Finance, Ltd., one thousand ordinary shares of £1 each, fully paid, in Carpets and Textiles (Wholesale), Ltd., being the whole of that company's issued share capital, and also two thousand ordinary shares of £1 each, fully paid in Afco Agencies, Ltd. (since become known as A. F. Finance, Ltd.), the whole of that company's issued share capital. On Nov. 1, 1957, it received from the first of these companies a gross dividend of £174,500 from which United Kingdom income tax of £74,162 10s. had been deducted, being an interim dividend of £174 10s. per share subject to deduction of income tax, and from the second company a gross dividend of £104,000 from which United Kingdom income tax of £44,200 had been deducted, being an interim dividend of £52 per share subject to deduction of income tax. Both dividends were wholly paid out of profits accumulated before the date on which the taxpayer company acquired the shares. The two companies were incorporated in 1950 and 1951 respectively under the Companies Act, 1948, and had been throughout resident in the United Kingdom. The shares were shares of a class to which s. 4 of the Finance (No. 2) Act, 1955, applied, as defined in s. 4 (8) (c).

It was admitted by counsel for the Crown at the hearing before the commissioners that repayments of income tax at the full standard rate had been made by the Crown to Irish residents between 1945 and 1948 on dividends from which income tax had been deducted when payment was made by companies resident in the United Kingdom which had received double taxation relief. It was not contended by counsel for the company that the company would be liable to pay income tax in respect of the dividends.

The company contended that the wide words of s. 4 (2) of the Finance (No. 2) Act, 1955, should be limited and controlled on well-known principles so as to exclude residents of Eire who were by treaty excluded from the ambit of British income tax. The Crown contended that s. 4 (2) applied to the company notwithstanding that it was a resident of Eire, and that it was not entitled to the exemption. The commissioners held that the words " a person entitled under any enactment to an exemption ", defining persons subject to the provision in s. 4 (2) of the Act of 1955, must be given a limited construction and should exclude Eire residents on the basis of two principles of construction, that if possible the construction should not have the effect of imposing the will of Parliament on persons not within the jurisdiction and that it should not involve a breach of a treaty with another country (in the particular case the treaty of April, 1926, with the Government of Eire, which afforded absolute exemption from British tax to residents of Eire who were not residents of the United Kingdom) unless so explicit as to allow of no other interpretation. They therefore held that s. 4 (2) of the Finance (No. 2) Act, 1955, had no application to the company and that it was entitled to repayment of the tax deducted from the dividends. On July 24, 1959 (reported [1959] 3 All E.R. 351) VAISEY, J., allowed the Crown's appeal by way of Case Stated against the decision, holding that the provisions of s. 4 (2) of the Act of 1955 were unambiguous and effect must be given to them even if they were contrary to the international treaty. The company appealed to the Court of Appeal.

The second case, of Lucbor Dealings, Ltd., was not dealt with separately in the judgment of the Court of Appeal, but the decision followed that in the appeal of Collco Dealings, Ltd.

J. G. Foster, Q.C., and *P. Shelbourne* for the taxpayer company.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*), *E. Blanshard Stamp* and *A. S. Orr* for the Crown.

LORD EVERSHED, M.R.: The appellant, Collco Dealings, Ltd., is in effect seeking to recover certain sums in respect of English income tax which, apart from legislation passed in 1955, it might and I can assume would have been able to recover as being a person resident in the Irish Republic. The company was incorporated in May, 1957, and in the following October and November it purchased shares in English companies from another English company called Matrim Finance, Ltd. The first company in which it purchased shares was Carpets and Textiles (Wholesale), Ltd., which had at the material time an issued capital of one thousand ordinary shares of £1 each. That company then proceeded, no doubt under the impetus of the new share owners, to declare and pay a dividend of 17,450 per cent. on the shares. That large dividend was paid to a substantial extent, at any rate, out of the accumulated past profits in respect of which United Kingdom income tax had been paid. The transaction fell within the description of operation known as " dividend stripping ".

Apart from the 1955 legislation the Irish taxpayer company would, either certainly or in all probability, have been able to recover from the English revenue, not the actual tax which had been paid in respect of the accumulated profits, but a sum of income tax (which might have been larger) calculated by grossing up this vast dividend. The right to recover such a sum—and I put this early in my judgment and in the forefront of it—must depend on some statutory right to be found in English legislation. As a matter of history, a series of agreements had been made between representatives of the governments, on the one side of the United Kingdom, and on the other side of what was formerly the Irish Free State and later became the Irish Republic. Those agreements were confirmed in both countries by appropriate legislation. So far as this case is concerned, it will only be necessary to pay regard, except in passing, to the English legislation contained in the consolidating Income Tax Act, 1952, and s. 349 of that Act in particular, and in s. 4 of the Finance (No. 2) Act, 1955, to which I have earlier alluded. In order to make more clear the history and the arguments, it is necessary to have in mind that the first of these agreements was made in 1926 between the representatives of the two governments. It is now to be found in Sch. 18 to the Income Tax Act, 1952. So far as relevant, the effect of it was that a person who should prove to the satisfaction of the Commissioners of Inland Revenue in England that he was a resident in the Irish Free State and not a resident in Great Britain or Northern Ireland should be entitled to exemption from British income tax for the year in question in respect of properties situated in and profits and gains arising in or from Great Britain and Northern Ireland, and also to exemption from British supertax for the same year. There was a corresponding arrangement for the benefit of English residents as respects property in the Irish Free State. That was the purpose of the agreement, and it was executed by Ministers on both sides. Article 8 provided as follows:

> " This agreement shall be subject to confirmation by the British Parliament and by [the Irish Free State Parliament] and shall have effect only if and so long as legislation confirming the agreement is in force in both countries."

That was necessary in order that individual citizens of the two countries should enjoy the rights which the agreement intended to confer.

That is the agreement the intended benefit of which the taxpayer company in this case asserts. The agreement was later modified twice during the relevant period. The first modification came about in 1928 and was necessitated by the substitution in this country for supertax of a new designation, surtax, so that the original provision, if and so far as implemented by appropriate United Kingdom legislation, became inapposite since it referred to supertax. In the

A same way in 1947 another agreement was made between representatives of the two countries in order to deal with this sort of case: an English company might not have paid British income tax at the standard rate because, owing to arrangements applicable between this country and other countries also enshrined in English legislation, the English company in question might only have paid a smaller rate, called net United Kingdom rate; and the agreement signed in B July, 1947, was intended to make applicable to Irish residents comprehended by the original agreement the net United Kingdom rate of tax instead of the standard British income tax rate, where applicable.

I have mentioned these later agreements in order that the history may be understood, but the claim here rests on the effect (as implemented in legislation) of the agreement of 1926, and we are not concerned with the later modifications C save to the extent that part of Mr. Foster's forcible argument for the taxpayer company turned in some measure on what happened in 1945, 1947 and 1948 in connexion with this so-called net United Kingdom rate, and to that argument I shall presently return.

As contemplated by art. 8, the agreement of 1926 was implemented by English legislation shortly afterwards. That legislation was later reproduced in s. 349 D of the Income Tax Act, 1952. Subsection (1) reads:

> " The confirmation, by s. 23 of the Finance Act, 1926, s. 21 of the Finance Act, 1928, and s. 37 of the Finance Act, 1948, of the agreements in force at the passing of this Act between the United Kingdom and the Republic of Ireland which are set out in Part 1 of Sch. 18 to this Act is not affected by the repeal, by this Act, of the said s. 23, s. 21 and s. 37."

E The purpose of that subsection is obvious. As I have stated, the agreements in question are set out in Sch. 18, from which I have already read some reference. Subsection (2) of s. 349 provides:

> " Accordingly the first of the said agreements [i.e., the agreement of 1926] as modified by the second and third of the said agreements, shall, for any F year of assessment for which, under the law of the Republic of Ireland, it has effect with respect to exemption and relief from Republic of Ireland tax, have effect with respect to exemption or relief to be granted from United Kingdom tax, and the references in the said agreements to enactments repealed by this Act shall be taken for that purpose to be references to the corresponding provisions of this Act . . ."

G Subsection (3) provides:

> " For the purpose of giving effect to the said agreements, this Act, in relation to . . . (c) claims by persons resident in the Republic of Ireland, shall, for any year for which the said agreements are in force, have effect subject to the modifications set out in Part 3 of the said Sch. 18."

H Part 3 of Sch. 18 is headed:

> " Provisions for giving effect to agreements set out in Part 1 of this Schedule ",

including, of course, the agreement of 1926, and it is substantially what one would call a series of mechanical provisions to make appropriate for the cases contem- I plated the relevant parts of the fiscal legislation in England, which is notoriously complex, and in particular to make applicable the terms of Sch. D for the purposes of taxation computations, and so forth. We have not examined closely the precise effect of these provisions, and I am not suggesting that they in any real way qualify the prima facie right which would be given to an Irish resident by s. 349 (2), standing alone, i.e., by the statement that the agreement and the rights intended to be enjoyed by Irish residents should have effect in England. I only observe that, by the terms of sub-s. (3), the giving effect to the agreements should for any year have effect subject to certain modifications. It is sufficient to say that, in so far as there was any modification of the rights intended to be conferred, it would obviously not go to the root of the matter but would be a modification based rather on procedural considerations. Still, I mention it for reasons which may later become more apparent.

It is plain enough so far that what the English Parliament did in 1952 was to say that the terms of the agreement of 1926 as stated in Part 1 of Sch. 18 should be incorporated as part of the Income Tax Act, 1952, and so should take effect in English law. It is clear that, if an Irish citizen desires to take advantage of the benefit which the agreement of 1926 intended that he should enjoy, he must be able to invoke for that purpose some provision of the English law, and more particularly in this sort of case some provision of an English statute, and his right in England to enjoy the benefit of this exemption (which means to be able to recover income tax) depends exclusively on the section which I have read.

In the course of opening the case counsel for the taxpayer company referred a good deal to matters of international law and international comity, and some references were made to cases. Gracefully, he did not cite all the cases cited to VAISEY, J., but it must be clear that it is competent to the legislature of the United Kingdom to impose income tax in respect of profits or gains which arise in the jurisdiction, and that competence is in no way qualified because the profits and gains may be enjoyed by someone who is himself not so resident. If, therefore, Parliament decides that tax at a certain rate should be levied in respect of that class of property, or alternatively decides that in certain cases persons who might otherwise suffer the tax should be entitled to exemption, it cannot be said that Parliament is trying to exert a jurisdiction over foreigners in the sense that it is trying to legislate outside the proper jurisdiction of the English Parliament. The fact that a person who has a statutory right to an exemption in respect of income tax, a statutory right to recover tax, may be a foreigner is of itself quite irrelevant and does not appear to me to involve any question of comity or international law.

The effect of s. 349 on the face of it, by enacting as part of the municipal law of England the agreement of 1926, is to provide that Irish residents may have certain rights to recover tax which is exigible in respect of property in England or profits and gains arising in England. In so far as Parliament chose in 1952 to confer that statutory right, prima facie it must be equally clear that Parliament by some later statutory provision can modify or wholly revoke or repeal it. Briefly, what is said here on behalf of the Crown and was the view formed by VAISEY, J., is that in the Act of 1955 Parliament in the exercise of its undoubted sovereign power did so qualify the statutory right which s. 349 had conferred.

Section 4 (2) of the Finance (No. 2) Act, 1955, provides:

> " Where a person entitled under any enactment to an exemption from income tax which extends to dividends on shares becomes entitled to receive a dividend on a holding of shares of any class to which this section applies . . . then, if those shares . . . amount to ten per cent. or more of the issued shares of that class, the exemption shall, to an extent proportionate to the said extent to which the dividend is paid out of profits accumulated before the date on which the shares were acquired, not apply to the dividend . . . "

I have read, I hope, enough to make the general purport of the subsection intelligible. It was intended to strike at this so-called dividend-stripping practice. There is no doubt that the shares in Carpets and Textiles (Wholesale), Ltd., were shares of the class covered by the subsection.

Prima facie, therefore, the case would appear simple enough. The taxpayer company was a person entitled to an exemption under an enactment, viz., s. 349 of the Act of 1952, and this subsection in the Act of 1955 qualified that exemption. The subsection did not take the exemption away altogether, but, as regards dividends in respect of particular classes of shares, it provided that the person specified would not get the full privilege, that he would not be entitled to recover the whole of the tax but only a certain proportion of it.

As VAISEY, J., observed, when finally analysed the point is short and, on the face of it, simple. The taxpayer company has put forward the argument that the language in s. 4 of the Act of 1955 cannot be given its natural effect because to do so would in some way strike at or involve a breach of an agreement between this country and another sovereign state; and that is something which offends against the comity of nations. With all respect to counsel for the taxpayer company, I do not propose to take much time on that submission. As I think, it suffices to say two things: first, that what counsel called treaties were these agreements of which the agreement of 1926 is the relevant one, and, on the face of that agreement, its effect and its continued effect depended and was expressed to depend on confirmation by the legislature of the two countries, so that the agreement itself contemplated on its face that either side might at some time, if it thought fit, by the exercise of its sovereign legislative power put an end to it. Secondly, as I repeat once more, so far as the taxpayer company's rights are concerned, they must depend on some provision giving effect to them in an English statute which necessarily must be subject to review and modification by later legislative enactments.

The Special Commissioners of Income Tax decided in favour of the taxpayer company. In para. 8 of the Case Stated they said:

> " In the first place it appears to be settled law that if possible a construction is not to be given to general words in a statute [the reference is to s. 4 (2) of the Act of 1955] which would have the effect of imposing the will of Parliament upon persons not within its jurisdiction . . . and we consider that Parliament, by entering into the treaty of April, 1926, with the government of Eire, in effect relinquished jurisdiction in matters of income tax over residents of Eire."

I am quite unable to accept the proposition there stated, and counsel for the taxpayer before us did not at all support it. I have already said with regard to English income tax that there is no question of imposing the will of Parliament on persons not within its jurisdiction; still less can it be said, in my judgment, that the treaty of April, 1926, had the effect that the English Parliament relinquished jurisdiction in matters of income tax over residents of Eire. The Case, however, went on as follows:

> " In the second place if the inroad contained in s. 4 (2) upon the exemption to tax is effective against residents of Eire, it would in our opinion be a breach of the treaty which afforded absolute exemption from British tax to such residents; and it appears to be a recognised principle of English law that words in an Act of Parliament are not to be construed in a sense which would create a breach of a treaty between this country and another unless such words are so explicit as to allow of no other interpretation."

A reference follows to *R.* v. *Wilson* (1).

It is on that basis, though his expression of the point was not quite the same, that counsel for the taxpayer company has founded his argument. As it has seemed to me, the argument has to face one grave difficulty, which, in my judgment, in the end must be fatal to it. The opening words of s. 4 (2) of the Act of 1955 are: " Where a person entitled under any enactment ". The difficulty is this: on the face of it, " any enactment " obviously means any Act of the United Kingdom Parliament. If the words are not to have that meaning, then, what is the qualified meaning which is to be given to them? In some cases (and there was an illustration of what I am saying in some of the cases cited, e.g., *R.* v. *Manchester JJ.* (2)) it was possible in the light of the relevant context to limit the phrase " Acts of Parliament " to mean special Acts of Parliament as distinct from general Acts of Parliament; but no such qualified definition appears here to be possible. In the end it must be said by counsel for the taxpayer company that " any enactment " has to be construed as " any enactment except an enactment which affects Irish residents ". I am not saying that that is necessarily impossible. If the context and the relevant sections require it, that might be the answer; but it is obviously, as I think, a construction involving very grave difficulty. Put the other way round, as it seems to me, the phrase " under any enactment " prima facie means, and is quite unambiguously referring to, any United Kingdom Act of Parliament, and s. 349, part of the Act of 1952, is therefore on the face of it and, as I think, unambiguously, comprehended in the phrase " any enactment ".

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(1) (1877), 3 Q.B.D. 42.

(2) (1855), 5 E. & B. 702.

The case has, however, been put in this fashion (and I think that it is the only way it could be put): it is said that s. 349 (2) of the Act of 1952 contains in clear and express terms confirmation of the agreement of 1926 and a statement by the legislature that it is to have effect so long as it has corresponding effect in the Republic of Ireland. The argument goes on to contend that the terms of s. 4 (2) of the Act of 1955 do not boldly and clearly say: " The agreement shall no longer have effect ", but they purport to qualify the rights given under the agreement by s. 349 while leaving, as it were, the general confirmation contained in s. 349 (2) on the statute book; and so it is said that there is created an inconsistency.

In my judgment, the answer to the point is this: sub-s. (2) states, no doubt clearly, that the agreement of 1926, the terms of which are incorporated in Sch. 18, shall have effect, and Parliament later said, as it was entitled to do, " the effect shall be modified ". It is true that the modification might have been taken by those representing the Republic of Ireland to involve a breach and therefore a repudiation of the whole agreement and that would mean an end of it. On the facts as we have seen them, that point was not taken, and it does not seem to me to follow at all that any modification of the statutory rights which s. 349 (2) conferred is necessarily inconsistent with the continued confirmation in general terms of the agreement of 1926. Counsel for the taxpayer company has also supported this part of his contention by referring to something which I earlier anticipated, viz., the agreement of 1947, and the place it took in the history of this matter between the two countries. It will be recalled that the purpose of the agreement of 1947 was to substitute in appropriate cases, for the standard rate of British income tax which the Irish resident could recover, a less figure called the net United Kingdom rate. That net rate had been brought into the income tax code, so to speak, in England by the Finance (No. 2) Act, 1945. Section 52 (2) (a) of that Act, so far as relevant, provided:

> " Notwithstanding anything in the Income Tax Acts, no relief or repayment in respect of the tax deducted . . . shall be allowed at a rate exceeding . . .",

the net United Kingdom rate.

The point of counsel for the taxpayer company was to this effect: In so far as that provision applied to an Irish resident, it qualified the right which he had under s. 23 of the Finance Act, 1926, to recover at the full standard British income tax rate, and, therefore, just as s. 4 of the Act of 1955 created an inconsistency, as he says, with s. 349 of the Act of 1952, so the provisions of s. 52 of the Act of 1945 were inconsistent with s. 23 of the Act of 1926, " and if effect were given to them ", says counsel, " they would involve a breach of the agreement, if not its termination—and observe ", he says, " in those circumstances what was done ". It was apparent on the findings in the Case and from the later events, such as the agreement of 1947 and the later enactment in England in 1948, that the English revenue authorities and, as counsel says, Parliament itself, proceeded on the basis that s. 52 of the Act of 1945 did not affect or qualify the statutory right given to Irish residents by the Finance Act, 1926.

Counsel for the taxpayer company invokes that in support of the view that the Act of 1955 should similarly be construed now. He does not go so far as to say that the view taken by Parliament in 1945 and 1948 of the effect or construction of the section of the Act of 1945 is necessarily conclusive as to what the right view of that construction is, but he says it does lend support to the view that the construction for which he contends is one that has been and can reasonably be accepted.

One answer to that argument is this, that the apparent view taken by the English revenue, and, if you like, by the English Parliament when it enacted this Act of 1948 to implement the agreement of 1947, is equally consistent with the view that, whatever the right construction of s. 52 of the Act of 1945 might have been, the revenue authorities and Parliament, for reasons which they no doubt thought good, did not think it desirable to invoke against the Irish resident the qualifying effect of s. 52 of the Act of 1945. As I think, they cannot put it higher than that. If that is right, then it does not seem to me that the matter with which we are concerned is really further advanced. So I come back to this, and agreeing once more with VAISEY, J.'s statement, the point is indeed short: the question is, having in mind the obvious and acknowledged competence of the English Parliament to qualify any statutory right to exemption or repayment of English income tax which any person may have, be he a charity, a foreigner, or what you will, in all the circumstances of this case, can one give to the phrase " in any enactment " a meaning, can one impose on it some qualification, which will have the result that the section will not apply to the taxpayer company as being a person otherwise entitled to the specific relief which s. 349 of the Act of 1952 conferred on him? Like VAISEY, J., I have come to a clear conclusion that one cannot, and in those circumstances and without, I hope, being disrespectful to the argument by abstaining from citation of the other cases which were mentioned to us, I would conclude that this appeal fails and must be dismissed.

PEARCE, L.J.: I agree with what my Lord has said. The relevant words of s. 4 (2) of the Finance (No. 2) Act, 1955, are clear and simple. It is argued that they are so wide and general as to contain a possible ambiguity or to invite some limitation, but they refer to what the learned judge described as a very limited and well-defined class of the community. In spite of Mr. Foster's forcible argument, I see no warrant for reading into the words " a person " or " any enactment " the respective glosses that have been suggested. In my view the learned judge was right in the conclusion at which he arrived and the appeal should be dismissed.

HARMAN, L.J.: I agree, and, with all deference to the eloquent argument presented to us, I thought this a plain enough case. The Irish resident who wishes to obtain exemption from tax arising on a dividend payable in this country must go to the English Parliament to obtain it. What Parliament has given Parliament may take away, and that it has done to the limited extent which the Act of 1955 proposes in a limited class of cases and in order to stop an abuse. It would be astonishing if that abuse, no longer available to a person resident in England, could still be perpetrated by those resident in the Irish Republic. If Parliament had chosen to say that that should be so, it could do so, but it is very unlikely that it did intend to do so, and, in my view, it has put a stop to it in the plainest terms, which apply no less to the stranger than to the citizen in this country.

Appeals dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *R. M. Bull & Co.* (for the taxpayer company); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

FINCH *v.* FINCH (HAYES intervening).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Mr. Commissioner Latey, Q.C.), March 14, 15, 16, 17, 18, 1960.]

Divorce—Practice—Pleading—Answer—Denial—Sufficiency of bare denial—Cross-examination of petitioner on matters not pleaded in answer—Matrimonial Causes Rules, 1957 (*S.I.* 1957 *No.* 619), *r.* 17 (1)—*R.S.C., Ord.* 19, *r.* 15.

The wife petitioned for divorce on the ground of cruelty and adultery. The husband filed an answer containing a bare denial of the charges. At the hearing of the suit the wife was cross-examined to show that by her ill-temper and violence she had been guilty of misconduct and had in part provoked the matters alleged as cruelty. Counsel for the wife objected on the ground that under R.S.C., Ord. 19, r. 15, such matters should have been pleaded in the answer and that he had been taken by surprise.

Held: the objection could not be sustained since there was no obligation on the husband, either in law or in practice, to plead more than a bare denial in his answer.

Observations of DENNING, L.J., in *Thompson* v. *Thompson* ([1957] 1 All E.R. at p. 169) applied.

[As to the contents of answer to a petition charging cruelty or adultery, see 12 HALSBURY'S LAWS (3rd Edn.) 339, para. 706; and for cases on the subject, see 27 DIGEST (Repl.) 480-482, *4180-4199* and Supplement.

For the Matrimonial Causes Rules, 1957, r. 17 (1), r. 82, see 10 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 227, 262.]

Cases referred to:

Slater v. *Slater*, [1952] 1 All E.R. 1343, n.; 3rd Digest Supp.

Thompson v. *Thompson*, [1957] 1 All E.R. 161; [1957] P. 19; [1957] 2 W.L.R. 138; 3rd Digest Supp.

Petition.

The wife filed a petition for divorce on the ground of the husband's cruelty and adultery. The husband filed an answer containing a bare denial of both charges. At the date of filing the answer less than three years had elapsed since the parties had separated. At the hearing of the suit the husband applied for and was granted leave to add a cross-petition for divorce on the ground of the wife's desertion*. Counsel for the husband cross-examined the wife on the basis that by her ill-temper and violence she had been guilty of misconduct and had in part provoked the matters alleged against the husband as cruelty. Counsel for the wife objected to this cross-examination on the ground that the matters now being put to the wife had not been pleaded in the answer and that he was taken by surprise.

Mr. Commissioner LATEY, Q.C., overruled the objection and gave his reasons in the course of his judgment.

S. C. Silkin and *R. D. L. Kelly* for the wife.

K. B. Campbell and *Elaine Jones* for the husband and for the intervener.

MR. COMMISSIONER LATEY, Q.C.: I said that I would deal with the legal submission of counsel for the wife. He claimed that as the answer was a bare denial of cruelty it was not open to counsel for the husband to set up in cross-examination a case of provocation and the like. He based himself on R.S.C., Ord. 19, r. 15, which says:

> "The defendant or plaintiff (as the case may be) must raise by his pleading all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of

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* See *Robertson* v. *Robertson*, [1954] 3 All E.R. 413, n., for the need for a cross-petition rather than a cross-prayer.

> law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds."

On the basis of that rule he suggested that he had been taken by surprise in this matter.

The doctrine as to pleading confession and avoidance or accord and satisfaction in common law and Chancery actions is well established, but it has never obtained in matrimonial causes. There are some circumstances in which though the answer may be confined to a bare denial, some extra fact should be pleaded, as, for instance, when the respondent's case in answer to a petition based on desertion was that there had been a mutual agreement to separate with subsequent happenings which might negative desertion. That was really the issue in *Slater* v. *Slater* (1). In such a case it is desirable that the fact be pleaded in the answer.

Counsel for the wife further invoked the Matrimonial Causes Rules, 1957, r. 82, which provides that the Rules of the Supreme Court should be followed where there is no rule of the Matrimonial Causes Rules, 1957, that deals with the subject-matter; but r. 17 of the Matrimonial Causes Rules does deal with this point. I need not recite it. Though it imposes no obligation on the defending party to set up more than a bare denial it leaves him free to do so if he is so advised. An apt explanation of the point raised by counsel for the wife was given by DENNING, L.J., in *Thompson* v. *Thompson* (2), a case based on cruelty charges in which the pleadings of both parties were prolix. DENNING, L.J., said that all that was needed from the wife respondent was a denial of the charge of cruelty. Speaking generally he said (3):

> " The respondent should also remember that in his answer he need only deny that he is guilty of cruelty. He need not go on to say what happened on the occasion in question."

Thus both by law and practice counsel's objections cannot be sustained.

The underlying principle in matrimonial causes is that the court should be told all the relevant facts to enable it to come to a decision and if satisfied of a matrimonial offence possibly to change the status of the parties.

[Mr. Commissioner LATEY, Q.C., having dismissed the intervener from the suit, then rejected the charges of cruelty and adultery and granted the husband a decree nisi on the ground of the wife's desertion.]

Order accordingly.

Solicitors: *Barradale, Blacket Gill, Silkin & Young* (for the wife); *Prothero & Prothero* (for the husband and for the intervener).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

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(1) [1952] 1 All E.R. 1343, n. (2) [1957] 1 All E.R. 161; [1957] P. 19.
(3) [1957] 1 All E.R. at p. 169; [1957] P. at p. 35.

NOTE.

BLOOMFIELD *v.* BRITISH TRANSPORT COMMISSION.

[COURT OF APPEAL (Sellers, Ormerod and Upjohn, L.JJ.), March 18, 1960.]

Legal Aid—Costs—Appeal—Dismissal of assisted plaintiff's appeal against amount of damages for personal injuries awarded—Damages awarded to plaintiff to be taken into account in assessing defendants' costs of the appeal —Assessment of costs by Court of Appeal—Legal Aid and Advice Act, 1949 (12 *&* 13 *Geo.* 6 *c.* 51), *s.* 2 (2) (*e*)—*Legal Aid* (*General*) *Regulations,* 1950 (*S.I.* 1950 *No.* 1359), *reg.* 17, *as substituted by the Legal Aid* (*General*) (*Amendment No.* 1) *Regulations,* 1954 (*S.I.* 1954 *No.* 166).

[As to costs awarded against an assisted person, see 30 HALSBURY'S LAWS (3rd Edn.) 502, para. 933.

For the Legal Aid and Advice Act, 1949, s. 2 (2) (e), see 18 HALSBURY'S STATUTES (2nd Edn.) 535.]

Case referred to:

Nolan v. *Marshall* (*C. & C.*), *Ltd.*, [1953] 2 All E.R. 389; [1954] 2 Q.B. 42; [1953] 3 W.L.R. 257; *on appeal*, C.A., [1954] 1 All E.R. 328; [1954] 2 Q.B. 45; [1954] 2 W.L.R. 285; 3rd Digest Supp.

Appeal.

On Mar. 2, 1959, PILCHER, J., gave judgment for the plaintiff in an action for damages for personal injuries involving the loss of an eye, and awarded him £1,500 against the defendants. The plaintiff appealed against the assessment of damages, on the ground that the award was below the conventional level for the type of injury. His appeal was dismissed by the Court of Appeal. Counsel for the defendants asked for the costs of the appeal notwithstanding that the plaintiff was an assisted person under the Legal Aid and Advice Act, 1949. Counsel for the plaintiff submitted that the award of £1,500, being the subject-matter of the litigation, should not be taken into account in assessing the amount of costs to be paid by the plaintiff, and submitted that a sum of £20 would be appropriate. Counsel for the defendants contended that the authorities were against the plaintiff's submission. He referred to s. 2 (2) (e)* of the Legal Aid and Advice Act, 1949, reg. 17† of the Legal Aid (General) Regulations, 1950 (as substituted by the Legal Aid (General) (Amendment No. 1) Regulations, 1954), the decision of MCNAIR, J., in *Nolan* v. *C. & C. Marshall, Ltd.* ([1953] 2 All E.R. 389) which was approved by the Court of Appeal ([1954] 1 All E.R. 328), and the decision of DONOVAN, J., in *Graham* v. *C. E. Heinke & Co., Ltd.* ([1958 1 All E.R. 365).

P. M. O'Connor for the plaintiff.

Marven Everett, Q.C., and *Tudor Evans* for the defendants.

SELLERS, L.J.: This court approves of what was said by MCNAIR, J., in *Nolan* v. *C. & C. Marshall, Ltd.* (1), accepted as it was in that case on appeal, and particularly by the words of BIRKETT, L.J. (2). I think that the matter is open to consideration by this court. I can see no ground for depriving the defendants, the respondents to this appeal, of their costs, or any good ground why the full costs should not be awarded. The costs will have to come out of the damages which the plaintiff has been awarded, and it is desirable that they should not be reduced more than necessary. This court, applying the best consideration that it can to the matter, will itself assess the amount of costs as not exceeding the sum of £75. That will avoid a taxation and further expense, and, I hope, do justice between the parties.

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* By s. 2 (2) of the Legal Aid and Advice Act, 1949: " Where a person receives legal aid in connexion with any proceedings . . . (e) his liability by virtue of an order for costs made against him with respect to the proceedings shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, including the means of all the parties and their conduct in connexion with the dispute."

† By reg. 17 of the Legal Aid (General) Regulations, 1950, as substituted by the Legal Aid (General) (Amendment No. 1) Regulations, 1954: " (1) Where an order for costs is made against an assisted person, the determination of the amount of his liability for costs in accordance with s. 2 (2) (e) of the Act shall be made at the trial or hearing of the action, cause or matter . . .

" (3) The court may direct—(a) that payment under the order for costs shall be limited to such amount, payable by instalments or otherwise, including an amount to be determined on taxation not exceeding the amount, as the court thinks reasonable having regard to all the circumstances . . ."

(1) [1953] 2 All E.R. 389; [1954] 2 Q.B. 42.

ORMEROD and **UPJOHN, L.JJ.**, concurred.

Order accordingly.

Solicitors: *Moodie, Randall, Carr & Miles,* agents for *Bankes, Ashton & Co.*, Bury St. Edmunds (for the plaintiff); *M. H. B. Gilmour* (for the defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

COMPAGNIE ALGERIENNE DE MEUNERIE *v.* KATANA SOC. DI NAVIGATIONE MARITTIMA S.P.A.

[COURT OF APPEAL (Hodson and Ormerod, L.JJ., and Gorman, J.), November 17, 18, 19, 1959, February 29, 1960.]

Shipping—Charterparty—Loading—Implied warranty—Seaworthiness—Vessel in need of special permission to load cargo from authorities at stipulated port of loading—Whether need of permission breach of implied warranty of seaworthiness—Whether additional warranty by shipowners to use reasonable diligence to obtain permission, and to obtain it within a reasonable time, to be implied.

A vessel, which in 1955 had discharged cargo at an Israeli port, was chartered in 1956 to load a cargo of grain at a Syrian port. The charterparty, which was in Gencon form, stated that the vessel was " now trading and expected ready to load under this charter about May 24, 1956 ", and provided that, after loading, she was to proceed to one or two Algerian ports and that, in the event of her not being ready to load on or before May 31, 1956, the charterers might cancel the charterparty. The vessel arrived off the port of loading on May 28, 1956, but was refused free pratique by the Syrian authorities on the ground of a Syrian law of 1954 prohibiting foreign vessels from anchoring if they had called at an Israeli port. The Syrian authorities had discretion to exempt vessels from the prohibition. On instructions of the shipowners the master of the vessel signed a declaration of non-co-operation with Israel and endeavoured to get permission to load, but, while permission was still withheld, the Syrian authorities placed an embargo on export of grain to French or Algerian ports which, as finally continued by decision of the Syrian authorities on June 3, 1956, commercially frustrated the charterparty. On June 5, 1956, the vessel sailed from the port of loading having taken on only fresh water and stores. At the time of the charterparty the shipowners knew that the vessel had called at an Israeli port in 1955, that subsequently declarations of non-co-operation with Israel had been made by the master, that these had been accepted and that there had been no trouble. The shipowners knew or ought to have known of the Syrian law of 1954, but the charterers neither knew nor ought to have known of any of these matters. The charterparty contained no express warranty of seaworthiness. The vessel had proceeded on the approach voyage with due despatch and the declaration of non-co-operation had been made with reasonable diligence. On a claim by the charterers for damages for breach of implied warranty in the charterparty, in that the shipowners had failed to get permission to load, A

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(2) [1954] 1 All E.R. at p. 330; [1954] 2 Q.B. at p. 45. BIRKETT, L.J., said: " When the court is dealing with costs under s. 2 (2) (e) . . . I think that the fact that the assisted person has recovered some amount is one of the circumstances of the case."

Held: (i) the shipowners were not in breach of contract because the warranty of seaworthiness that was implied in the charterparty did not attach until the vessel sailed with her cargo and that time was never reached; B moreover, even if that implied warranty had attached on the approach voyage, a breach of it would not have been established as the voyage was not known to the shipowners to be foredoomed from its start to failure.

Ciampa v. *British India Steam Navigation Co., Ltd.* ([1915] 2 K.B. 774) distinguished.

(ii) there was no implied warranty that the shipowners would use due C diligence to obtain and would obtain permission to load under the Syrian law of 1954, for there was no sufficient necessity that such a term should be implied.

Dictum of SCRUTTON, L.J., in *Re Comptoir Commercial Anversois & Power, Son & Co.* ([1920] 1 K.B. at p. 899) applied.

Decision of DIPLOCK, J. ([1959] 1 All E.R. 272) affirmed on different D grounds, the decision at (ii) above reversing his holding on implication of warranty.

[As to shipowners' duty to obtain free pratique and to comply with requirements of port of loading, see 30 HALSBURY'S LAWS (2nd Edn.) 428, para. 594. As to implied condition of seaworthiness during loading, and at the commencement of the voyage, see ibid., 429-433, paras. 597-599, p. 463, para. 620.] E

Cases referred to:

Ciampa v. *British India Steam Navigation Co., Ltd.*, [1915] 2 K.B. 774; 84 L.J.K.B. 1653; 41 Digest 413, *2569*.

Cohn v. *Davidson*, (1877), 2 Q.B.D. 455; 46 L.J.Q.B. 305; 36 L.T. 244; 3 Asp. M.L.C. 374; 41 Digest 475, *3070*. F

Comptoir Commercial Anversois & Power, Son & Co., Re, [1920] 1 K.B. 868; 89 L.J.K.B. 849; 122 L.T. 567; 39 Digest 463, *893*.

Cunningham v. *Dunn*, (1878), 3 C.P.D. 443; 48 L.J.Q.B. 62; 38 L.T. 631; 3 Asp. M.L.C. 595; 41 Digest 449, *2816a*.

Levy v. *Costerton*, (1816), 4 Camp. 389; Holt, N.P. 167; 1 Stark. 212; 171 E.R. 124; 41 Digest 476, *3091*. G

Monroe Bros., Ltd. v. *Ryan*, [1935] All E.R. Rep. 163; [1935] 2 K.B. 28; 104 L.J.K.B. 450; 153 L.T. 31; Digest Supp.

Reed (A. E.) & Co. v. *Page, Son & East, Ltd.*, [1927] 1 K.B. 743; 96 L.J.K.B. 390; 137 L.T. 77; 17 Asp. M.L.C. 231; 41 Digest 478, *3114*.

Sanday & Co. v. *Keighley, Maxted & Co., Sanday (S.) & Co.* v. *Hillerns & Fowler*, (1922), 91 L.J.K.B. 624; 127 L.T. 327; 15 Asp. M.L.C. 596; 41 Digest 328, *1845*. H

Appeal.

The charterers of the s.s. Nizetti, the Compagnie Algerienne de Meunerie, the claimants, in an arbitration, of damages for breach of warranty against the owners of the ship, appealed from the decision of DIPLOCK, J., dated Dec. 5, I 1958, reported [1959] 1 All E.R. 272, in favour of the owners on a Case Stated by an umpire. The facts, which are summarised in the headnote, are stated in the judgment of HODSON, L.J.

John Megaw, Q.C., and *R. A. MacCrindle* for the charterers.

Ashton Roskill, Q.C., and *J. F. Donaldson* for the owners.

Cur. adv. vult.

Feb. 29. The following judgments were read.

HODSON, L.J.: This is an appeal from a judgment of Diplock, J., dated Dec. 5, 1958, (1), on a Special Case stated under s. 21 (1) (b) of the Arbitration Act, 1950. The learned judge reversed the decision of the umpire, who had found in favour of the charterers a breach of contract, under a charterparty in the Gencon form dated May 17, 1956.

The charterers had chartered from the shipowners the Italian s.s. Nizetti, stated to be " now trading and expected ready to load under this charter about May 24, 1956." It was agreed

> " that the said vessel shall proceed to Lattakia [in Syria] or so near thereto as she may safely get and lie always afloat, and there load a full and complete cargo of 2,750 metric tons, five per cent. more or less, quantity in master's option to be declared on giving notice to shippers. Wheat in bulk, charterers to supply up to five per cent. of bagged cargo, as demanded by the master for safe stowage . . . and being so loaded the vessel shall proceed to one or two ports in charterers' option out of Philippeville, Alger or Oran."

The cancelling date was May 31, 1956.

On Nov. 23, 1954, in pursuance of the boycott of Israel by Arab states, the Republic of Syria decreed that foreign vessels should not be allowed to anchor in Syrian ports if they had previously called at an Israeli port, but there was a discretion to remove the ban if owners of such vessels promised not to co-operate in future with Israel. The charterers had simultaneously with the charterparty made a contract of sale with a French government organisation which controlled the import of grain into French North Africa, and to fulfil this contract they had made a contract with a grain supplier in Beirut to purchase at Lattakia 5,000 tons of Syrian grain, 2,750 tons of which was to be shipped on the Nizetti. Their claim [in the arbitration] was for loss of profit on this transaction and for compensation for the loss of a sum of money, which they had been required to deposit in French North Africa, which they had forfeited on non-fulfilment of the French contract.

In February, 1955, the Nizetti had discharged at Haifa in Israel. Between February, 1955, and May, 1956, she had passed four times through the Suez Canal and on each occasion the master had signed a declaration of future non-co-operation with Israel. The vessel was not substantially delayed on any of those occasions. Of those matters within the owners' knowledge the charterers did not know at the date of the charterparty.

The vessel anchored in the roads at Lattakia at noon on May 28 and moved to a closer anchorage at 15.00 hours the same day. After she had moved, her log book was seen by a Syrian police officer and the master was told that free pratique would not be granted. On May 29 the charterers heard of the trouble and informed the owners, who cabled the master giving him instructions to sign a declaration of future non-co-operation with Israel. The master, being forbidden to land, did not receive the cable till the next day, and was never given free pratique, although on May 30 he was permitted to land, received the cable and made the necessary declaration. The Syrian government had been considering prohibiting the export of grain to French North Africa, and in the latter part of May 29 they imposed an embargo. This was released on May 31 in respect only of vessels which had already begun to load. On June 2 the government imposed a total and final embargo which took effect from June 3. On June 5 the vessel sailed from Lattakia without having loaded anything. The charterers had had their cargo ready to load on May 28 when the vessel arrived off Lattakia.

The charterers' contention is that, but for the defect of which the owners knew and they did not, the vessel would have gone through to the loading berth on May 28 in the normal course of events and would have loaded before the final embargo on June 3, having been stopped from May 29 to May 31. It is contended that the defect was one which put the owners in breach of their implied warranty of seaworthiness; alternatively, in breach of their implied warranty that the A ship shall commence and carry out the voyage contracted for with reasonable diligence; these two undertakings being implied in all contracts of carriage by sea in the absence of express stipulation to the contrary.

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(1) Reported [1959] 1 All E.R. 272; [1959] 1 Q.B. 527.

The learned judge rejected these submissions but held that, since it lay solely within the power of the owners and outside the power of the charterers to obtain the permission to load, a term must be implied in the charterparty to give business B efficacy to the contract that the shipowners would at least exercise reasonable diligence to obtain the permission. He further held that, since the owners knew and the charterers neither knew nor ought to have known at the date of the charterparty that permission might be needed, there was an implied warranty by the shipowners not only that they would use due diligence to obtain, but that they would in fact obtain, whatever permission was necessary within a reasonable C time, and decided that such reasonable time had not expired when this embargo took effect on June 3. Accordingly, he held that the charterers had failed to establish any breach of warranty on the part of the owners before the charterparty was frustrated on June 3 by the embargo.

The charterers maintain that the term implied by the learned judge is not stringent enough. The owners, while content to accept the finding in their favour, D contend that in any event no special warranty should be implied, for the situation was covered by the obligation of the owners to provide the vessel " expected ready to load . . . about May 24, 1956 " and by the undertaking admittedly implied to carry out the voyage with reasonable diligence. So far as seaworthiness is concerned, the contention is that this is a case of a vessel suffering from a fault not found in normal vessels analogous to a defective boiler which made her unfit E for the voyage. Comparison was made with *Levy* v. *Costerton* (2). There, a ship was stipulated

> " tight, staunch, and strong, and well and sufficiently manned, tackled, apparelled, and furnished with everything needful and necessary . . . for the voyage . . ."

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It was held that a bill of health was a thing within the meaning of that covenant and that the shipowners were in breach of that covenant having performed the voyage with some delay consequent on the absence of a bill of health. Reliance is also placed on *Ciampa* v. *British India Steam Navigation Co., Ltd.* (3), where it was held that the ordinary perils to which cargo may be exposed may include such treatment of the ship and cargo (for example fumigation) as by the local G laws of a port of call the cargo shipped may be exposed to. In that case, the ship to the knowledge of the owners, but not of the charterers, was foredoomed to inability to carry the contractual cargo and the vessel was held to have been unseaworthy when she took on her cargo of lemons at Naples.

This is an entirely different case and compares rather with *Cunningham* v. *Dunn* (4) where the facts were not dissimilar, and BRAMWELL, L.J., said (5): H

> " . . . counsel for the plaintiff contended, that the charterparty contained an implied warranty that the ship should be presented to the plaintiff in such plight and condition that she might lawfully take on board the proffered cargo. I know of no authority supporting such a proposition."

It cannot be said on the facts of this case that, as in *Ciampa* v. *British India Steam Navigation Co., Ltd.* (3), the voyage was foredoomed to failure by reason I of any lack of seaworthiness. In any event this warranty would not avail the charterers since there is no express warranty and the implied warranty, according to the authorities, attaches not on the approach voyage but when the vessel sails with her cargo (see *Cohn* v. *Davidson* (6), and SCRUTTON, L.J.'s judgment in

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(2) (1816), 4 Camp. 389. (3) [1915] 2 K.B. 774.

(4) (1878), 3 C.P.D. 443; 3 Asp. M.L.C. 595.

(5) (1878), 3 C.P.D. at p. 447; 3 Asp. M.L.C. at p. 596.

(6) (1877), 2 Q.B.D. 455; 3 Asp. M.L.C. 374.

A *A. E. Reed & Co.* v. *Page, Son & East, Ltd.* (7) as to various stages of a voyage). The time of sailing with the cargo was never reached. So far as the undertaking to carry out the voyage with reasonable despatch is concerned, that obligation was performed. She was never an arrived ship, and all her approach voyage was carried out with reasonable diligence. A short measure of delay may be involved in the situation where a master had to make a declaration of non-co-operation B before being allowed to load, but it is not true to say that the voyage was foredoomed to failure. It would be otherwise if the delay involved up to the time the vessel became an arrived ship were so great as to defeat the commercial purpose of the voyage.

There remains the express obligation contained in the words " expected ready to load ". If this statement is not made honestly and on reasonable grounds, the C charterer has his remedy (see *Sanday & Co.* v. *Keighley, Maxted & Co.* (8), per LORD STERNDALE, M.R., and *Monroe Bros., Ltd.* v. *Ryan* (9)). The case was not presented as one in which there was a breach of this obligation, no doubt because the master had had no serious trouble before, having made and having had accepted declarations of non-co-operation with Israel. Accordingly, the expectation of the owners was honestly held and based on reasonable grounds. If, on the D other hand, there had been serious trouble and delay on earlier occasions by reason of the obstruction of the Syrian authorities, this factor could not have been ignored and the " expected " date would not have been given on reasonable grounds.

There is no business necessity, in my judgment, for such an additional warranty as that implied by the learned judge. The obligation " expected ready to load " E is sufficient for business efficacy. The implied warranties as set out in SCRUTTON ON CHARTERPARTIES (11th Edn.) at p. 95, have stood for many years, and it must be rarely necessary for any further implication to be made. It is said that the necessity for the implication arises from the knowledge of the owners, denied to the charterers, as to the defect of their ship. No doubt knowledge as a surrounding circumstance is an aid to construction, but I do not see how the F knowledge can assist to imply a term of the kind which the learned judge thought necessary, since it is impossible to say what action they would have taken if they had known of the defect. The shipowners would no doubt say they had never had any trouble, and the charterers might have accepted the risk. The warranty sought to be implied amounts to an implied warranty that the ship had never called at an Israeli port. If it is put in this way I think that the owners' submis- G sion is right and that the implication is erroneous in principle. In the language of SCRUTTON, L.J., in *Re Comptoir Commercial Anversois & Power, Son & Co.* (10)

> " . . . it must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted."

The warranty sought to be implied does not, in my judgment, pass the test.

H It was found by the umpire that the owners made their declaration of non-co-operation within a reasonable time. He found in effect that if the Nizetti had been allowed to load on arrival it would have been stopped by the temporary embargo late on May 29 and loading would have been resumed on May 31 when the temporary embargo was lifted from the ships which had begun to load before the temporary embargo was imposed. In that event she could on his findings have I loaded a full cargo before the final embargo was imposed. On these findings, it was the embargo which frustrated the contract between the parties and there was no breach by the owners, for but for the embargo the Syrian authorities would have allowed the vessel to load within such time as would not have frustrated the contract.

I would dismiss the appeal.

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(7) [1927] 1 K.B. at p. 754; 17 Asp. M.L.C. at p. 239.

(8) (1922), 15 Asp. M.L.C. at p. 597. (9) [1935] All E.R. Rep. 163; [1935] 2 K.B. 28.

(10) [1920] 1 K.B. at p. 899.

ORMEROD, L.J.: The learned trial judge said (11):

> " The question, therefore, is whether at any time before the beginning of June 3, 1956, the owners were guilty of any breach of warranty and, if so, what damage did that breach cause."

To answer this question involves consideration of the obligations, express and implied, imposed on the owners by the charterparty. There was in the first place the obligation contained in the words B

> " now trading and expected ready to load under this charter about May 24, 1956."

It was not contended by the charterers that there had been a breach of this warranty. The Nizetti had discharged cargo at the Israeli port of Haifa in February, 1955, but on four subsequent occasions between that date and May, 1956, she had passed through the Suez Canal. Each time the master had signed a declaration of non-co-operation with Israel and the ship had been allowed to proceed on her voyage without any substantial delay. It was reasonable to expect, therefore, that there would be no delay from this cause in carrying out the proposed voyage, and that the expectation was " one made honestly and upon reasonable grounds " (see *Sanday & Co.* v. *Keighley, Maxted & Co.* (12)). C D

There was no express warranty of seaworthiness in the charterparty. In the circumstances there was an implied warranty of seaworthiness, and in addition an implied warranty that the ship would commence and carry out the voyage contracted for with reasonable diligence. The learned judge, however, was of the opinion that there should be implied into the charterparty a further warranty. He said (13): E

> " In the absence of such knowledge [that is, that the Nizetti had called at an Israeli port] on the part of the charterers at the time the charterparty was entered into, I am prepared to hold, although I do not think that any of the cases cited really assists me in this, that there was an implied warranty by the owners not merely that they would use due diligence to obtain but that they would in fact obtain whatever permissions to carry cargoes were necessary under the Syrian law of 1954 . . ." F

And then, after considering the time factor, he went on to say (13):

> " It seems to me that the highest at which the warranty on the part of a shipowner may be put is that he will (a) exercise due diligence to obtain and (b) will in fact obtain within a reasonable time any permission to load the vessel which is required under the Syrian law in force at the time when the charterparty was entered into." G

The learned judge held that there had been no breach of this warranty up to the time when the contract became impossible of performance because of the embargo imposed by the Syrian authorities, as a reasonable time had not expired and the owners were therefore entitled to succeed. H

It was contended on behalf of the charterers that there was an implied warranty of seaworthiness in relation to a vessel proceeding to the port of loading. This contention, however, is not in accordance with the authorities. Seaworthiness is well understood to mean the measure of fitness which the particular voyage or particular stage of the voyage requires; see *Cohn* v. *Davidson* (14), where it was held that the implied warranty of seaworthiness attaches at a time when the perils of the intended voyage commence, that is, when she sets sail with the cargo on board for her destination. FIELD, J., said (15): I

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(11) [1959] 1 All E.R. at p. 277; [1959] 1 Q.B. at p. 539.
(12) (1922), 15 Asp. M.L.C. at p. 597.
(13) [1959] 1 All E.R. at p. 278; [1959] 1 Q.B. at p. 540.
(14) (1877), 2 Q.B.D. 455; 3 Asp. M.L.C. 374.
(15) (1877), 2 Q.B.D. at p. 461; 3 Asp. M.L.C. at p. 376.

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> " Now nothing can be clearer than that upon such a policy [the ordinary marine policy] the warranty of seaworthiness for the voyage . . . is a warranty that the ship is or shall be seaworthy for the voyage at the time of sailing on it."

In *A. E. Reed & Co.* v. *Page, Son & East, Ltd.* (16) SCRUTTON, L.J., said: " . . . she need not be fit for the voyage before it commences, and when she is B loading in port ".

It seems clear from these and other authorities which were cited to us that in the absence of express warranty of seaworthiness there is an implied warranty which does not come into operation until the vessel sets sail on her voyage. Seaworthiness, of course, means more than that the ship is " tight staunch and strong ". It means that she must be fitted with everything necessary for the C intended voyage and to carry the specified cargo or cargoes. In *Levy* v. *Costerton* (17) a ship was warranted to be

> " . . . tight, staunch, and strong, and well and sufficiently manned, tackled, apparelled, and furnished with everything needful and necessary . . . for the voyage . . . "

D The shipowners had failed to obtain a necessary bill of health and were held to be in breach of their warranty in consequence. Again, in *Ciampa* v. *British India Steam Navigation Co., Ltd.* (18) it was necessary for a ship carrying a cargo of lemons from Naples to London, which had previously called at Mombasa, where there was plague, to be fumigated when calling at the port of Marseilles. The cargo was in consequence damaged, and the shipowners were held liable on E the ground that the ship was unseaworthy. The facts which brought about the necessity of fumigating arose and were known to the shipowners before the voyage started, and the purpose of the voyage was thereby foredoomed to failure. The present case is a very different one. It could not be said that the voyage was foredoomed to failure, nor was it expected that when the ship commenced to load there would be any factor which rendered her unfit for F the voyage. She had called at the Israeli port of Haifa in the previous year, but the owners had no reason to anticipate any difficulty or delay in obtaining the necessary permission to load from the Syrian authorities. In any event, the question whether the ship was seaworthy does not arise. If the implied warranty does not begin to operate until the ship sets sail on her voyage, it never attached to this ship at all.

G It was further submitted by the charterers, and accepted by the owners, that in a charterparty such as the one in this case there is an implied warranty that the vessel will proceed with all reasonable speed to the place of loading and load with all reasonable despatch. It would seem difficult to contend that there was a breach of this warranty in view of the finding of the arbitrator in para. 15 of the Case Stated, where he found that

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> " (1) The vessel began the approach voyage to Lattakia in due time and proceeded there with due despatch . . . (3) The owners and the master acted with reasonable diligence with regard to the making of the declaration of future non-co-operation with Israel."

It was contended, however, that if there was some defect in the vessel not found normally in vessels of this class by reason of which the vessel was prevented I from presenting herself for loading, there would be a breach of the implied warranty. It was put alternatively that there must at least be implied a term that a fact of this kind known to the owners and not known to the charterers will not cause any delay in the loading. I find it difficult to see how the first part of this contention can succeed. It appears to be an extension of the implied warranty for which there is no authority.

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(16) [1927] 1 K.B. at p. 754; 17 Asp. M.L.C. at p. 239. (17) (1816), 4 Camp. 389. (18) [1915] 2 K.B. 774.

The real question, in my judgment, is whether there should be implied a term that the necessity for obtaining the consent to load would not cause any delay in the loading. Are the circumstances in which the contract was entered into between the parties sufficient to justify the inclusion of a term not normally implied? In *Re Comptoir Commercial Anversois & Power, Son & Co.* (19) SCRUTTON, L.J., said:

> " . . . it must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted."

As in this case the charterers were not aware of the call at Haifa, it is difficult to see how they could have intended such a term to be implied. In any event it is impossible to say what their attitude might have been had they known all the facts. They might, of course, have insisted on an express term being included in the contract, but they might equally well have taken the view that the risk of delay was negligible, and that the ship would be allowed to proceed on the master signing the declaration of non-co-operation as on the four previous occasions. It could not be said in these circumstances that the necessity for the term proposed by the charterers was so obvious that it was taken for granted.

It follows that I would come to the conclusion, as did the learned judge, that the appeal should be allowed. I come to the conclusion, however, for a different reason. Had I been of the opinion that the warranty which I have already cited from his judgment should be implied, I should have agreed with him that there had been no breach of it by the owners. In my judgment, however, the circumstances do not warrant such an implication. The warranty implied in the words " expected ready to load " is sufficient. Had the owners had difficulty in the past, by reason of the ship's call at Haifa in 1955, in obtaining permission to proceed on the respective voyages, or had they had reason to expect that there would be serious delay for this same reason when the ship arrived at Lattakia, there might well have been a breach of this warranty. Such, however, was not the case.

I would dismiss the appeal.

GORMAN, J.: In my view, there is no express warranty of seaworthiness or fitness for the contemplated voyage. The implied warranty of seaworthiness does not arise until the vessel sails with her cargo and not on the approach voyage. In this case, this time was never reached, and the implied warranty of seaworthiness never attached to the vessel.

The umpire found, in para. 15 (7) of the Case Stated, that at the time of the negotiation and execution of the charterparty, the owners knew that the vessel had called at an Israeli port during February, 1955, and knew, or ought to have known, of the existence and effect of Legislative Degree No. 48 and of the Instruction relating thereto. He also found that the owners also knew that, on previous occasions, the master had made declarations of future non-co-operation with Israel, and that the charterers did not, at the time of the negotiation and execution of the charterparty, know that the vessel had called at an Israeli port, nor that the master had been required to make the aforesaid declarations. It was contended by the charterers that, in such circumstances, the ship was subject to a defect which made her unfit for the contemplated voyage. In my view, there was not in this case, as contended, such a breach of warranty within the authorities. In any case, any such warranty would not attach to the vessel on the approach voyage to the place of loading, and the warranty, if existing, did not attach to the vessel at any time. The learned judge had rejected the contention of the charterers.

There was an implied warranty that the ship would proceed with all due diligence to the place of loading. In the award, the umpire made the following

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(19) [1920] 1 K.B. at p. 899.

A findings of fact: namely that the vessel began the approach voyage to Lattakia in due time and proceeded thence with due despatch; and that the owners and the master acted with reasonable diligence with regard to the making of the declaration of future non-co-operation with Israel. This warranty is a warranty to proceed with reasonable despatch: it is not an absolute obligation. There may always arise impeding factors or circumstances, but the existence of these is not B necessarily a breach of the warranty. In my view, on the findings of the umpire, there has not been proved to have taken place a breach of the warranty to proceed with reasonable despatch. The learned judge had rejected the contention of the charterers that the owners were in breach of the implied warranty of due diligence.

It was, however, contended by counsel on behalf of the charterers that, in the circumstances of this case, the owners were guilty of breach of a warranty to be C implied, that the vessel would not be delayed by a special defect in the vessel known to the owners and not to the charterers. The learned judge said in his judgment (20):

> " . . . I am prepared to hold, although I do not think that any of the cases cited really assist me in this, that there was an implied warranty by the owners not merely that they would use due diligence to obtain but that D they would in fact obtain whatever permissions to carry cargoes were necessary under the Syrian law of 1954 which was in force at the time that the charterparty was entered into and applicable to vessels of the category into which the Nizetti as they, the owners, knew, but as the charterers neither knew nor ought to have known, fell."

E The learned judge also held that if such a warranty was to be implied, there was a time factor to be considered and that, when the final embargo took effect on June 3, 1956, a reasonable time for the obtaining of such permissions had not expired. There was therefore no breach by the owners of any such implied warranty.

Counsel for the owners contended that, in the circumstances of this case, there F was no room for such an implied warranty. He referred to the statement of SCRUTTON, L.J., in *Re Comptoir Commercial Anversois & Power, Son & Co.* (21):

> " . . . it must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted."

In my view, counsel for the owners was right, and there is no room, in law, for G the introduction of the further warranty suggested by counsel for the charterers and found by the learned judge.

There was no breach of contract under the charterparty by the owners, and I agree that this appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Ince & Co.* (for the charterers); *Edward Thompson & Hauser* (for the owners).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

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(20) [1959] 1 All E.R. at p. 278; [1959] 1 Q.B. at p. 540. (21) [1920] 1 K.B. at p. 899.

THE FORTUNITY.

OWNERS OF THE MOTOR CRUISER FOUR OF HEARTS *v.* OWNERS OF THE MOTOR VESSEL OR MOTOR SHIP FORTUNITY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hewson, J.), March 14, 15, 16, 1960.]

Shipping—Collision—Damages—Constructive total loss—Loss of profits—Motor cruiser owned by plaintiffs for letting out on hire on the Broads—Loss of prospective profits of next season—Cruiser of distinctive design characteristic of plaintiffs' fleet—Fixed engagements at date of sinking for part of next season—Measure of damages.

On Oct. 12, 1958, the plaintiffs' motor cruiser Four of Hearts was rammed and sunk on the River Yare on the Norfolk Broads by the defendants' vessel, Fortunity, and became a constructive total loss. The defendants admitted liability. The Four of Hearts was a six-berth cabin cruiser built in 1937 by the plaintiffs for their own letting business on the Broads; she was one of a fleet of thirteen vessels. The vessels had a distinctive similar build, and it was reasonable for the plaintiffs not to replace the Four of Hearts until a new vessel of like design was built. She was not replaced in the 1959 season as the plaintiffs were unable to build a replacement until 1960. Accordingly her earnings of that season were lost. At the time of the collision the Four of Hearts was booked for sixteen of the twenty-five weeks of the 1959 season, and on the evidence it was found that she would have been booked for the whole of that season. The assessment of damages was referred to the Admiralty registrar, the plaintiffs claiming (i) £3,000 for the loss of the cruiser and (ii) £788 for loss of bookings of the cruiser for the 1959 season. The total gross hire of the Four of Hearts under her existing bookings at the time of the collision would have been £635 5s. On appeal from a decision of the registrar rejecting claim (ii),

Held: the measure of damages was the sum of (i) the market value of the Four of Hearts to the trade (assessed by the court at £2,200) and (ii) loss of profit for the 1959 season (assessed at £350), that loss of profit being estimated for the whole 1959 season, not merely for the sixteen weeks of fixed engagements, because such a vessel as the Four of Hearts was employed in a small defined area where the seasonal rates could be fairly accurately determined by comparison with other hirings of similar craft by the same owners.

The Philadelphia ([1917] P. 101) distinguished.

Dictum of LORD WRIGHT in *The Edison* ([1933] All E.R. Rep. at p. 160) considered.

Appeal allowed in part.

[As to measure of damages in shipping collisions, see 30 HALSBURY'S LAWS (2nd Edn.) 857, 858, paras. 1130, 1131; and for cases on the subject, see 41 DIGEST 802, 803, *6626, 6627, 6630, 6633*; 809, 810, *6700-6713,* and SUPPLEMENTS.]

Cases referred to:

Edison, The, [1933] All E.R. Rep. 144; sub nom. *Liesbosch Dredger* v. *Edison S.S.* (*Owners*), [1933] A.C. 449; 102 L.J.P. 73; 149 L.T. 49; 18 Asp. M.L.C. 380; Digest Supp.

Harmonides, The, [1903] P. 1; 72 L.J.P. 9; 87 L.T. 448; 9 Asp. M.L.C. 354; 41 Digest 810, *6710.*

Llanover, The, [1947] P. 80; [1948] L.J.R. 108; 177 L.T. 591; 2nd Digest Supp.

Philadelphia, The, [1917] P. 101; 86 L.J.P. 112; 116 L.T. 794; 14 Asp. M.L.C. 68; 41 Digest 809, *6708.*

Motion.

This was a motion by way of appeal from the decision of the Admiralty registrar dated Nov. 5, 1959, on a reference as to damages by collision in the following circumstances. The plaintiffs, the Hearts Motor Cruisers, Ltd., were the owners of the motor cruiser Four of Hearts, one of a fleet of thirteen vessels of which twelve were motor cruisers, all built and maintained by the plaintiffs solely for letting to hirers for cruising on the Norfolk Broads through the agency of Messrs. Blake's (Norfolk Broads) Holidays, Ltd., of London. The plaintiffs built their own craft and did not build for any other buyers and were a self-contained firm existing solely for the purpose of catering for holiday makers on the Norfolk Broads. Their craft, it was agreed in evidence, maintained a high standard and were of a distinctive build with a family-likeness. The Four of Hearts was built in 1937 and, apart from the war years, she operated continuously during each holiday season between the months of April and September. She was a cruiser thirty-four feet in length, ten feet in beam and had three separate cabins accommodating six persons in all. During the winter of 1957-1958 the plaintiffs, who did all their own repair and maintenance work, spent the sum of £779 on her, including the fitting of a diesel engine, which was safer and more economical to run than a petrol engine, a fact which made for popularity with hirers. In 1958 the Four of Hearts was booked for twenty-five weeks, from Apr. 5 to Oct. 4, at a gross hire of £1,156 10s.

On Oct. 12, 1958, the Four of Hearts, whilst at moorings on the River Yare on the Norfolk Broads, was rammed and sunk by the Fortunity, owned by the defendants who admitted liability for the collision. The Four of Hearts became a constructive total loss. There was evidence that a new ship of appropriate design, which was being built by the plaintiffs, would not be ready until May, 1960. It was reasonable for the plaintiffs not to introduce a six-berth vessel of unusual type into their fleet for the 1959 season and there was evidence that no suitable craft was available on the Broads for that season. The plaintiffs claimed (i) £3,000 for the loss of the cruiser; (ii) £788 for the loss of bookings for the hire of the cruiser on the Norfolk Broads for the 1959 holiday season*; (iii) £9 9s. for surveyor's fees; and (iv) £10 7s. 6d. for hirers' claims for lost effects as a result of the sinking of the Four of Hearts. The parties agreed to items (iii) and (iv), and the two items in dispute, namely, (i) and (ii) were referred to the Admiralty registrar for the assessment of damages.

At the time of the sinking, two weeks after the close of the 1958 season, the Four of Hearts was already booked for various periods during the 1959 season, amounting to fifteen or sixteen weeks in all, by ten different hirers for a total sum of £635 5s. The court accepted evidence on behalf of the plaintiffs that in all probability the Four of Hearts would have been booked for twenty-five weeks of the 1959 season if she had not been sunk. The Two of Hearts, her sister ship, in fact fulfilled twenty-five weeks' bookings in 1959 although she was petrol-engined and thus, according to the evidence, was less sought after by hirers.

The plaintiffs contended before the registrar that the Four of Hearts had a particular value to them, her owners; that her value to them as a going concern, taking all surrounding circumstances into consideration, was the proper measure of damages, and that to this should be added the net profits which would have been made under fixed engagements which were lost owing to the sinking, for which purpose it would be fair, so they argued, to regard the whole of the 1959 season as fixed. The sum of £788 was based by the plaintiffs on estimated bookings of £1,100. The defendants contended that the loss of profits should not be allowed in addition to the value of the vessel as a going concern at the time and place of her loss because the former was an element of the latter; that, if fixed engagements were to be regarded, only the fifteen or sixteen weeks booked for the Four of Hearts at the time of the collision should be so regarded, and further, that in any event it was only the net profit that was to be taken into account.

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* The plaintiffs had originally claimed £1,100 under item (ii) for loss of bookings for 1959, but this was later amended to £788.

The registrar took the view that the proper measure of damages was the value of the cruiser as a going concern to the plaintiffs at the time and place of her loss, taking all the circumstances into consideration including the fact (which the registrar found) that the vessel would almost certainly have been fully employed throughout the 1959 season. He further held that nothing should be added in respect of the fifteen or sixteen weeks' specific engagements which had been made for the Four of Hearts at the time of her sinking, because these were included in the element of virtual certainty of employment. The registrar disallowed item (ii) but awarded the plaintiffs £2,950 under item (i). This award was made up as follows—£2,250 for the market value of the cruiser, £650 in respect of the special value to the plaintiffs of the cruiser taking into account that they would lose at least one season's profit before they could reasonably replace her, and a sum of £75 for cruiser's equipment less an agreed deduction of £25 for the salvage of the vessel (i.e. £50 balance which, added to the £2,250 under (i) made £2,300, apart from the special value). The registrar arrived at the figure of £650 after hearing evidence that the average profits in hiring vessels of this kind on the Broads was between 20 per cent. and 22½ per cent. of the gross hire. He doubted if it would be fair to take this percentage as the figure of profit to be applied; but was of the opinion that the figure should lie between £788 (the amended figure put forward by the plaintiffs) and £247 10s., which was the mean of the 20 per cent. and the 22½ per cent. of the gross earnings, and thus considered that a reasonable sum would be £650, which figure he allowed.

The defendants gave notice of motion in objection to the registrar's decision on the following grounds—(a) that there was no evidence on which the registrar was at liberty to allow item (i) at more than £2,300 or alternatively at so much as £2,950; (b) that in allowing the said item (i) at more than £2,300 or alternatively at so much as £2,950, he was acting against the weight of evidence; (c) that he was wrong in law in adding any sum to the market value of the Four of Hearts in respect of what he had described as the special value of the vessel to the plaintiffs; (d) alternatively, if the registrar was right in law in adding something to the market value of the Four of Hearts in respect of her special value to the plaintiffs, the basis on which he assessed such addition (namely, the amount of the net profits which the said cruiser would have earned in the 1959 season) was a wrong basis in law.

On the motion the defendants contended that, accepting the market value of the cruiser at £2,300 (viz. £2,250, plus £75 for equipment, minus the deduction of £25 for salvage), the allowance of the additional sum of £650 was wrong both in fact and in law because, having rightly disallowed item (ii) of the plaintiffs' claim, the award of the £650 allowed the claim for loss of profits (viz. item (ii)) as an element of item (i).

The authority and cases enumerated below* were cited in argument in addition to those referred to in the judgment.

R. F. Stone for the plaintiffs.
H. V. Brandon for the defendants.

HEWSON, J., after stating the facts and contentions before, and decision of, the Admiralty registrar, continued: Counsel for the defendants in argument quoted to me, among other cases, *The Philadelphia* (1) as authority for saying that future earnings are only to be taken into account when the ship is

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* ROSCOE'S MEASURE OF DAMAGES IN ACTIONS OF MARITIME COLLISIONS (3rd Edn.), p. 30 et seq.; *The Northumbria*, (1869), L.R. 3 A. & E. 6; 3 Mar. L.C. 314; *The Argentino*, (1888), 13 P.D. 191; 6 Asp. M.L.C. 348; *The Racine* [1906] P. 273; 10 Asp. M.L.C. 301; *Monarch S.S. Co., Ltd.* v. *Karlshamns Oljefabriker (A.B.)*, [1949] 1 All E.R. 1; [1949] A.C. 196; *Bishop* v. *Cunard White Star Co., Ltd.*; *Appleby* v. *Cunard White Star Co., Ltd., The Queen Mary*, [1950] 2 All E.R. 22; [1950] P. 240.

(1) [1917] P. 101; 14 Asp. M.L.C. 68.

A under fixed engagements; that there should only be allowance for that if the engagements are under contract, and that in principle there was no distinction between cases like *The Philadelphia* (2), that is, tramp ships, and pleasure craft on the Broads and that further engagements not already contracted for and fixed were too remote for consideration. As a general statement of the law for ocean shipping I entirely agree with that; in fact I cannot do otherwise because it is a B judgment of the Court of Appeal; but in my view craft of the type of the Four of Hearts should not be considered in the same way as ocean going shipping about whose future employment, apart from charters already fixed, there must be a great element of doubt. Vessels on the Broads, as I find, are employed in one small defined area, whose seasonal employment at scheduled rates, not subject to fluctuation, can be fairly accurately determined by comparison with what C actually occurred in this case in the hiring of other craft similarly employed by the same owners. Of course, due allowance must be made for a particular construction of an individual boat and its popularity, if such is shown to exist. All the evidence in this case shows that the Four of Hearts was a very popular craft, whose popularity was likely to increase, if anything, owing to the recent fitting of a diesel engine in place of a petrol engine. Some of the plaintiffs' craft, D if not the majority of them, all of which were fully employed during the 1959 season, were petrol engined and the Four of Hearts, being diesel, was safer and cheaper to run, that is, run at the expense of the hirer, and would, I am satisfied, have been fully occupied during the 1959 season.

Then counsel for the defendants referred me to *The Llanover* (3). That was a case where PILCHER, J., held that the value of a coaster during the last war which E was engaged in the north-east coast convoys was based on the sales of comparable vessels which were substantially enhanced by the fact that all parties concerned with the sales knew that the ships were virtually certain of continuous remunerative employment during hostilities and that that included any sum to which the plaintiffs might have been entitled under the principles laid down in *The Philadelphia* (4).

F I was also referred, I think by learned counsel on both sides, to *The Edison* (5), and in particular to what LORD WRIGHT said in his opinion (6):

> " The true rule seems to be that the measure of damages in such cases is the value of the ship to her owner as a going concern at the time and place of the loss. In assessing that value regard must naturally be had to her pending engagements, either profitable or unprofitable. The rule, however, obviously G requires some care in its application; the figure of damages is to represent the capitalised value of the vessel as a profit-earning machine, not in the abstract, but in view of the actual circumstances. The value of prospective freights cannot simply be added to the market value, but ought to be taken into account in order to ascertain the total value for purpose of the damage, since, if it is merely added to the market value of a free ship, the owner will H be getting pro tanto his damages twice over."

That is a very clear statement of this branch of the law. Then LORD WRIGHT went on to say this (6):

> "The contrasted cases of a tramp under charter or a seeking tramp do not, however, exhaust all the possible problems in which must be sought an answer I to the question what is involved in the principle restitutio in integrum. I have only here mentioned such cases as the step to considering the problem in the present case. Many, varied and complex are the types of vessels and the modes of employment in which their owners may use them. Hence the

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(2) [1917] P. 101; 14 Asp. M.L.C. 68.

(3) [1947] P. 80.

(4) [1917] P. at pp. 103-107, and approved ibid. at pp. 108-113; 14 Asp. M.L.C. at pp. 70, 71, and approved ibid. at pp. 72-74.

(5) [1933] All E.R. Rep. 144; 18 Asp. M.L.C. 380.

(6) [1933] All E.R. Rep. at p. 160; 18 Asp. M.L.C. at p. 383.

> difficulties constantly felt in defining rules as to the measure of damages. I think it impossible to lay down any universal formula. A ship of war, a supply ship, a lightship, a dredger employed by a public authority, a passenger liner, a trawler, a cable ship, a tug boat (to take a few instances), all may raise quite different questions before their true value can be ascertained." A

With those observations of LORD WRIGHT in mind I have applied my mind to the facts and circumstances of this present case. B

Counsel for the defendants says that the value as given in evidence took account of the future profits, in other words, the value of £2,200 given in evidence by the witness called by the plaintiffs, Mr. Huggenbach, should be accepted as the value to the owners as a going concern; and I was referred, I think at a late stage in the case, to *The Harmonides* (7) as to what is meant by that expression. There it was held that where there is no market value you must take the value to the owners as a going concern. C However, the Harmonides, so far as I can discover from the report, was a single ship with no market value; nobody else would buy her and her only value was scrap, but to her owners, who were engaged in Atlantic passenger traffic and, I rather suspect, in emigrant traffic, which was a profitable traffic at that time, she had a peculiar value. Therefore, some means had to be found of establishing the loss in order to apply the principle of restitutio in integrum. D

It seems to me that in this present case the situation is different. There is no question in this case of scrap value. There is no question in this case that this craft, the Four of Hearts, would not have been of considerable use to other people had she been for sale. The Four of Hearts was a valuable unit of her owners' fleet and likely to continue so, and on the evidence, to which I shall refer in a moment, there was before the learned registrar a market price for her both to the trade and to a private owner. E In the circumstances of this case it was desirable to maintain a family likeness in the fleet for the purposes, I suppose, of prestige and identification and uniformity. In my view, it was reasonable on the part of the plaintiff owners not to introduce a six-berth vessel of unusual type into their fleet for a season until a replacement was available. F On the evidence there were no suitable craft on the Broads available at the time. On the other hand, I do not find that the remainder of the fleet, or its reputation, suffered as a result of the non-existence of the Four of Hearts in the 1959 season. I do find that her earnings were lost to her owner for that season.

It seems to me that in the particular circumstances of this case in applying the principle of restitutio in integrum I have to decide which method will be the more satisfactory and the more equitable. G Having in mind what LORD WRIGHT said in *The Edison* (8) about the circumstances, the types of vessels, and so on, I have come to the conclusion that the proper way to approach this case in the circumstances is to make some attempt to arrive at what, I think, one witness called the net net profits for the 1959 season which would have been earned by this craft had she been in existence. H A plaintiffs' witness, Mr. Huggenbach (9) who is experienced in the building and hiring of craft on the Broads, gave evidence that a vessel such as the Four of Hearts would in the trade, as distinct from a private owner, have fetched £2,200. It is true, he said, that someone in the trade would pay a price which would be governed by what the trade purchaser estimated it would earn. He said that in cross-examination (10). I As I understand his evidence taken as a whole, that is the price which a hirer of craft in the trade would pay in the expectation of a reasonable return on his capital, and not taking into account the fact that she was already fixed with considerable bookings for the next season, with a virtual certainty of full employment throughout the season; and I say that because of the evidence that the price to a private buyer would be considerably higher. Mr. Huggenbach said that the price to a private buyer would be £2,350 to £2,400. Normally a private buyer would be buying for pleasure, as I see it, and not for financial gain, and I find it impossible to accept that the price to the trade, if it was the price which reflected future earning capacity, would have been considerably less than that to a private buyer. In other words, without going any deeper into this matter, I find on Mr. Huggenbach's evidence that £2,200 was a fair figure to put as the market price of this craft because in his last answer in re-examination he said that if a buyer " needed another boat for his fleet, he has logically got to have one of his own styling and he has got to give over the odds to get it, there is no question . . ."

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(7) [1903] P. 1; 9 Asp. M.L.C. 354.

(8) [1933] All E.R. Rep. at p. 160; 18 Asp. M.L.C. at p. 383.

(9) The managing director of Graham Bunn (Wroxham), Ltd. a firm operating a fleet of hire craft in a similar manner to that of the plaintiffs.

(10) The question was " When you are considering the values of these craft I suppose you have in mind what they can be made to earn? "

Taking his evidence as a whole, in my view the figure which would represent, as near as one can establish it, the true figure of loss sustained by the plaintiffs for the loss of this ship would be something over £2,200, but the question is: How much? Mr. Huggenbach, who seems to have given his evidence very fairly and with considerable authority in these matters, said this in cross-examination:

> " I would say the percentage of gross hire which is net net profit is between 20 and 22½ per cent., that is, after all maintenance, depreciation, agents' charges, insurance, laundry, etc.,—that is net net; that is after the proportion of overheads, and so on."

In other words, what he was saying was that after all the charges and expenses, so far as you can calculate them, had been taken from the gross earnings, there would be left to the owner 20 to 22½ per cent. It seems to me, as far as that goes, that I must accept his evidence because when asked whether there was any reason why his competitors should do either appreciably better or appreciably worse, Mr. Huggenbach replied:

> " There are half a dozen top yards in Broadland; Hearts [that is the plaintiff owners] is one of them, and my own fleet is another one of the very popular fleets, and I imagine that in that half a dozen the experience will be very similar."

Nevertheless, I must look not only at Mr. Huggenbach's evidence but at all the evidence which was before the learned registrar in order to do justice to all. But, pausing for a minute on the effect of Mr. Huggenbach's evidence, it comes to this, that the net net profit on seasonal earnings of £1,100 is about £220 to £250. Then I tested it in another way taking Commander Ashby's evidence. Commander Ashby (11) said that fifteen per cent. must come off for agents' fees. He agreed with counsel for the defendants that so far as overheads were concerned they should be shared and he thought the figure should be twenty-five per cent. Those two factors alone take forty per cent. of £1,100, which is £440. Then to that is to be added what he reckoned as maintenance for fitting her in the winter, and that is £150, with a further £45 for insurance. That comes to a total of about £635, leaving a profit of about £465 which takes no account of contingencies at all. I have had evidence that there was this somewhat expensive overhaul and fitting of a new engine in the Four of Hearts in December, 1957, and it may well be that the figure for her maintenance during the next winter would be much less than the previous winter; but when I look at all the expenses, the amounts which are to be taken off the gross earnings of the fleet season by season for the years 1956 to 1958 (12), I find that there is a large amount to be accounted for and split, on a notional basis at all events, between the thirteen members of this fleet. I am not going into exact figures now, but with those thoughts in mind what is the true measure of loss? I find that the market value to the trade should be taken at £2,200; that the loss of profit for the 1959 season should be taken as a mean between Mr. Huggenbach's 20 to 22½ per cent. and that which I derived from Commander Ashby's evidence. With all those factors in mind, if the sum of £350 is allowed it is as far as, on the evidence, I am prepared to go. That gives a total figure of £2,550, plus £75 for equipment, which is £2,625, less £25 for the agreed deduction, which brings the total measure of loss, so far as I can find it, to £2,600—that is, £2,250 under item (i) and £350 under item (ii).

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(11) The managing director of the plaintiffs' company, Hearts Motor Cruisers, Ltd.

(12) The plaintiffs' accountants had set out in a letter to the plaintiffs' solicitors, dated Oct. 15, 1959, the cost of labour and materials for maintaining the Hearts fleet for the three years 1956, 1957 and 1958, which showed a trend of increasing costs each year, and suggested that the estimated cost to the plaintiffs of building themselves a new cruiser of a similar type to the Four of Hearts would be in the region of £3,400 at that date.

Appeal allowed in part. Order varied.

Solicitors: *Ingledew, Brown, Bennison & Garrett* (for the plaintiffs); *Holman, Fenwick & Willan* (for the defendants).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

COMPTON (MARQUIS OF NORTHAMPTON) *v.* COMPTON (MARCHIONESS OF NORTHAMPTON) AND HUSSEY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Marshall, J.), February 1, 1960.]

Variation of Settlement (Matrimonial Causes)—"Post-nuptial settlement"—Wife a trustee with special power of appointment—Jurisdiction of court to order removal of trustee—No evidence that wife likely to abuse position as trustee or misuse power of appointment—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 25.

Divorce—Settlement of wife's property—Capital given to her by husband during marriage—Marriage broken by wife's adultery—Restoration of pecuniary status of parties—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 24 (1).

The parties married in 1942, when the husband was fifty-six and the wife twenty-two years of age. There were four children of the marriage, two daughters and two sons, the youngest being born in November, 1947. The husband made a settlement on each child. The wife and a corporate trustee were the trustees of all four settlements. The wife was given a life interest by each of the settlements in favour of her daughters, and under the settlements in favour of her sons she had a power of appointment in favour of the daughters in the event of the death of both sons before their reaching the age of twenty-one. In 1947 the husband gave to the wife by a deed of gift property and investments to the value of £121,000, and in 1948 he gave her a further £19,000, the latter sum being the proceeds of sale of an heirloom. The wife contributed no money towards any of the settlements. The court found that the wife was given the capital in the belief that the marriage would be preserved until the husband's death and that after his death the capital would be used by the wife for the benefit of herself and the children and that after her death it would be distributed among the husband's family. The parties separated in 1957 and in 1958 the husband obtained a decree of divorce on the ground of the wife's adultery. After the decree had been made absolute the wife married the co-respondent and made a will leaving the house in which she was living, together with its contents, to the co-respondent absolutely. The husband now applied (i) for an order under s. 25 of the Matrimonial Causes Act, 1950, extinguishing the wife's rights, powers and interests under the four settlements, and (ii) for an order under s. 24 (1) of the Act of 1950 that the wife should execute a settlement in favour of the children out of the property and investments given to her by the husband since the marriage. The wife did not object to the

A extinction of her beneficial interests under the daughters' settlements. The present estimated value of the property and investments given to the wife by the deed of gift was £227,000.

Held: (i) all the four settlements were post-nuptial settlements within s. 25 of the Matrimonial Causes Act, 1950, but the court would make no order either to remove the wife from her position as trustee or to extinguish B her power of appointment since (a) there was no evidence that the wife was likely to abuse her position as trustee, and in any event the proper court to which to apply for the removal of a trustee was the Chancery Division, and (b) there was no evidence that the financial or other interests of the husband or the children would be prejudiced by the wife continuing to hold her power of appointment (see p. 76, letter E; and p. 77, letter F, post).

C (ii) under s. 24 (1) of the Matrimonial Causes Act, 1950, the court would order the wife to execute a settlement of £140,000 (or the equivalent in property) out of her separate property, in favour of the four children in equal shares, since the moneys had been given to the wife out of the husband's family resources and, the marriage having been broken by the wife's misconduct, it was the duty of the court to restore, as far as was reasonable and D just, the pecuniary status of the parties which had been changed by the divorce (see p. 79, letter I, and p. 80, letter D, post).

Principle stated by LORD PENZANCE in *March* v. *March & Palumbo* ((1867), L.R. 1 P. & D. at p. 442) followed.

[As to the principles on which the court will vary a settlement, see 12 HALSBURY'S LAWS (3rd Edn.) 455, para. 1023; and for cases on the subject, see 27 E DIGEST (Repl.) 637, *5994*.

For the Matrimonial Causes Act, 1950, s. 24 (1), s. 25, see 29 HALSBURY'S STATUTES (2nd Edn.) 411, 412.

For the Matrimonial Causes Rules, 1957, r. 44 (3), r. 51, r. 53, see 10 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 241, 243.]

F Cases referred to:

Hargreaves v. *Hargreaves*, [1926] All E.R. Rep. 195; [1926] P. 42; 95 L.J.P. 31; 134 L.T. 543; 27 Digest (Repl.) 646, *6094*.

Hartopp v. *Hartopp & Akhurst*, [1899] P. 65; 68 L.J.P. 33; 80 L.T. 297; 27 Digest (Repl.) 651, *6134*.

Lorriman v. *Lorriman & Clair*, [1908] P. 282; 77 L.J.P. 108; 99 L.T. 314; G 27 Digest (Repl.) 636, *5994*.

March v. *March & Palumbo*, (1867), L.R. 1 P. & D. 440; 36 L.J.P. & M. 64; 16 L.T. 366; 27 Digest (Repl.) 641, *6032*.

Application.

In this case the husband applied (i) for an order under the Matrimonial Causes Act, 1950, s. 25, to vary four settlements made by the husband after the H marriage and (ii) for an order under s. 24 (1) of the Act of 1950, that the wife should execute a settlement of her property. The facts appear in the judgment which was delivered in open court.

R. J. A. Temple, Q.C., and *W. D. Collard* for the husband.

Gilbert Beyfus, Q.C., and *D. Loudoun* for the wife.

I *J. G. Strangman, Q.C.*, and *E. I. Goulding* for the children by the husband as their guardian ad litem.

Baring Brothers & Co., Limited, trustees under the settlements, and Compton Estates Co., Ltd., appeared by solicitor.

Cur. adv. vult.

MARSHALL, J.: This matter comes before me by way of two applications made by the petitioner in this cause, the Marquis of Northampton. By the first application dated Oct. 6, 1958, I am asked to exercise my powers under the Matrimonial Causes Act, 1950, s. 25, to vary the terms of four post-nuptial A settlements so as to extinguish the rights, powers and interests of the wife, the former Marchioness of Northampton (now Mrs. Hussey) as if she were dead or had died at the date of the decree absolute. The settlements in question were all made in favour of children of the marriage, out of moneys provided solely by Lord Northampton, on the following dates: (a) Dec. 19, 1946, Lady Judith Compton Settlement, (b) Dec. 19, 1946, Lady Elizabeth Compton Settlement, B (c) Apr. 11, 1947, a settlement in favour of the younger children which now enures to the benefit of Earl Spencer Douglas David Compton, (d) Aug. 18, 1947, a settlement in favour of the first younger child which now operates to benefit Lord William James Bingham Compton.

The wife's rights, powers and interests which arise under the settlement fall into three categories: (i) she is a trustee under all four settlements; (ii) she has C a life interest on the happening of certain events in the money settled under the two settlements dated Dec. 19, 1946, in favour of her daughters; (iii) she has a power of appointment as between her two daughters only on the happening of certain events, under the settlements dated Apr. 11, 1947, and Aug. 18, 1947, respectively, which now operate in favour of her two sons. I am also asked under the terms of this application to extinguish or alter the wife's rights, powers D and interests under a tenancy agreement dated Nov. 7, 1952, whereby the Compton Estates Co., Ltd., let by way of post-nuptial settlement to the husband and the wife jointly for a term of ninety years the ancient mansion (one of the Compton family seats) of Compton Wynyates in the county of Warwick.

By the husband's second application, also dated Oct. 6, 1958, he seeks an order from this court under its powers under the Matrimonial Causes Act, 1950, E s. 24, on the wife to execute a settlement out of property and investments given to her by the husband since the marriage, so as to provide: (a) that property and investments to the value of £110,000 be settled on the children of the marriage on discretionary trusts; (b) that property and investments to the value of £30,000 be settled on trust for the wife for life and after her death on trust for Earl Spencer Douglas David Compton or that such other F provisions be made for the benefit of the husband and children as may be just. Under the Matrimonial Causes Rules, 1957, r. 51 and r. 53, the matter came before Mr. Registrar TOWNLEY MILLERS by way of preliminary investigation on July 3 and 23, 1959, when both Lord Northampton and Mrs. Hussey and other witnesses were called and cross-examined.

The registrar made his report on Aug. 26, 1959. It first came before STEVENSON, J., on Dec. 10, 1959, when the children of the marriage, who had not been G separately represented before the registrar, were again not represented independently. The learned judge decided that the matter ought not to proceed without separate representation of the children and made an order under the Matrimonial Causes Rules, 1957, r. 44 (3), appointing Lord Northampton guardian ad litem in order that they should be separately represented. In accordance with the H direction dated May 27, 1938 (1), the respondents, Baring Brothers & Co., Limited (as trustees under the settlements) and the four children of the marriage through Lord Northampton as guardian ad litem have served notices dated Nov. 23, 1959, Dec. 2, 1959, and Dec. 23, 1959, respectively of their intention to apply that the registrar's report should be varied and certain of its proposals not confirmed. The notice given on behalf of the children put forward new I proposals that had never been advanced or considered before the learned registrar. The substance of those proposals which dealt only with the application for an order to be made against Mrs. Hussey that she settle a proportion of her separate property on the children was that the sum of £140,000 (or its equivalent property or investments) be ordered to be settled on the four children in equal shares and that the Public Trustee be appointed sole trustee of the settlement.

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(1) RAYDEN ON DIVORCE (7th Edn.) 1183, direction No. 6.

The matter was heard by me on Jan. 14, 15, 18, 1960, and in addition to affidavits filed by or on behalf of the parties I had the advantage of a transcript of the arguments and evidence given before the learned registrar.

It is material to note that the husband is the sixth holder of the Marquisate of Northampton and comes of very ancient lineage. His family name is Compton and as the holder of the title he has inherited two old and stately homes together with their very valuable contents. The older is Compton Wynyates in the county of Warwick, where his forebears have been known to reside since 1204. The second is Castle Ashby in Northamptonshire, the building of the present house having been commenced by the first Lord Compton in 1574. As would be expected the husband regards the conservation of the family line and estates as a trust. It is known to all that the growth of taxation in all its forms has rendered the task of passing on such an inheritance intact to a successor in the title one of mounting difficulty and requiring much foresight and planning. Towards this end, on Dec. 31, 1932, the husband made a settlement known as the Canonbury Settlement. It was primarily in favour of the heir to the Marquisate and involved property and investments valued at £1,100,000. I was told that its present value is £1,387,000 together with the shareholding in the Compton Estates Co., Ltd., which is now the legal owner of the two family houses. On June 17, 1942, by way of marriage settlement the husband entered into a deed of covenant to leave the wife £4,000 per annum on his death. This deed of covenant was disclaimed by deed dated Jan. 9, 1953, other financial provisions having been made by the husband in favour of the wife, but it does show the husband's views at that time as to the minimum annual income which should be provided for his widow after his death.

The parties married on June 18, 1942. There was a substantial difference in their ages, the husband being fifty-six and the wife only twenty-two. On the same day the husband made a new will, the terms of which in so far as they relate to the wife have some bearing on the issues which I have to decide. Under it the wife was left a legacy of £1,000 and it was made plain by cl. 4 that any provision made in the will for the wife was to be in addition to that provided under the settlement of June 17, 1942. It also gave to her a right to take a lease of Compton Wynyates and its contents for renewable periods of not exceeding three years at a yearly rent of £5, but any such lease was to be determined on the wife's re-marriage or death without leaving children. Subject to any such lease the property was to be held on trust for the husband's sons in tail with remainders over to distant relatives. In addition the husband left to the wife an annuity of £4,000 a year if and so long as she held a lease of Compton Wynyates and its contents and the husband expressed the hope that this annuity together with the marriage settlement would enable her to accept the grant of such a lease. These provisions in my judgment are important in that they indicate a strong desire on the part of the husband that Compton Wynyates should be available to her to live in after his death and that she should have the means to render this financially possible.

The marriage was blessed with four children. Lady Judith Compton was born on Sept. 26, 1943. Lady Elizabeth Compton was born on Dec. 7, 1944. The Honourable Spencer Douglas David Compton (otherwise Earl Spencer Compton) was born on Apr. 2, 1946, and the Honourable William James Bingham Compton was born on Nov. 26, 1947. In the years 1946 and 1947, that is after the birth of his son and heir, the husband made four settlements in favour of his children and it is for a variation of the terms of these settlements that application is now made by the husband. The two settlements in favour of the daughters were made on Dec. 19, 1946. Each settles a sum of £25,000 on each daughter. The trustees under each settlement are Baring Brothers & Co., Limited and the wife.

The capital and income until they reached twenty-two years or married before reaching twenty-two years was to accumulate and should either of them die before reaching that age the money thus accumulated was to go to the wife, if still alive, absolutely. In the event of her predeceasing either daughter the money was to go to Earl Spencer Compton and in the event of his prior death to whoever held the title of Marquis of Northampton at the time. The money accumulated under the settlement in favour of Lady Judith Compton by June 16, 1959, had reached a figure of £44,816 and that under Lady Elizabeth Compton's settlement the figure of £45,215. On Apr. 11, 1947, the husband made a further settlement in favour of his " younger child or children ". In the events that have happened the beneficiary under this settlement will be Earl Spencer Compton. The sum settled was again £25,000 and the wife was again one of the trustees. She received no beneficial interest under this settlement but was given a power of appointment exercisable in the event of the death of both sons before reaching twenty-one years which enabled her to appoint amongst her two daughters. The capital and income was to accumulate until the son reached the age of twenty-one and by June 16, 1959, had reached the figure of £50,648.

The last settlement is dated Aug. 18, 1947, and is in favour of the " youngest child " the Honourable William James Bingham Compton. The sum settled was £25,000. The trustees are again Baring Brothers & Co., Limited and the wife. The terms of the settlement are the same as under the previous settlement and include the same power of appointment in the wife. The accumulated sum under it on June 16, 1959, was £39,793. On Feb. 18, 1947, the husband executed a deed of gift in favour of the wife " in consideration of his natural love and affection " for her. Under it property and investments to the value of £121,350 were transferred to her. The estimated value of this property today is in the region of £227,000 and the wife receives from it an annual income of between £8,000 and £10,000.

I am asked to order the wife to make a settlement in favour of the children out of this sum. About a fortnight after this deed of gift, namely, on Mar. 3, 1947, the wife made a will, the terms of which have some relevance in resolving certain issues of fact in dispute between the parties. It shows that apart from the capital transferred to her under the deed of gift dated Feb. 18, 1947, her only capital was £5,000 which she left in equal shares to her two sisters. Apart from certain bequests of jewellery and after payment of all debts, funeral and testamentary expenses and legacies she bequeathed all the residue of her real and personal property to trustees on trusts which after making certain provisions in favour of her two daughters left everything to Earl Spencer Compton on his attaining twenty-one years. In the event of Earl Spencer Compton dying before attaining twenty-one years it was to go to

> " such other son of mine as shall first attain twenty-one years or if there should be no surviving son then to the person who shall succeed to the title and dignity of Marquis of Northampton."

This will was superseded by another signed on Apr. 3, 1953. Although the terms of this will were different its importance lies in the fact that the wife still distributed her possessions among members of the family and the ultimate beneficiary thereunder was the heir to the Marquisate. A codicil dated Oct. 9, 1954, did not vary substantially the residuary trusts contained in this will. The only other document executed in this period to which reference need be made is a will made by the husband on Sept. 7, 1947. It revoked all previous testamentary dispositions. In it the wife was left the husband's wearing apparel, consumable stores, horses, cars and equipment in connexion therewith. She was permitted to have the use of jewellery during her widowhood. The contents of Compton Wynyates were settled on trust to permit the wife to have the use thereof during her life, she being responsible (reasonable wear and tear excepted) for keeping them in repair and insured. The only money legacy to be received by the wife under this will was a sum of £1,000.

A There is one further matter to be dealt with to complete the story of the husband's money payments to the wife. On Apr. 8, 1948, the sum of £19,000 was paid to the wife by the husband, who in an affidavit dated Oct. 3, 1958, swore that he paid it to her with the same object as he transferred the property under the deed of gift dated Feb. 18, 1947. The recollection of both the husband and the wife concerning the circumstances surrounding this payment is vague and B unreliable. The only matter on which they both agree is that the £19,000 resulted from the sale of a valuable pearl necklace. The wife says that this was an outright gift to her by the husband at the time of her marriage, in which case she would be entitled to receive the proceeds arising from its sale. I do not believe the facts of this transaction are quite so simple. It would appear that this necklace was something of an heirloom and a part of the Compton family C jewellery. I do not doubt that on marriage it was given to the wife for use in her adornment as the then Marchioness of Northampton. It was never contemplated that the wife would dispose of it outside the family. Confirmation of this is to be found in cl. 2 (i) of the wife's will dated Mar. 3, 1947:

> D " To my son the Honourable Spencer Douglas David Compton commonly called Earl Compton the three row pearl necklace . . . which was given to me by my said husband on our marriage."

It was to go therefore to the heir to the title. I have no doubt the decision to sell was made by the husband with a view to reducing the tax payable on his death and he transferred the money to the wife with the same object.

The husband and the wife continued to live together until October, 1957, E when they parted. By this time the wife had formed a close friendship with the co-respondent. A petition for divorce on the ground of adultery between them was filed by the husband. The suit was not defended and on July 25, 1958, after a short hearing Mr. Commissioner RAEBURN, Q.C., granted a decree nisi which became absolute on Oct. 28, 1958. In the meanwhile the husband had commenced proceedings in the Chancery Division with a view to making the children wards F of court and they are now wards of court spending their holidays from school, by order of UPJOHN, J., equally between the parents. The wife is now married to the co-respondent and the husband has also re-married. At the hearing before the registrar the parties agreed that his report should be made on the basis that nothing could be said against the husband as father or the wife as mother of the children. The hearing before me proceeded on the same agreed G basis, but it should be said that it is impossible for any court in proceedings of this kind to exclude from its mind the fact that the break-up of this marriage arises out of the wife's adulterous association with the co-respondent and that she put that association above the preservation of the matrimonial home, which in normal circumstances must always be regarded as in the children's best interest.

I now pass to the consideration of the first application, made under the H Matrimonial Causes Act, 1950, s. 25, for an order to vary the terms of the four settlements on the children previously set out. The first point taken by counsel for the wife is fundamental. He has submitted that the four settlements in question are not " post-nuptial settlements made on the parties whose marriage is the subject of the decree ". This submission was made before the registrar but was later abandoned before the hearing concluded. It has, however, been I revived before me and I must deal with it. If he were right in that submission this court would have no jurisdiction to make any order on this application. I do not entertain any doubt that this submission is wrong. These settlements are settlements of property made in the course of marriage and deal with the interests of the children of the marriage. In the disposal of the property for the benefit of each child the wife has been given a voice both as trustee and under a power of appointment, even though it is the husband who provides all the money. Under the settlements on the two daughters she also has a beneficial interest in reversion. A settlement can settle on parties to a marriage power over the disposal of property as well as the property itself. In these circumstances I hold that all four settlements come within my jurisdiction under the Matrimonial Causes Act, 1950, s. 25.

I am reinforced in this view by a passage in the judgment of HILL, J., in *Hargreaves* v. *Hargeaves* (2), in which he defines the marriage settlement as

> "a settlement made in contemplation of, or because of, marriage, and with reference to the interests of married people, or their children."

It is true that the decision in that case fell to be decided under the Matrimonial Causes Act, 1859, s. 5, or the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192, but a comparison of those sections with s. 25 of the Act of 1950 will show that the operative words in all three sections are identical and the powers arising under them the same. One of the variations asked for can be disposed of shortly. The wife through her counsel has raised no objection to the extinction of her beneficial interest under the two settlements dated Dec. 19, 1946, in favour of her two daughters. Accordingly, on that ground I make an order that the wife's beneficial interest under the two settlements dated Dec. 19, 1946, be extinguished as if she were dead or had died at the date of the decree absolute.

Ought I to order her removal as a trustee under all four settlements? The registrar's report recommends that she be allowed to remain as trustee under all four. I confirm that recommendation. The removal of a trustee can often involve a serious reflection on the character of a person in that he has wrongly exercised his trustee powers. I have not heard one single piece of evidence against the wife to justify the least expectation that she is likely to abuse her position as a trustee. I think that ought to be said. In any event, I do not order her removal for the reason that this Division, in my judgment, has no jurisdiction to do so. The proper Division to apply to remove trustees is the Chancery Division whose jurisdiction includes such matters.

The registrar's report further recommends that the wife's powers of appointment under the settlements dated Apr. 11, 1947, and Aug. 18, 1947, be extinguished. This question is a great deal more difficult. It requires a careful assessment of what is involved in the exercise of such power. The following points are important and relevant: (i) The power is not one which enables the wife to appoint any sum under the settlement outside the family. It is confined to a power to decide in certain remote contingencies how sums released by such contingencies shall be allocated as between her two daughters. (ii) The contingency referred to in (i) is the following: if both sons die before reaching twenty-one the wife would be enabled to appoint among the daughters. The elder son is now nearly fourteen, the younger is just over twelve. It is a power therefore that can only fall to be exercised in the next seven or eight years. (iii) The husband is now seventy-four and one cannot rule out entirely the possibility of his death before the end of this seven or eight years' period. Should that happen the wife, who is still under forty, would be the only surviving parent. (iv) There is no evidence to suggest that the wife is on any but the best terms with both daughters and nothing to suggest that she would discriminate unfairly against the one or the other. (v) I have a feeling that this power of appointment was given to the wife as the mother of these daughters rather than in her capacity of Marchioness of Northampton. (vi) On the other hand, the money under these settlements was provided by the husband by whose wish the power of appointment was given. He now wishes the power extinguished and his wishes should be respected. Nor can there be any doubt that the husband in endowing the wife with these powers did so in the belief that his marriage would remain intact.

In argument it was urged on me by counsel for the children that there were three main reasons why I should confirm this recommendation of the registrar:

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(2) [1926] All E.R. Rep. 195; [1926] P. 42.

A (i) because it is a common form order in cases such as this; (ii) because there is no sufficient ground for departing from such a common form order; (iii) without a power of appointment the money would certainly be divided equally between the daughters. I confess that none of these considerations makes a strong appeal to me. To suggest that a discretionary jurisdiction should be exercised "in common form" runs counter to my view of its true nature and the certainty that B the money would be divided equally between the daughters does not necessarily carry with it the certainty that in all circumstances an equal division would be just.

The registrar has recommended the extinction of this power of appointment on other grounds. He regards the exercise of this power in future as potentially dangerous, largely, if I read his report aright, because the wife in the witness-C box left an impression on him of insincerity and because he formed the view that to continue her power of appointment would be "unnecessary, unjust and unsafe". Those are strong words. If I am to indorse this view I must feel that they can be justified. I recognise that the registrar had the advantage of seeing the wife under cross-examination in the witness-box. There is no substitute for that, but a careful reading of the transcript left me unconvinced. She showed a D muddled recollection and a tendency to fight to give as little away as possible in the hope that by so doing she would be able to keep as much of the money or power over money as she could. That made her an unsatisfactory witness. The husband's evidence, affidavit and oral, showed some clear mis-statements of fact under oath, a faulty recollection and a clear tendency to concede nothing where the wife and Captain Hussey were concerned. Both were unreliable witnesses E but I am not prepared to impugn the honesty of either or of one more than the other. The power when given was never "necessary". If it is "unjust", unjust to whom? No argument or evidence convinced me of its injustice. If it is "unsafe", no evidence or argument that carried conviction showed whom it endangered.

I approach the issue from the angle of whether it has been established that the F interests of the husband and/or children, financial or otherwise, would be prejudiced by the wife continuing to hold this very restricted power of appointment. She remains the children's mother and has access to them. She remains a trustee under the settlements and if she acts properly in that office nothing is likely to be done to remove her. If she remains a trustee, acting as a trustee should, I cannot see any real danger in allowing her to keep her power of appointment. I do not G confirm this recommendation in the registrar's report.

This leaves only the tenancy agreement of Nov. 7, 1952. Very little argument was addressed to me on it and I have a very real doubt whether such an agreement comes within the terms of the Matrimonial Causes Act, 1950, s. 25. The matter, I was assured, could and would be amicably resolved as the wife was willing to renounce her rights on an assurance given by the husband that he would bear H the cost of preparation of the documents legally necessary to effect such renunciation. On this part of the case I make no order by consent of both parties.

I now pass to a consideration of the second application, that I should exercise my powers under the Matrimonial Causes Act, 1950, s. 24 (1), to order the wife to settle out of her separate property a sum of £110,000 on the children of the marriage on discretionary trusts, and a further £30,000 on trust for herself for I life and after her death on trust for Earl Compton. The registrar in his report has recommended that the wife be ordered to settle £120,000 on the children as well as a further £30,000 in trust for herself for life and thereafter on trust for Earl Compton. The separate representation of the children has resulted in a new proposal being put forward on their behalf in the notice of Dec. 23, 1959. They now ask through their guardian ad litem that the sum settled be £140,000, divided equally among the four children under a trust of which the Public Trustee would be the sole trustee.

What are the principles that must guide me? I think that the best statement, which indeed I follow, is to be found in *March* v. *March & Palumbo* (3), which was a case under s. 5 of the Divorce Amendment Act, 1859. The Judge Ordinary (Lord Penzance) said (4) the following:

> " But the intention of the legislature cannot be doubted . . . Now, in applying this section to the circumstances of any particular case, the first consideration will be this: what is the nature and extent of the pecuniary change [and I stress the word " change "] operated by the wife's criminality? The court will look at the probable pecuniary position which the parties and their children would have occupied if the marriage which the settlement contemplated had been a binding union, and the parties had lived in harmony together upon their joint incomes. If this union has been broken and the common home has been abandoned by the criminality of one without fault in the other, it seems just that the innocent party should not, in addition to the grievous wrong done by the breach of the marriage vow, be wholly deprived of means, to the scale of which he may have learnt to accommodate his mode of life; nor, viewing the matter on the other side, does it seem either just or equitable that funds which were intended at the time of the marriage for the use of both should be borne off by the guilty party, and perhaps transferred to the hands of the adulterer as the dowry of the second marriage. The interests of society point in the same direction. It would be of evil example if this court were to decide that the entire fortune of a wealthy woman was to be reckoned as part of the prospects of an adulterer, or the resources of a second home for a guilty woman. Regarding, then, the matter in this light, and with the view of restoring in a reasonable degree the pecuniary status of the parties . . . the court proceeds to such details as are necessary . . . The relative sums contributed by each party, the conduct of each, the total amounts of their joint income, the relation it bears to the requirements of the parties, and their respective prospects of increased income, are all elements to be considered. These elements are not capable of exact expression in figures, and the result must be a general one, varying according to the details of each case."

That decision went to appeal before the full court and again the principles set out by Lord Penzance were indorsed (5). *Hartopp* v. *Hartopp & Akhurst* (6) is another case setting out in somewhat different words the same principle and that was further underlined by a decision of Bucknill, J., in *Lorriman* v. *Lorriman & Clair* (7).

I now apply to the facts of the present case the principles thus laid down in the cases to which I have referred. There are certain important facts which I bear in mind. (i) The wife by way of capital brought nothing to the resources of the Compton family at the time of the marriage or at any time thereafter. (ii) The property and funds which she now possesses which amount to just over £227,000 were provided solely by the husband by way of the deed of gift dated Feb. 18, 1947. They were a part of the family's resources owned by him as a holder of the title of Marquis of Northampton. Counsel for the wife urged on me that the origin of the fund is not a matter which I am entitled to consider. I am unable to understand why, for apart from stating that this was so, he advanced no reasons why the origin of the money should not be taken into account. I should have thought that if a court had power to order a settlement out of the funds of the guilty party acquired from sources outside and independent of the marriage, it has equal power and in most cases greater reason for ordering a guilty party to settle funds acquired from the innocent party in contemplation of the marriage. In my judgment, it is impossible to assess the pecuniary change brought about by the wife's " criminality " in a case of this kind without taking into account the

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(3) (1867), L.R. 1 P. & D. 440.
(4) (1867), L.R. 1 P. & D. at p. 442.
(5) (1867), L.R. 1 P. & D. 444.
(6) [1899] P. 65.
(7) [1908] P. 282.

A fact that the moneys were given to the wife by the husband and came out of the family resources.

Prior to the deed of gift the husband was providing the wife with the modest sum of £650 per annum by way of pin money. On June 17, 1942, he entered into a deed of covenant by way of marriage settlement to leave the wife £4,000 per annum on his death. The next day, June 18, 1942, he executed a new will
B whereby he left a further annuity of £4,000 per annum if and so long as she held a lease of Compton Wynyates and its contents, and he expressed the hope that this annuity and her marriage settlement would enable her to accept the grant of such a lease. By the same will the wife was given a right to take a lease for not exceeding three years (renewable for like periods) at a nominal rent of £5 per annum of Compton Wynyates and its contents but such lease was to be deter-
C mined on the wife's re-marriage or death without leaving children. I think that at the inception of the marriage the mind and motives of the husband were clear and he made what he regarded as the necessary dispositions to render his hopes practicable. His desire was to see the wife so endowed as to enable her after his death to live on in comfort at Compton Wynyates. Though different steps were later taken by the husband to make the fulfilment of his hopes possible, I am
D satisfied on a consideration of the documents and the evidence that the husband continued to act with this consideration in the forefront of his mind. He told me that he decided to transfer to the wife the sum of £121,350 by way of a deed of gift for that same purpose and in substitution for the earlier provision which he had made. I accept that, although I think other considerations were operating alongside that consideration. I am satisfied that the husband acted from a desire
E to see that, apart from her living at Compton Wynyates, the wife had resources of her own, but the size of the gift was dictated by what the husband knew would be required to enable her to live at Compton Wynyates. I also think that he acted by way of deed of gift in the hope that on his death his tax liabilities would thereby be reduced.

The wife's evidence was that although her living at Compton Wynyates was
F vaguely discussed, she had no understanding with the husband that the extent of the resources with which she was being provided were dictated by the fact that she would live after the husband's death at Compton Wynyates, thereby providing for the rest of the children a home to which they could go when the new holder of the title was installed in Castle Ashby. I do not accept her evidence in this respect. I am satisfied that the husband made clear to her the purpose of
G the gift and that the wife herself, prior to the break-up of the marriage, accepted what was given for the purposes for which it was intended. The big disparity in the ages of the parties rendered such an arrangement prudent. The terms of the various wills dated June 18, 1942, Mar. 3, 1947, Sept. 7, 1947, and Apr. 3, 1953, are consistent with this view, as is the joint tenancy agreement dated Nov. 7, 1952.

I have, therefore, come to the conclusion that the wife was given her present
H capital (save £5,000) by the husband in the belief that the marriage would be preserved until his death and that thereafter it would be available to the wife as his widow; that she would use it for the benefit of her children as well as herself and that after her death such money as was left would remain for distribution within the Compton family. The break-up of this marriage in divorce has altered all that. No one can have any doubt that there has been, to use the words of
I LORD PENZANCE in *March* v. *March & Palumbo* (8): " a pecuniary change operated by the wife's criminality ". In the circumstances of this case a serious change has occurred. I do not accept the argument of counsel for the wife that merely because the Marquis has not now to meet the extra income tax arising out of his wife's income, that the Marquis is for all purposes and all respects a man who must be described as better off. It appears to me quite impossible to argue that when a man has given away £121,000 for a particular purpose and that

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(8) (1867), L.R. 1 P. & D. at p. 442.

particular purpose is frustrated, that he is no worse off, certainly from a capital point of view. Though the Compton family is far from poor, it is faced with the heavy financial burden of maintaining in the conditions of our modern society the status of a titled and ancient lineage. It is important that financial resources intended to be used toward that end should be available for that purpose.

The wife has admitted that she is living above her means; that her money is being used to keep her house at Egerton Crescent going, where she now lives in matrimony with Captain Hussey. New affections and loyalties are attaching themselves to her. On May 4, 1959, she made a new will and when she gave evidence before the registrar she was by no means quick to disclose that she has left a life interest in her property to the man whose adultery with her has broken up the home life of the family that endowed her. She has left him 53, Egerton Crescent and its contents absolutely. It is true that she leaves her residuary estate in trust for distribution in equal shares among her children. There is no guarantee, however, as to what the amount of that residuary estate will be. It is out of the question that she could ever, in decency, live at Compton Wynyates with the co-respondent and the children. That she realises that is shown by her willingness to renounce her tenancy. I have no doubt in all the circumstances of this case that I have a duty to restore, as far as is reasonable and just, the pecuniary status of the parties that has so materially been changed by this divorce. All the material elements cannot be assessed exactly in figures. I must try to arrive at a just result. It is no part of my task to punish the wife financially for her conduct. I merely try to restore the past financial hopes and expectations of the family. The husband asks nothing for himself. He would have been entitled to an order in his favour had he asked. He now supports the figures advanced by counsel for the children and a settlement in the terms sought on their behalf. In my judgment the terms put forward by counsel for the children are reasonable and just. They still leave the wife with a substantial sum.

Accordingly, I do not confirm the recommendation in the registrar's report in this regard. I make an order in the following terms: (i) that the wife execute a settlement of £140,000 (or the equivalent in property in Clerkenwell and/or investments managed by Baring Brothers & Co., Limited) on her children, Lady Judith Compton, Lady Elizabeth Compton, Earl Spencer Compton, the Honourable William James Bingham Compton, in equal shares; (ii) that the Public Trustee be the sole trustee; (iii) that the share of each be held on trust for him or her during his or her life and after death in trust for the children in equal shares; (iv) in the event of any of the four dying without issue, the share falling in to accrue to the others; (v) that there shall be the usual statutory power of maintenance and advancement; (vi) the trustee to have full discretionary power to pay any child all or any part of the capital of its share. I favour a deed along the lines of a draft document submitted to me.

Order accordingly.

Solicitors: *Jaques & Co.* (for the husband and for the children by the husband as their guardian ad litem); *Lewis & Lewis and Gisborne & Co.* (for the wife); *Freshfields* (for Baring Brothers & Co., Limited and for the Compton Estates Co., Ltd.).

[*Reported by* A. T. Hoolahan, Esq., *Barrister-at-Law.*]

WALLS *v.* PEAK (VALUATION OFFICER).

[COURT OF APPEAL (Lord Evershed, M.R., Pearce and Harman, L.JJ.), March 25, 1960.]

Rates—Valuation—"Dwelling-house"—Letting of rooms singly for residential purposes—Premises where substantially the whole of available accommodation was so let excluded—Four rooms used by occupier, seven let—Whether four rooms part of available accommodation—Valuation for Rating Act, 1953 (1 *&* 2 *Eliz.* 2 *c.* 42), *s.* 3 (2).

Premises comprised a sitting-room and three bedrooms, used by the occupier and his family, and seven rooms let singly for residential purposes, in addition to other accommodation not suitable for such letting. By s. 3 (2) of the Valuation for Rating Act, 1953, a hereditament was not a dwelling-house within s. 3 if substantially the whole of the available accommodation in it was used for the letting of rooms singly for residential purposes. Available accommodation meant so much of the accommodation in the premises as was suitable for letting rooms singly for residential purposes. The premises were assessed for rating purposes otherwise than as a dwelling-house within the meaning of s. 3* of the Valuation for Rating Act, 1953. On appeal,

Held: substantially the whole of the available accommodation was not used for letting rooms singly for residential purposes since out of the eleven rooms that were suitable for such letting (and thus were within the definition of "available accommodation" in s. 3 (2) of the Act of 1953) seven only were let; therefore the premises were rateable as a dwelling-house within s. 3.

Appeal allowed.

[For the Valuation for Rating Act, 1953, s. 3 (2), see 33 HALSBURY'S STATUTES (2nd Edn.) 586.]

Case referred to:

Wellington v. *Woodward* (*Valuation Officer*), (1958), 4 R.R.C. 169; 52 R. & I.T. 73.

Case Stated.

The appellant ratepayer was the occupier of a hereditament described as flatlet house, garage and premises, 23, Florence Road, Boscombe, and assessed at £250 gross value, £205 rateable value in the valuation list for Bournemouth County Borough. He appealed by way of Case Stated against a decision of the Lands Tribunal (H. P. HOBBS, Esq.), given on Mar. 9, 1959, and reported (1959), 4 R.R.C. 216, under which the hereditament was held to be assessable for rating purposes otherwise than as a dwelling-house within the meaning of s. 3 of the Valuation for Rating Act, 1953. His grounds of appeal were: (i) that on the basis of the statutory definition of the words "the available accommodation" in s. 3 (2) of the Valuation for Rating Act, 1953, viz.,

> "so much of the accommodation in the hereditament in question as is suitable for being used for the letting of rooms singly for residential purposes . . ."

the Lands Tribunal was wrong in law in determining that the accommodation proper to be taken into account under the subsection was only such accommodation as was both suitable and available for that purpose; and (ii) that on the true construction of the subsection the Lands Tribunal misdirected itself in holding on the facts as it found them that the whole, or substantially the whole, of the available accommodation in the hereditament was used for such lettings and that the hereditament was not a dwelling-house within s. 3 of the Act. He sought an order that the hereditament should be described in the valuation list as a dwelling-house and should be entered therein at £110 gross value, £88 rateable value (which values were agreed).

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* The relevant terms of s. 3 are stated at p. 82, letter C, post.

F. A. Stockdale for the ratepayer.

J. R. Phillips for the valuation officer.

LORD EVERSHED, M.R.: We need not trouble you, Mr. Stockdale. This appeal has raised a question of the construction of s. 3 of the Valuation for Rating Act, 1953, which has left me with a most unhappy feeling that the Parliamentary intention, in the end, may have been defeated. It is, however, the function of the court to construe the language of the Act. As I think BLACKSTONE said, if Parliament plainly enacts that which is unreasonable, there is nothing that the judges can do to put it right.

Section 3 of the Act provides:

> " (1) Subject to the provisions of this section, in this Act—the expression ' dwelling-house ' means a hereditament used wholly for the purposes of a private dwelling *or private dwellings* [in the plural] . . .
>
> " (2) For the purposes of this Act a hereditament which is used for the letting of rooms singly for residential purposes shall be deemed not to be used for the purposes of a private dwelling or private dwellings if the whole, or substantially the whole, of the available accommodation is used for such lettings; but save as aforesaid a hereditament shall not be deemed for the purposes of this Act to be used otherwise than wholly for the purposes of a private dwelling or private dwellings by reason that one or more rooms therein are let for residential purposes."

Then comes the pregnant sentence:

> " In this subsection ' the available accommodation ' means so much of the accommodation in the hereditament in question as is suitable for being used for the letting of rooms singly for residential purposes."

The case relates to premises situate in Florence Road, Boscombe, near Bournemouth, a part of the country which no doubt, during the holiday season at any rate, is attractive to visitors. The total number of rooms on the ground, first and second floors, and excluding two outside sheds and excluding also the porch and the entrance hall, is seventeen. From those some deductions must be made for present purposes, viz., a kitchen, a larder, an open yard which contains or gives access to a fuel store and a water closet, a bathroom and a separate water closet. The exclusions that I have made leave a total number of rooms which must be considered in the case as twelve.

The facts as found are that at the relevant time—a phrase to which I will return in a moment—the appellant ratepayer and his family were occupying, of the total number of twelve, the following: the front dining-room on the ground floor, which was fitted with a domestic boiler; the rear sitting-room on the ground floor; the rear bedroom on that floor; and two front bedrooms on the second floor; a total of five rooms. The other seven rooms, consisting of a bed-sitting room on the ground floor and six bed-sitting rooms on the first and second floors, all fitted with lavatory basins and gas points, were let individually, separately, singly, for the purpose of residences or private dwellings.

On that finding of fact, the question is whether the house in question is excluded from being described as a dwelling-house or as " a hereditament used wholly for the purposes of a private dwelling or private dwellings " by virtue of sub-s. (2). The view of the Lands Tribunal—and let me say at once that it has support from earlier decisions of the tribunal which were quoted. and it has a certain common sense as well—was that this house, when its occupation is analysed in the way I have analysed it, could fairly be said to be excluded. to be deemed not to be used for the purposes of a private dwelling, because the available accommodation was substantially, if not wholly, used for the purpose of letting the rooms singly; and the tribunal quoted certain language used in an

A earlier case in which the meaning of the essential words in sub-s. (2) was discussed. The passage cited was (*Wellington* v. *Woodward* (1)):

> " A hereditament ceases to be a dwelling-house if the whole, or substantially the whole, of the available accommodation is let. " Available accommodation ' means such accommodation as is ' suitable ' for the letting of rooms singly for residential purposes. The section is loosely worded, B but I think it also implies suitable accommodation that is ' available ' in the ordinary meaning of the word: the proprietor and his staff must live somewhere."

The reasoning was to this effect, therefore, that in construing this phrase " available accommodation " one must first exclude from one's mind so much of the C accommodation as the proprietor and his family, in the ordinary case, require for themselves. If that is done in the present case, and if the dining-room is excluded—and it is agreed it should be, because it contained the domestic boiler—the result is that all the seven remaining available rooms were let for residential purposes, so that (on this view) the terms of the subsection were satisfied. The question is whether that conclusion is justified.

D One result of that construction would appear to be this, that, if a family in the normal course requires to occupy every room in the house but one—I exclude kitchens, offices and that sort of thing—and that one is let for residential purposes, then it will be said that sub-s. (2) applies and the house is excluded. Results not much less startling no doubt arise from the opposite view. I would say here, too, that problems, which fortunately do not now call for determination, may also E arise in considering at what point of time the subsection supposes one should form one's view. The phrase is " a hereditament which is used for the letting of rooms ". It is notorious, I suppose, that a hereditament may well be used to a substantial extent for the letting of rooms at one season of the year and not at all at another; but fortunately we are not called on to consider that matter.

I think that there is really no escape from the proposition which counsel for F the ratepayer put forward, founding himself on the plain and unambiguous words of the subsection, and in particular the last three lines of it:

> " In this subsection ' the available accommodation ' means so much of the accommodation in the hereditament in question as is suitable for being used for the letting of rooms singly for residential purposes."

I can see no escape from substituting for the words " available accommodation " G in the fifth line of the subsection the expanded definition; and if that is done it seems inevitably to follow that, excluding the dining-room, eleven of the rooms of the house constitute accommodation in the hereditament suitable for being used for the letting of rooms. Seven only are let. And I cannot think it possible to say that seven out of eleven is " substantially the whole ". If that is right, it is the end of the case.

H Counsel for the valuation officer gallantly has tried to introduce some means whereby some sensible result can be introduced, notwithstanding the language. He has suggested that one ought first to see whether this is a dwelling-house at all within the section. One difficulty in his way, I think, is that that is not the point which is submitted for our consideration. If counsel for the valuation officer is right, a tribunal might find as a fact that a particular building was not a I dwelling-house, and that might be the end of it. But, on the whole, I feel that there is considerable difficulty in the way of this view. The language of the section is,

> " the expression ' dwelling-house ' means a hereditament used wholly for the purposes of a private dwelling *or private dwellings* ";

and with the experience of the Rent Acts behind us, I should have thought that it might be difficult to say that a hereditament was not used wholly for the purpose of private dwellings when it contained quite a number of private dwellings each consisting of sublet single bed-sitting rooms; and, indeed, to my mind, the language of sub-s. (2) proceeds on that premise.

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(1) (1958), 4 R.R.C. 169 at p. 171.

It is true that there may be some inconsistency between the last words of s. 4 (4) and what is said in this section. But we can only answer this case by construing the language of s. 3 (2) of the Act in the light of the proper context. And the essence of the tribunal's finding is that it limits the phrase " available accommodation " to so much of the accommodation as is not only suitable but is also left available for letting when regard is had to the normal requirements of the proprietor. As I say, it is with some regret that I cannot find justification for that expansion of the language. In the circumstances I feel compelled to say that the proprietor here has not been brought within the subsection; that, on the facts, it is not established that substantially the whole of the available accommodation in this house was used for the lettings indicated; and I would therefore allow the appeal. I should have added that some argument was addressed to the last few lines of the main part of the subsection, " but save as aforesaid a hereditament ", etc. But on analysis it has seemed to me that these lines really carry it no further.

PEARCE, L.J.: I agree. Either contention can produce a very unsatisfactory result and neither has more appreciable merit than the other; but on the literal construction of the Act, I think the appeal must prevail. One must read into the first paragraph of sub-s. (2), in place of the words " available accommodation ", the words set out in the second paragraph as being the definition of the words " available accommodation ", viz.,

> " so much of the accommodation in the hereditament in question as is suitable for being used for the letting of rooms singly for residential purposes."

I see no justification for then adding again to the subsection, so read, the word " available ", for which the definition has been substituted, and using that word " available " in a slightly different sense.

I think that the construction put forward by the ratepayer follows what was really the intention at the back of the draftsman's mind, although the subsection as phrased has not satisfactorily carried it out. There are three categories of dwelling-house in this connexion. There is first the dwelling-house as defined under the main part of s. 3, viz., that which is used wholly for the purpose of a dwelling-house. Then there is the second category, which is envisaged in sub-s. (2) in the words following " save as aforesaid ", viz., the dwelling-house that shall not be deemed to have ceased to be a dwelling-house merely because one or more rooms are let therein for residential purposes. And the third category is described in the opening words of sub-s. (2), where the whole, or substantially the whole, of the available accommodation is used for such letting purposes and accordingly the premises have ceased to be a dwelling-house. But on any view the wording of the subsection can produce an unsatisfactory result. I agree that the appeal should be allowed.

HARMAN, L.J.: I agree, too. Where the language is so unsatisfactory, as this is, the only way is to follow the language and leave the effect for the decision of the legislature. It is not for this court to attempt legislation on its own.

Appeal allowed. Leave to appeal to the House of Lords granted conditionally on the valuation officer not asking for costs or seeking to disturb the order as to costs of the Court of Appeal.

Solicitors: *Walmsley & Stansbury*, agents for *E. W. Marshall Harvey & Dalton*, Bournemouth (for the ratepayer); *Solicitor of Inland Revenue* (for the valuation officer).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

THE HEBRIDEAN COAST. OWNERS OF STEAMSHIP LORD CITRINE *v.* OWNERS OF MOTORSHIP OR VESSEL HEBRIDEAN COAST.

[Court of Appeal (Hodson, Willmer and Devlin, L.JJ.), February 22, 23, 24, March 10, 1960.]

Shipping—Collision—Damages—Detention—Measure of damages—No specific vessel chartered as replacement tonnage—Interest on capital value.

On Dec. 23, 1951, the Lord Citrine, a collier owned by the Central Electricity Generating Board, was damaged by the defendants' vessel, the Hebridean Coast. The defendants admitted liability. The Lord Citrine was detained for 11½ days undergoing permanent repairs. Much of the coal which the board required was transported to them by sea, and about half of their sea-borne coal was carried in their own ships, the rest being carried in chartered vessels. Ten large vessels were on long-term charter to the board at the time and other vessels were employed by them on short charter or spot charter. None of the board's vessels was idle and the Lord Citrine would not have been idle during the detention period if she had not been detained, but no vessel specifically replaced her by carrying coal which she would have carried. The carrying capacity lost by the Lord Citrine's detention represented only about one-thousandth part of the tonnage that had to be made available in the current six months' period of coal supply of the board. The board did not trade for profit, their duty being to generate electricity for sale at such prices as would be sufficient to meet their combined outgoings properly chargeable to revenue account taking one year with another*. Damages for loss by detention of the Lord Citrine were referred for assessment, the board claiming special damage measured on the basis of the freight payable for chartering alternative tonnage. On appeal as to the measure of damages, it being conceded that, in addition to the damages to be adjudged, a sum of £214 17s. 2d. should be allowed for depreciation of the vessel during her detention,

Held: (i) the board had failed to show that they had chartered substitute shipping space to carry the coal that the Lord Citrine would have carried but for her detention, and it was not legitimate to infer that such coal had been carried by chartered ships; therefore the board's claim to special damage on the basis of the freight payable for chartering tonnage to take the coal failed.

(ii) the board were, however, entitled to general damages, such as would fairly compensate them for loss caused by the detention of the Lord Citrine, and in the circumstances of this case these should be computed on the basis of interest on capital and an interest rate of seven per cent. was fair.

The Ikala ([1929] A.C. 196, subsequent proceedings, (1929), 35 Lloyd's Rep. 191) distinguished.

Per Devlin, L.J.: if damages had been sought in some ampler form as in *The Marpessa* ([1907] A.C. 241) [viz., operating cost] or *The Mediana* ([1900] A.C. 113) [viz., cost of maintaining a spare ship] they might have been obtained (see p. 96, letter G, post).

Decision of Lord Merriman, P. ([1959] 3 All E.R. 126) affirmed.

[As to measure of damages in shipping collisions, see 30 Halsbury's Laws (2nd Edn.) 860-862, paras. 1138, 1139 and Supplement; and for cases on the subject, see 41 Digest 800-803, *6613-6636*; 806-808, *6666-6695*; 812, 813, *6737-6745*, and Supplements.]

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* By virtue of the Electricity Act, 1947, s. 36 (1), which is printed at p. 87, letter A, post.

Cases referred to:

Admiralty Comrs. v. *Susquehanna* (*Owners*), *The Susquehanna*, [1925] P. 196; *affd.* H.L., [1926] All E.R. Rep. 125; [1926] A.C. 655; 95 L.J.P. 128; 135 L.T. 456; 17 Asp. M.L.C. 81; 41 Digest 802, *6624*.

Black Prince, The, (1862), Lush. 568; 1 Mar. L.C. 251; 167 E.R. 258; 41 Digest 804, *6650*.

Chekiang, The, [1925] P. 80; *revsd.* H.L. sub nom. *Admiralty Comrs.* v. *S.S. Chekiang*, [1926] All E.R. Rep. 114; [1926] A.C. 637; 95 L.J.P. 119; 135 L.T. 450; 17 Asp. M.L.C. 74; 41 Digest 805, *6663*.

City of Peking, The v. *Compagnie des Messageries Maritimes, The City of Peking*, (1890), 15 App. Cas. 438; 59 L.J.P.C. 88; 63 L.T. 722; 6 Asp. M.L.C. 572; 41 Digest 805, *6657*.

Finlay (*James*) *& Co., Ltd.* v. *N.V. Kwik Hoo Tong H.M.*, [1928] All E.R. Rep. 110; [1929] 1 K.B. 400; 98 L.J.K.B. 251; 140 L.T. 389; 17 Asp. M.L.C. 566; Digest Supp.

Gracie (*Owners*) v. *Argentino* (*Owners*), *The Argentino*, (1888), 13 P.D. 191; *affd.* H.L., (1889), 14 App. Cas. 519; 59 L.J.P. 17; 61 L.T. 706; 6 Asp. M.L.C. 433; 41 Digest 802, *6627*.

Mediana (*Owners*) v. *Comet* (*Owners, etc*), *The Mediana*, [1900] A.C. 113; 69 L.J.P. 35; 82 L.T. 95; 9 Asp. M.L.C. 41; 41 Digest 811, *6733*.

Mersey Docks & Harbour Board v. *Marpessa* (*Owners*), *The Marpessa*, [1906] P. 14; *affd.* C.A., [1906] P. 95; *affd.* H.L., [1907] A.C. 241; 76 L.J.P. 128; 97 L.T. 1; 41 Digest 808, *6690*.

No. 7 Steam Sand Pump Dredger (*Owners*) v. *Greta Holme* (*Owners*), *The Greta Holme*, [1897] A.C. 596; 66 L.J.P. 166; 77 L.T. 231; 8 Asp. M.L.C. 317; 41 Digest 808, *6689*.

Strathfillan S.S. (*Owners*) v. *Ikala S.S.* (*Owners*), *The Ikala*, [1928] P. 86; *affd.* H.L., [1929] A.C. 196; 98 L.J.P. 49; 140 L.T. 177; 17 Asp. M.L.C. 555; Digest Supp.; on reference to assess damages (1929), 35 Lloyd's Rep. 71; *affd.* C.A., 35 Lloyd's Rep. 191.

Appeal.

The plaintiffs, the Central Electricity Generating Board, owners of the steamship Lord Citrine, appealed against the decision of LORD MERRIMAN, P., reported [1959] 3 All E.R. 126, on a motion by the defendants, the owners of the motorship Hebridean Coast which had collided with and damaged the Lord Citrine, objecting to the registrar's assessment of the damages suffered by the plaintiffs by reason of the detention of the Lord Citrine for 11½ days while undergoing repairs necessitated by the collision. The facts are stated in the judgment of HODSON, L.J.

Sir David Cairns, Q.C., *Waldo Porges, Q.C.*, and *R. F. Stone* for the plaintiffs.
Kenneth Carpmael, Q.C., and *Peter Bucknill* for the defendants.

Cur. adv. vult.

Mar. 10. The following judgments were read.

HODSON, L.J.: This is an appeal by the plaintiffs from a decision of the President dated June 19, 1959, (1) on a motion in objection to the registrar's decision dated Dec. 5, 1958, as to damages by collision. The appeal concerns only one of a number of items claimed, namely, item 14, a claim for damages quantified by the registrar at £2,032 and reduced by the President to £457 12s. 9d. in respect of a period of 11½ days in January, 1952, during which the plaintiffs' vessel, the Lord Citrine, was detained for repairs rendered necessary by a collision for which the defendants have admitted liability. The plaintiffs seek to restore the decision of the registrar.

The Lord Citrine is a collier owned by the Central Electricity Generating

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(1) Reported [1959] 3 All E.R. 126.

A Board, the successor of the Central Electricity Authority, the general duties and powers of which are controlled by the Electricity Act, 1947, of which s. 36 (1) reads as follows:

> "It shall be the duty of the Central Authority so to exercise and perform their functions under this Act, including their functions in relation to area
> B boards, as to secure that the combined revenues of the Central Authority and all the area boards taken together are not less than sufficient to meet their combined outgoings properly chargeable to revenue account taking one year with another."

The statement of damages sustained by the plaintiffs contained some twenty-two items, of which all the material ones were agreed at figures shown in the
C record save and except the item relating to detention. These agreed items covered not only the cost of repairs but the cost of running the ship during the period of detention, and the dispute between the parties was as to the basis on which the claim for detention should be treated. The defendants contended that since the authority was not a trading body interest on capital value was the right basis, and the plaintiffs that their claim was not so limited.
D By a letter dated June 14, 1954, the claim was put in this way:

> "Item 14. As we have already said, we are unable to agree with your view that the British Electricity Authority is not a trading body, and that the Lord Citrine is not to be regarded as a profit-earning ship. However, even if you are right as to this, it is quite clear in our view that interest on capital value is not the proper basis for the allowance for loss of use but that
> E our clients must then be entitled to recover the cost of chartering other shipping space to carry the coal which the Lord Citrine would have carried if she had not had to be stopped for repairs . . . Since it was, as stated above, essential that all the coal allocated should be carried, as this was in fact done, and as the authority's own ships could not have done it in any case, the lay-up of the Lord Citrine necessarily of course involved extra chartering
> F for which they have had to pay. Although the exact replacement ships cannot be identified in the circumstances, it seems to us that the amount of our clients' loss on a chartering basis can doubtless be arrived at roughly by calculating what quantity of coal she would have carried during the detention period from the average cargoes on the six voyages (of which you have particulars) and from the times occupied by those voyages (of which
> G you also have particulars) and ascertaining the cost of hiring other ships to carry that quantity . . ."

The practice of the Electricity Authority was to maintain a fleet of vessels to carry coal for the purposes of generating electricity. In so far as their own vessels were insufficient, the authority chartered other vessels, some on long, some on
H short, and some on spot, charter. During the period of six months covered by the programme for the winter period 1951-52 all the vessels owned by the authority were employed. While the Lord Citrine was being detained, therefore, the plaintiffs contend that all the coal which she would have carried was carried in chartered vessels and that the freight payable by the authority under prevailing Chamber of Shipping rates was the test by which damages for detention
I should be measured.

The facts found by the registrar and confirmed by the President are as follows: For the year in question the National Coal Board provided only eighty-seven per cent. of the quota allocated to the plaintiffs. The quantity short-delivered was no less than one and a quarter million tons. Of the eighty-seven per cent. delivered, twenty-five per cent. of the coal was sea-borne. Of that fraction forty-five per cent. to fifty per cent. was carried in the plaintiffs' own colliers, whereas fifty to fifty-five per cent. was carried in chartered tonnage. The plaintiffs' own ships could not have carried the whole of the sea-borne coal actually received.

There were ten large chartered vessels on ten-year charter from June, 1949, all of which were regularly employed over the years, while certain other vessels were employed on short charter and others on spot charter, as required. None of the plaintiffs' own vessels was idle during the detention period, and if the Lord Citrine had not been under repair she would not have been idle. At no time during the twenty-six winter weeks of 1951-52 were the plaintiffs not chartering vessels additional to the long-term chartered vessels; but no specific vessel can be pointed to as having taken the place of the Lord Citrine during the detention period in order to carry the coal which she would have carried had she not been laid up for repairs. It was, of course, cheaper for the plaintiffs to carry coal in their own vessels, because all chartered vessels, whether on long-term, short-term, or spot charter, were entitled to be paid so much per ton of coal carried. There was no question of the plaintiffs chartering their own vessels or subchartering the chartered vessels to someone else. While it was customary to build up stocks at each station during the twenty-six summer weeks, and to run down stocks in the period from November to April, the situation in the winter period 1951-52 was normal, and there was no under-stocking or over-stocking at all.

The defendants have sought to criticise these findings of fact on the footing that the witnesses who spoke to them were not in a position to know and indeed admitted that the details of the chartering and the working out of the programme for the winter 1951-52 were not known to them. This court should, however, deal with the appeal on the basis of the facts as found and not on some other basis which may or may not be more favourable to the defendants.

The registrar held, and the President confirmed, that the plaintiffs had failed to show that they had in fact chartered other tonnage to replace the Lord Citrine. The amount of coal involved which would have been carried by the Lord Citrine during the detention period was about five thousand tons, and was relatively small in proportion to the amount involved in the winter programme, which was about five million tons, and the plaintiffs were unable to show that they chartered any other tonnage to replace the Lord Citrine during the period. I do not see any ground for interfering with the concurrent findings of the President and the registrar to this effect. The plaintiffs, therefore, fail to prove as an item of special damage that they have had to charter other space to replace the Lord Citrine.

The contention of the plaintiffs was, however, that although they could not point to exact replacement of ships yet it must necessarily follow that the Lord Citrine's coal was carried on such hired ships and damages should be measured on such basis. The plaintiffs contend that, even if they cannot establish replacement, hire charges are the appropriate basis for fixing general damages having regard to the operations of the authority which I have described. They say that they are for the purposes of this argument a commercial organisation and they ought to be treated in the same way as if they were a profit-making concern. They rely in particular on *Strathfillan S.S.* (*Owners*) v. *Ikala S.S.* (*Owners*), *The Ikala* (2), a case which arose from a collision involving the plaintiff's vessel in thirteen days' detention and which had a long and chequered career, culminating in the Court of Appeal (see (1929), 35 Lloyd's Rep. 191). They sought to bring themselves within the language of LORD WARRINGTON OF CLYFFE, who said (3):

> "Though there was no sufficient positive evidence of any chartering effected for the purpose of supplying the tonnage lost by the detention of the Strathfillan the circumstances proved might have been such that the

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(2) [1929] A.C. 196; 17 Asp. M.L.C. 555.
(3) [1929] A.C. at p. 211; 17 Asp. M.L.C. at p. 561.

A tribunal would have been justified in drawing the inference that a proportion of the chartered tonnage did in fact supply the tonnage lost by the detention."

The learned President dealt with this submission as follows (4):

> " In my opinion, having regard to the evidence it is not legitimate to infer B that the coal which might otherwise have been carried by the Lord Citrine during the 11½ days was carried by chartered tonnage; or, if so, that it was necessary to do so. Certainly there is no evidence that there was any special chartering for the purpose; or that such ' spot ' charters as were made for special deliveries had any connexion with the detention of the Lord Citrine."

In my judgment the learned President was right in this conclusion.

C LORD SUMNER, in the same case (5), pointed out that it has to be proved that, in doing a shipowner the wrong of laying his ship idle at the time in question, work which she would otherwise have done during the time went undone to his measurable loss or was only done by resorting to other expedients at a measurable outlay. It is true that at the end of the day the plaintiff obtained judgment against the Ikala for a substantial sum (see (1929), 35 Lloyd's Rep. at p. 191, where D the final decision of the Court of Appeal is to be found), but it was on the basis that she had not proved that she had chartered to replace but had given sufficient evidence to enable her value as a freight-earning ship—the amount of profit that she might be presumed to be earning—to be ascertained so as to find out what thirteen days' loss of that capacity was. That was a case of a ship which was not only a profit-earning ship but also one earning enormous profits during E war time, as SCRUTTON, L.J.'s judgment, given in its last stage, shows. The Lord Citrine, on the other hand, though a trading ship in one sense, is not and never can be a profit-earning ship " taking one year with another ", any more than the dredger in *Mersey Docks & Harbour Board* v. *Marpessa* (*Owners*), *The Marpessa* (6).

The registrar having reached his conclusion, with which I agree, that the F plaintiffs were not able to prove that they had chartered other tonnage to replace the Lord Citrine, reached the further conclusion, with which I also agree, that the Lord Citrine was not a vessel of a kind in regard to which rates of freight for comparable ships could be directly available as a measure of damages. Accordingly he was driven to the conclusion that interest on capital was the only available method by which he could assess the damages.

G In this I think that he was right; but he was clearly wrong in producing the same result as if the plaintiffs had succeeded in their claim put forward on an owner's profit basis by awarding the same sum on an interest basis of about thirty per cent., which is on the face of it an inordinate rate. There is nothing in the speech of LORD HAILSHAM, L.C., in *The Ikala* (7) or the judgment of SCRUTTON, L.J., in the same case (8) which lends support to the view that the rate of interest H can be adjusted so as to produce a figure which the plaintiffs have failed to establish by another route. As the President pointed out, the two measures of damage contended for are quite distinct and should not be confused. I agree, therefore, with the learned President that the rate of interest must be at a reasonable rate. He fixed seven per cent., saying that a generous rate was justified, and there is no cross-appeal against his decision by the defendants. The appeal of the I plaintiffs should, in my judgment, be dismissed.

The plaintiffs having sought to sustain the decision of the registrar on the basis that they were entitled to general damages on the basis of those awarded in *The Ikala* (7) or alternatively as interest at thirty per cent., and the defendants contending that the interest basis was right but the rate was inordinate, no sum for depreciation was added to that awarded for interest. This omission was only drawn to the attention of the President after the judgment had been given, and he subsequently refused to amend his award. Counsel on behalf of the defendants has consented to a figure for depreciation being added to that for interest, on the basis of *The Marpessa* (9) (see the judgment of Sir Gorell Barnes, P.), and leave to appeal out of time against the subsequent refusal of the President to amend his award has been given. The figure to be paid out of court will, therefore, be increased by £214 17s. 2d. The plaintiffs must, however, pay not only the costs of the appeal but any additional costs occasioned by the supplemental notice of appeal.

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(4) [1959] 3 All E.R. at p. 130.

(5) [1929] A.C. at p. 205; 17 Asp. M.L.C. at p. 559.

(6) [1907] A.C. 241.

(7) [1929] A.C. 196; 17 Asp. M.L.C. 555.

(8) (1929), 35 Lloyd's Rep. 191.

WILLMER, L.J., stated the facts and continued: The witnesses could not point to any specific charter of any particular vessel as having been effected for the purpose of replacing the Lord Citrine. None the less it was submitted that, since all the coal forthcoming was in fact carried, it was a necessary inference that the loss of carrying capacity caused by the detention of the Lord Citrine could only have been made good by the use of a chartered vessel which would not otherwise have been required.

It must be emphasised that the plaintiffs' claim for the cost of hiring alternative tonnage to do the work of the Lord Citrine was a claim for special damage. Although the plaintiffs are not engaged in trading for profit, there can be no objection in principle to such a claim. The right of a non-trading corporation to claim for the cost of hiring another vessel to do the work of the damaged vessel was specifically recognised by Lord Loreburn, L.C., in *The Marpessa* (10), but such a claim for special damage must be strictly proved, and must be causally connected with the collision. As was said by Viscount Sumner in *The Ikala* (11):

> "It has to be proved that, in doing the shipowner the wrong of laying his ship idle at the time in question, work, which she would otherwise have done during the time, went undone to his measurable loss or was only done by resorting to other expedients at a measurable outlay."

The first question on this appeal, therefore, is whether it was proved that the plaintiffs did in fact charter other tonnage in consequence of the Lord Citrine being laid idle during the period of the repair. The learned registrar thought not. He said in his reasons:

> "I do not think that if the plaintiffs have to show that they chartered other tonnage to replace the Lord Citrine they have succeeded in doing so."

The learned President came to the same conclusion: see his judgment (12). Agreeing as I do with these concurrent findings of fact I can deal quite briefly with this aspect of the case.

[His Lordship referred to the evidence on this point and continued:] The evidence to my mind falls far short of proving that other tonnage was chartered to replace the Lord Citrine. The carrying capacity lost by reason of the detention of the Lord Citrine amounted to no more than about one-thousandth part of the tonnage that had to be carried during the six-monthly period. There is nothing to show that that proportionately trifling loss was not easily absorbed by the work of the other vessels which the plaintiffs had at their disposal. Records produced by the plaintiffs showed that several of the ships at their disposal were in fact not engaged in carrying cargoes for substantial periods during the relevant six months. The witnesses called were quite unable to explain the reasons for these periods of apparent idleness. No doubt it was their misfortune that they were being asked about these details nearly seven years after the events took place, and it is easy enough to excuse and sympathise with their inability to remember. This, however, is no substitute for proof; and I can only say that in my judgment there was no proof that any tonnage had to be chartered to replace the carrying capacity lost by reason of the detention of the Lord Citrine or that the over-all tonnage of coal during the relevant period could not have been carried without such additional chartering.

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(9) [1906] P. at p. 27.

(10) [1907] A.C. at p. 244.

(11) [1929] A.C. at p. 205; 17 Asp. M.L.C. at p. 559.

(12) [1959] 3 All E.R. at p. 129.

I am clearly of opinion, therefore, in agreement with both the learned registrar and the learned President, that the claim for special damage on the basis of chartering alternative tonnage fails. The plaintiffs are left, accordingly, with a claim for general damages—for it has been conceded throughout that they are entitled to something by way of general damages for the laying up of their ship. The learned registrar, having held that the claim for special damage failed, proceeded nevertheless to award identically the same sum as claimed. This he described as interest on capital—which would involve a rate of interest of approximately thirty per cent. It appears to me that the learned registrar did not have in mind the distinction between general damages and special damage, and in this I think that he fell into the same error as that of his distinguished predecessor, which was criticised by VISCOUNT DUNEDIN in *Admiralty Comrs.* v. *Susquehanna* (*Owners*), *The Susquehanna* (13). He proceeded as if there had been proof of special damage, whereas he should have dealt with the question of general damages as a jury question. This is what the learned President did. Taking the view that a fair way of assessing general damages was on the basis of interest on capital, he held that the rate awarded by the learned registrar was inordinately high, and himself awarded a sum based on interest at the rate of seven per cent., to which was added a further sum to cover maintenance and consumption of stores during the agreed period of 11½ days.

In this court it has been argued that, even assuming no special damage was proved, the sum awarded by the learned registrar was a fair figure in all the circumstances, as an award of general damages, and should not have been disturbed by the learned President. The argument put forward has been that the plaintiffs were deprived of the use of a valuable chattel, and the best way of estimating the value to them of that chattel is by reference to the market rates of freight prevailing at the time for comparable ships in comparable employment. Putting it another way, it was said that the Lord Citrine was worth to her owners what it would cost to replace her by hiring at current rates. As to this argument, it must first be pointed out that, even if it is sound, it will not justify the figure claimed, namely, £2,032. For this figure, being based on the cost of hiring another vessel, takes no account of the wages, insurance and stores that would have to be paid for if the plaintiffs were running their own vessel. If allowance were made for these items, as it was eventually admitted by counsel for the plaintiffs that allowance should be made, the figure of £2,032 is immediately reduced to something in the neighbourhood of £1,500. But this figure at least, it was contended, should properly be awarded by way of general damages.

The argument for the plaintiffs on this aspect of the case was based largely on the decision that was ultimately arrived at in *The Ikala* after the case had been remitted to the registrar by the House of Lords, and especially on the judgment of SCRUTTON, L.J., in the Court of Appeal (14). There is a certain superficial similarity between the facts of that case and the facts of the present case, in that, whereas the Lord Citrine was one of a fleet of vessels carrying coal for her owners, the damaged vessel in the other case was one of a fleet of vessels carrying oil for her owners; but there, as it seems to me, the similarity ends. The owners of the vessel concerned in *The Ikala* were a company trading for profit, and the loss that was being claimed was the loss of a profit-earning vessel. Moreover, whereas in the present case we are dealing with a period of peace time, when conditions of trading were more or less normal, the casualty in the case of *The Ikala* occurred in the year 1917, at the height of the German submarine campaign, and at a time when any serviceable vessel—and not least an oil-carrying vessel—was a chattel of immense value from the use of which enormous profits could be earned. I can, therefore, derive no assistance from the fact that in the very exceptional circumstances of that case a very exceptional sum was awarded by way of general damages for loss of use of the vessel concerned.

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(13) [1926] All E.R. Rep. at p. 128; [1926] A.C. at p. 662; 17 Asp. M.L.C. at p. 83.

(14) (1929), 35 Lloyd's Rep. 191.

Even assuming that a sum in the neighbourhood of £1,500 would be an appropriate amount to award by way of general damages for the loss of use of a profit-earning vessel comparable to the Lord Citrine, it does not seem to me that this helps very much in assessing the amount which ought to be awarded in this case. The Lord Citrine was not a vessel trading for profit. The evidence given in the case did not disclose anything which would make it possible to assess what proportion of the notional figure of £1,500 would represent the profit element, with which I would include overhead and management expenses which, in the case of a vessel trading for profit, would be expended solely for the purpose of making such profit. How much would be left after making a deduction in respect of this element is a matter of pure conjecture.

In these circumstances I am of opinion that the only proper approach to the problem which has to be solved in this case is to consider what are the elements of loss which the plaintiffs have in reality sustained by reason of the detention of the Lord Citrine. For it is an elementary proposition that the plaintiffs are entitled to recover as damages what they have in fact lost, neither more nor less. Looking at the problem in this way, it seems to me that the real elements of the plaintiffs' loss may be summarised as follows: (i) crew's wages thrown away during the period while the vessel was out of use; (ii) proportionate part of annual cost of insurance during the same period; (iii) proportionate part of annual depreciation; (iv) proportionate part of annual maintenance and repair expenses; (v) proportionate part of annual consumption of stores during ordinary use of the vessel; (vi) lastly—and this is the only other possible element of loss that I can think of in the case of a vessel not engaged in trading for profit—some allowance to cover the fact that the capital invested in the vessel was rendered infructuous while she was out of use. Now as to these elements, the cost of wages and insurance thrown away has already been allowed in full under other items of the claim. As to depreciation, the learned President did not allow anything in respect of this item, but it has been conceded in this court by counsel for the defendants that some allowance for depreciation ought properly to be made. There is no difficulty with regard to the figure, for it is not in dispute that the annual rate of depreciation was £6,820, of which the proportionate part attributable to 11½ days would be £214 17s. 2d. With regard to maintenance charges and consumption of stores attributable to the detention period, the sum awarded by the learned President includes allowances in respect of these items, the amounts of which are not in dispute. The only remaining matter, namely, the loss due to the capital invested in the vessel being rendered temporarily infructuous, is covered by the learned President's award of seven per cent. on the agreed capital value. It might well be thought that this allowance erred, if anything, on the generous side, seeing that, according to the information given to us, the plaintiffs were able at the material time to borrow money at an appreciably lower rate. Be that as it may, it seems to me that, subject to the addition of an agreed sum in respect of depreciation, which is conceded by the defendants, the learned President's award fully covers the plaintiffs in respect of all the elements of loss which they can fairly claim to have sustained.

I do not think that this case raises any question of principle, other than the principle that a plaintiff claiming general damages is entitled to be awarded such sum as will fairly compensate him for the loss which he has actually sustained. This, as has been said, is a jury question. There is no special sanctity about any particular method of arriving at the appropriate sum. Every case must be judged on its own facts. The method adopted by the learned President, that is, a calculation based on a fair rate of interest on capital value together with a due allowance for expenses thrown away, has repeatedly been approved by the House of Lords for use in appropriate cases. This method was foreshadowed in

A *The Greta Holme* (15); it was applied in *The Marpessa* (16) and again in *The Chekiang* (17); and it was again referred to with approval by all the members of the House in *The Susquehanna* (18). It appears to me to be an appropriate method for assessing the plaintiffs' loss in the present case, and I cannot see that the learned President in adopting this method was guilty of any error of principle.

It follows that in my judgment the amount awarded by the learned registrar B was excessive and was rightly reduced by the learned President. Subject to the addition of the agreed sum for depreciation I am of the opinion that the learned President's award should be affirmed.

DEVLIN, L.J.: It is well established that the owner of a ship which is damaged and detained for repairs can recover from the wrongdoer the cost of a C substitute ship if he hires one during the period of detention and if it is reasonable that he should do so. Money paid out for this purpose can be claimed in the action as special damage or as moneys numbered. If he does not hire a substitute ship, he can recover as general damages compensation for the loss of the use of his vessel during the period of detention.

In this case the plaintiffs as owners claim in the first instance a sum as special D damages. The plaintiffs do not claim that they hired a vessel in substitution for the damaged vessel, the Lord Citrine. [HIS LORDSHIP summarised the facts and continued:] The vagaries of shipping caused by bad weather required the plaintiffs to take vessels from time to time on spot charter. The case for the plaintiffs is that although they cannot show an exact replacement of the Lord Citrine, the missing tonnage was made good by spot charter: in short, that the E casualty was one of the "vagaries" which caused the plaintiffs to charter tonnage which would not otherwise have been required. The plaintiffs submit, therefore, that an appropriate charge for substitute tonnage can be calculated and recovered as special damage. They rely on a passage in the speech of LORD WARRINGTON OF CLYFFE in *The Ikala* (19) which is as follows:

> F "Though there was no sufficient positive evidence of any chartering effected for the purpose of supplying the tonnage lost by the detention of the Strathfillan the circumstances proved might have been such that the tribunal would have been justified in drawing the inference that a proportion of the chartered tonnage did in fact supply the tonnage lost by the detention."

Have they proved the circumstances which would bring them within this dictum? G In my judgment they have not. The first essential is that they should prove that some vessels were fixed, either on spot charter or otherwise, after the casualty was known. [HIS LORDSHIP referred to the evidence and continued:] There is no evidence that anyone in their office even knew of the casualty, let alone that he took it into account in assessing any additional tonnage which he thought would be required. This is not surprising when one considers what a very small part the H detention of the Lord Citrine for 11½ days played in the programme. During those days she could have made one voyage and carried 4,171 tons. The tonnage which the plaintiffs expected to have to lift during the winter period was over five and a half million tons, of which about a quarter went by sea. The casualty to the Lord Citrine therefore prevented her from carrying less than one half per cent. of the programmed tonnage. It is extremely unlikely that any programme I of chartering could be so exact as to get within one half per cent. of the required tonnage. There is no evidence that any part of the million tons or more which went by sea had to be lifted by any particular dates during the winter period. Unless, therefore, the Lord Citrine was fixed for a particular voyage and a substitute vessel had to be sent in her place, which is not suggested, the natural thing would be not to replace her at once but to wait and see how the programme worked out, since there might easily have been one half per cent. surplus capacity anyway. When one learns in addition that during the winter period the board in fact received only eighty-seven per cent. of the allocated quantity, it makes it all the more unlikely that a deficit of one half per cent. caused any embarrassment.

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(15) [1897] A.C. 596; 8 Asp. M.L.C. 317.
(16) [1907] A.C. 241.
(17) [1926] All E.R. Rep. 114; [1926] A.C. 637; 17 Asp. M.L.C. 74.
(18) [1926] All E.R. Rep. 125; [1926] A.C. 655; 17 Asp. M.L.C. 81.
(19) [1929] A.C. at p. 211; 17 Asp. M.L.C. at p. 561.

The board sought to make good the gaps in the evidence by general assertions made by their witnesses, such as: If one of those ships falls out then surely, to carry out that programme, you must have a ship to replace it. This is not true unless it can be shown either that the chartering made in accordance with the programme was insufficient to lift the coal—unlikely, since there was a deficit in deliveries of thirteen per cent.—or that it was accurate to within one half per cent. There was similar evidence of a general character to the effect that all the coal that was available during the period was in fact lifted and that none of the ships, either owned or chartered, was idle during the period. Without further details to elucidate it, all that this evidence shows is that the plaintiffs managed to get on sufficiently well without the Lord Citrine. As the President says (20):

> ". . . there was no necessity, as a matter of business, to make any special arrangements to replace the Lord Citrine . . ."

In my judgment, there is no satisfactory proof that tonnage was chartered which but for the casualty would not have been chartered; and I agree with the judgment of the registrar accepted by the President that the claim for special damage breaks down.

I now turn to the claim for general damages. The only principle of law that can be laid down is the familiar one that the plaintiff is entitled to be awarded such sum as will fairly compensate him for the loss that he had actually sustained. In the application of this principle to the detention of chattels during repairs, there is no difference between ships and other chattels. In the cases in which this general principle has been applied to ships, various ships of different types have been considered—trading or profit-earning vessels, pleasure vessels, warships, utility vessels such as dredgers and lightships—but that does not mean that there are different rules for different categories of ships. I think with respect that the learned registrar was wrong in regarding the matter primarily as " a problem of classification ". The class of vessel is only one of the matters to be considered. Even the broad distinction between profit-earning and non-profit-earning vessels must be handled with care. The same type of car in the hands of a car-hiring concern has different potentialities from those which it has in the hands of a private owner. Likewise with ships: there are types of vessels, such as pleasure yachts, which are capable of earning a profit in some circumstances but not in others: one must inquire into all the circumstances and in particular into what the owner would probably have been able to do with the ship during the period of detention. I have not therefore studied the cases that have been cited to us in order to place the Lord Citrine in any particular category of vessel. I have looked for the broad statements of principle which show how the general rule has been made to work. There are, I think, two working principles that are relevant to this case.

The first is that where there is " a reasonable certainty of employment ", the owner is entitled to be compensated for the profit which he has lost. I take the words which I have quoted from the judgment of Bowen, L.J., in *Gracie (Owners)* v. *Argentino (Owners), The Argentino* (21). Dicta on causation in damages have multiplied since then, and I think that it would now be held sufficient if it were shown that the vessel would probably have earned a profit during the period of detention. It may be sufficient—it is unnecessary on the facts of this case to canvass the matter—to show no more than a real possibility of profit-earning;

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(20) [1959] 3 All E.R. at p. 130.

(21) (1888), 13 P.D. 191 at p. 203.

when making an award the full amount of the profit that could have been earned can then be discounted to allow for the degree of improbability. As Bowen, L.J., says, the best evidence that a profit would have been made is when there is an existing engagement that has been lost, but more general evidence will do. A useful, but not obligatory, way of assessing the damage is to take, subject to an allowance for contingencies if need be, an appropriate rate of hire for the period, to deduct from that the costs of earning the hire, so far as they have not been incurred, and award the balance. This is what the registrar aptly describes as " charter rates less savings ". But the profit that is lost need not be wrapped up in hire. It may consist of a loss of profit on the sale of goods that the owner would have carried in his own vessel (see *The Ikala* (22)). I do not see why any other form of productive service that might be open to the ship should not be treated in the same way. The facts in the present case make it akin to that of a manufacturer who carries his raw materials to his factory, and it may be that if the interference with the transport causes the manufacturer to lose a profit on the finished product, he can properly ask for compensation for that, so long as there is a measurable loss. Lord Sumner says in *The Ikala* (23):

> " It has to be proved that, in doing the shipowner the wrong of laying his ship idle at the time in question, work, which she would otherwise have done during the time, went undone to his measurable loss or was only done by resorting to other expedients at a measurable outlay."

The other principle is that the owner of a vessel may get substantial, and not merely nominal, damages notwithstanding that he cannot show any loss of profit. He has lost the use of his vessel; and whether he would have used her for pleasure or business or some other form of service, such as dredging, he is entitled to compensation for the loss of use. Whereas in cases in the former class the award may best be calculated by starting at the top end, as it were, with charter rates or the like and working downwards, cases in this class may best be dealt with by beginning at the bottom, that is by counting the costs. The owner will be entitled to recover running expenses in maintaining the vessel and paying the crew while they are of no use to him. In addition he must have something which in the last analysis can only be a lump sum as compensation for loss of use. In *The Greta Holme* (24), a case of a dredger belonging to a harbour board, a lump sum was awarded. In later cases more precise calculations have been made based on various factors. In *Mediana* (*Owners*) v. *Comet* (*Owners, etc.*), *The Mediana* (25), a case of a lightship belonging to a harbour board, the calculation was based on the cost of maintaining a spare lightship for use in emergencies. In *The Marpessa* (26), another case of a dredger belonging to a harbour board, the calculation was, or should in the opinion of the House of Lords have been, based on the cost of maintaining and working the dredger. That means operating cost and is to be distinguished from the costs thrown away while she was idle; operating cost was taken as a fair measure of the value of the dredger's daily services to the board. In *The Chekiang* (27), the case of a warship, the calculation was made on the basis of five per cent. on the estimated capital value of the ship at the time of the collision. In *The Susquehanna* (28) the damaged vessel was an oil tanker owned by the Admiralty and used for servicing the fleet. The case was sent back to the registrar without any precise directions being formulated, but there were several indications in the House of Lords that the calculation might well be based mainly on interest on capital and depreciation. In the judgments in these cases there are many statements that the amount of the sum to be awarded is a jury question. No rules are laid down. In *The Chekiang*, Bankes,

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(22) (1929), 35 Lloyd's Rep. 191.
(23) [1929] A.C. at p. 205; 17 Asp. M.L.C. at p. 559.
(24) [1897] A.C. 596; 8 Asp. M.L.C. 317.
(25) [1900] A.C. 113; 9 Asp. M.L.C. 41.
(26) [1907] A.C. 241.
(27) [1926] All E.R. Rep. 114; [1926] A.C. 637; 17 Asp. M.L.C. 74.
(28) [1926] All E.R. Rep. 125; [1926] A.C. 655; 17 Asp. M.L.C. 81.

L.J., refers (29) to "indications of principles which may be applied"; and in the same case LORD DUNEDIN says (30) that there is no absolute rule enjoining that the calculation must be a percentage of capital value.

This second principle does not mean that the owner of a damaged vessel must inevitably be given something for loss of use. The facts may show that before the casualty occurred the owner was already saddled with the liability to maintain an idle vessel from which he could get no profit or pleasure or other form of service. In such a case, which, as BOWEN, L.J., says in *The Argentino* (31), "must necessarily be exceptional", the owner cannot recover more than nominal damages: see *The Black Prince* (32); *The City of Pekin* (33). The defendants have not put their case as high as that. It is true that the evidence showed that the plaintiffs got on satisfactorily despite the temporary loss of the Lord Citrine; I suppose that on this it might be contended that the Lord Citrine or other equivalent tonnage would have been idle anyway, with the result that no damage has been caused, but it has not been so argued. I think that she should be regarded as being in service throughout the period. In every trading fleet, a vessel may be idle from time to time; but if the purpose of the fleet is to carry out a programme and in order to be sure of that the owner has a margin of safety, I think that the whole fleet should be regarded as being in service. *The Mediana* (34) and *The Susquehanna* (35) afford sufficient authority for that.

The plaintiffs invoke the first of the two "working principles" that I have stated as being the correct instrument for the measurement of their claim. If they fail on this, the only alternative for which they have asked is interest on capital. Under other heads they have recovered all the running expenses thrown away during the period of detention so that the only items of cost remaining are interest and depreciation. The registrar did not take depreciation into account and owing to a muddle the President was not invited to do so until too late. The payment into court by the defendants in fact allowed for depreciation and they have now very sensibly conceded it to be payable. The President was asked, in the alternative to the main claim based on charter rates, only for interest, and he has awarded it at the rate of seven per cent.

I mention this because I should not wish this decision to be mistakenly cited as an authority for the proposition that the measure of damages in respect of vessels belonging to nationalised industries should inevitably be based on interest and depreciation. Quite apart from any question of profit making, if damages had been sought in some ampler form, as in *The Marpessa* (36) or *The Mediana* (34), they might have been obtained; but the case was not presented in that way.

Consequently the appeal fails unless the plaintiffs can establish their claim on the basis of charter rates less savings. This claim succeeded before the registrar, in substance though not in form, because he gave them the amount claimed though under the description of interest on capital, the rate on this footing working out at over thirty per cent. I respectfully agree with the President that this is wrong. At thirty per cent. it includes a large profit element and so could be justified only if profit could be justified; and if profit could be justified, it only confuses the matter to call it interest. Interest is to be awarded where profits could not be made and where the loss of use can best be measured by saying that at least the owner has had no return on the capital money invested in the asset. It must therefore be given at an investment rate. The President has awarded seven per cent, and as an investment rate that has not been attacked.

Before us the plaintiffs' claim has been presented on the footing that the

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(29) [1925] P. at p. 90.
(30) [1926] All E.R. Rep. at p. 118; [1926] A.C. at p. 642; 17 Asp. M.L.C. at p. 76.
(31) (1888), 13 P.D. at p. 201.
(32) (1862), Lush. at p. 574.
(33) (1890), 15 App. Cas. 438; 6 Asp. M.L.C. 572.
(34) [1900] A.C. 113; 9 Asp. M.L.C. 41.
(35) [1926] All E.R. Rep. 125; [1926] A.C. 655; 17 Asp. M.L.C. 81.
(36) [1907] A.C. 241.

Lord Citrine was a profit-earning vessel and that the rates at which similar vessels were being chartered by the plaintiffs afford the best evidence of the profit the Lord Citrine would have earned. Unless all that I have said so far in this judgment is erroneous, the fallacy in this contention is immediately obvious. The question is not whether the Lord Citrine was engaged in trade or is of a type that could be used to make profits; it is whether there is any evidence of a probability, or at the least of a real possibility, that if she was seaworthy during the 11½ days she would have made an actual profit for the plaintiffs. In my judgment there is not. When damages are awarded for breach of contract, there are many cases in which they are placed on a notional basis, such as market value, irrespective of what the injured party has actually done. As SCRUTTON, L.J., said in his judgment in *James Finlay & Co., Ltd.* v. *N.V. Kwik Hoo Tong H.M.* (37) there are many instances in English law where the measure of damage does not give the real loss suffered by the party. A hypothetical measure has the advantage of introducing uniformity and of tending to make similar wrongdoers pay alike, irrespective of the behaviour and circumstances of the injured party. But the rule which we are considering is firmly grounded on actual loss and there is no place in it for an assessment based on notional rates. The point is very well put by LORD MERRIVALE, P., in his judgment in *The Susquehanna* (38). Therefore, the possibility or probability of profit-making must be clearly proved if it is to be allowed for in the damages. I propose to examine in greater detail three of the authorities which I have mentioned, two of them in order to show how clearly this point has been established and the third because it was greatly relied on by the plaintiffs in support of their argument.

The Marpessa (39) shows that in a claim for loss of services not sounding in money the profit element cannot be included. The plaintiffs, the Mersey Docks & Harbour Board, were the owners of a dredger which they used in the port of Liverpool. She earned nothing in money, was maintained out of the rates, and did indispensable work of maintenance in the port of Liverpool. She was damaged by the Marpessa and disabled for nine days. The claim presented by the owners, as will be seen from the report (40), was for £102 per day, representing the average expenditure in maintaining and working the vessel and included a charge of twenty-five per cent. for " owner's profits ". It appears (41) that the registrar reduced this sum to £35 per day, which covered insurance, wages, supplies, depreciation and an allowance of seven per cent. calculated on the depreciated value of the ship to cover establishment charges, owner's profits and general damage. This last item was divided as to four per cent. for owner's profits and three per cent. for general damage and establishment charges. The plaintiffs' attempts to recover a larger sum than the registrar awarded failed in all three courts. LORD LOREBURN, L.C., said in the House of Lords (42) that the award for demurrage should represent the value of the work that would have been done by the dredger during the nine days had she not been disabled. If the plaintiffs had hired another vessel to do the work, they could have recovered the cost of doing it. But as they had not they were entitled to have the cost of maintaining and working the dredger per day and its depreciation, taking the total daily sum as a fair measure of the value of each daily service. The Lord Chancellor went on to say that (43) the plaintiffs had

> " added an item for owner's profit, which was appropriate enough if they had paid it to the owner of a vessel which they hired, but had no place in a claim based on the cost to themselves of the services rendered by the dredger. The registrar allowed them something on this head to which they were not entitled."

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(37) [1928] All E.R. Rep. at p. 115; [1929] 1 K.B. at p. 411; 17 Asp. M.L.C. at p. 571.
(38) [1925] P. at p. 202; 16 Asp. M.L.C. at p. 552. (39) [1907] A.C. 241.
(40) [1906] P. at p. 17. (41) [1906] P. at p. 19. (42) [1907] A.C. at p. 244.
(43) [1907] A.C. at p. 245.

The House, however, did not interfere with the registrar's award because, A although they thought that in this and other respects it had not been correctly made up, it was substantially sound.

In *The Susquehanna* (44) the damaged vessel was one of a number of oil tankers belonging to the Admiralty and used for supplying oil to the fleet. Some of these tankers were from time to time let out on charter by the Admiralty for commercial purposes, but there was no evidence that during the period of repairs the B damaged vessel could or would have been chartered. The Admiralty claimed damages for loss of use based on the rate that could have been obtained for the tanker on charter and the registrar awarded £200 per day on this basis. It was declared in all of the three higher courts to be the wrong basis. SCRUTTON, L.J., said (45):

> " The registrar, as I read his judgment, says the commercial value of C the ship can be got at by seeing for what sum a ship could be chartered if the Admiralty were ready to charter, and that the commercial value of any one of them appears to be a sound basis on which to base an amount for damages for loss of time; and he does not seem to have taken into account that in fact there was no probability of that vessel or of the vessel that substituted her at any time being let on a commercial basis." D

The function of the tanker in that case was to supply the fleet with oil, just as it was the function of the Lord Citrine to supply the plaintiffs' generating stations with coal. It is therefore worth noticing that LORD SUMNER (46) looked into the question whether the Admiralty had suffered any damage in this respect. He concluded:

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> " There is no proof that any ship was without its due supply of oil, when required, or that any service of any ship was foregone or stinted for want of oil in consequence of this collision. If this had been so, it could and should have been proved, for the Admiralty knew the facts. In no case can this be matter of presumption. Unless such loss is proved the reduction of the margin of supply or its total disappearance is not a head of pecuniary damages, for no actual harm was done." F

The case on which the plaintiffs rely is *The Ikala* (47). The owners of the damaged ship, the Strathfillan, were oil importers and they both owned and chartered ships for the purpose of importing oil for sale. The case had a complicated history which it is unnecessary to recite; it is sufficient to consider the position as it was presented to the Court of Appeal when it came before that G court the second time. As in the present case, evidence was tendered to show that substitute tonnage had been chartered; and as in the present case the point was not proved. In this state of affairs, SCRUTTON, L.J., put the question for consideration as follows (48):

> "Assuming you do not prove that you have chartered to replace, have you yet given sufficient evidence to enable her value as a profit-earning ship H —the amount of profit she may be presumed to be earning—to be ascertained so as to find out what thirteen days' loss of that capacity is?"

The evidence showed, SCRUTTON, L.J., said (49), that the trade in imported oil was so profitable (this was in 1917) that it paid the plaintiffs to carry on if only by chartering ships at the extraordinarily high rate of £11 10s. a ton deadweight. He said: I

> " There is evidence given, this evidence as to the rate per ton that was required for other ships, which shows that the Strathfillan was a very profitable vessel to her owners."

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(44) [1926] All E.R. Rep. 125; [1926] A.C. 655; 17 Asp. M.L.C. 81.
(45) [1925] P. at p. 208; 16 Asp. M.L.C. at p. 555.
(46) [1926] All E.R. Rep. at p. 128; [1926] A.C. at p. 663; 17 Asp. M.L.C. at p. 84.
(47) [1929] A.C. 196; 17 Asp. M.L.C. 555.
(48) (1929), 35 Lloyd's Rep. at p. 194. (49) (1929), 35 Lloyd's Rep. at p. 195.

The plaintiffs had put forward a calculation showing a loss of £10,000, but were prepared to accept the sum of £7,150, which the registrar on another basis had thought sufficient, and therefore it was unnecessary for the Court of Appeal to say more than that the £7,150 was not too great a sum to represent the profitability of the vessel during those thirteen days. Lawrence, L.J., agreed (50) with the judgment of Scrutton, L.J. Greer, L.J., said (51) that the plaintiffs were entitled to put their case as follows:

> "For these thirteen days we could not get a substitute in the state of the shipping market, and, therefore, we will ask the owners of the Ikala to pay on the basis of ascertaining what the daily value of that ship was to us, having regard to the enormous profits we were making out of these voyages."

I have already stated the only principle that I can extract from this case. It is that in considering whether or not there is "a reasonable certainty" or likelihood that a vessel would have earned profits during the period of detention, the court is not restricted to inquiring whether it was likely that the owner could have hired the vessel out at a profit but can inquire also into the profits that would probably have been earned by the carriage of the owners' own goods. It is quite true that in this case in measuring the value of the ship as a profit earner the court took as its guide the sums that would have to be paid as hire for the chartering of a similar ship. It cannot be said that that is a test for universal application; it may or may not be appropriate in other cases. I need not consider that, since before it could be considered as appropriate in this case, it would be necessary for the plaintiffs to prove that but for the detention the Lord Citrine would have carried coal in a manner that was profitable to them. There is no evidence to show that.

I do not rest this last assertion simply on the fact that the plaintiffs are not a profit-making enterprise. The plaintiffs, the Central Electricity Generating Board, may be said to be engaged in trade in a way in which the Mersey Docks & Harbour Board and the Admiralty could not be; and it may be necessary to consider with some care the position of a public authority which engages in trade but which Parliament has instructed simply not to make a loss. I am anxious not to determine these larger and important issues unless the facts of this case require that I should. In my judgment they do not. Treating the plaintiffs as if they were allowed to make a profit from the sale of electricity, there is no evidence that the cost of making electricity was in any way increased (with the consequence that its profits would have been diminished) by the unavailability of the Lord Citrine to carry coal. The evidence is that the plaintiffs were able to transport all the coal that they could buy. There is no evidence of any particular voyage that the Lord Citrine was scheduled to make and therefore no evidence that the failure to make it resulted in any measurable loss because coal was not delivered at any particular place or time. The fact that none of the spot chartering is proved to be due to the casualty means that the higher cost of chartered vessels would have been incurred anyway.

Thus this case on its facts is entirely different from *The Ikala* (52), where, once the suggestion which had bedevilled the earlier stages of the inquiry that the plaintiffs could only import a limited amount of oil was out of the way, they were able to show that they could buy and sell as much oil as they could carry and make enormous profits on every voyage. Indeed in its material facts the present case resembles much more closely *The Susquehanna* (53). In both cases the vessel was owned by a public authority and was of a type that could have been hired out at a profit but there was no evidence that it would have been. In each case the use to which the vessel was being put was for the service of the undertaking A and in neither case was there any evidence that the undertaking had suffered. While I think that this case should be decided on principle and not by a comparison of its facts with the facts in another case, I am bound to say that I do not see how, consistently with the decision in *The Susquehanna* (54), this appeal could be allowed.

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(50) (1929), 35 Lloyd's Rep. at p. 195.

(51) (1929), 35 Lloyd's Rep. at p. 196.

(52) [1929] A.C. 196; 17 Asp. M.L.C. 555.

(53) [1926] All E.R. Rep. 125; [1926] A.C. 655; 17 Asp. M.L.C. 81.

I agree that it should be dismissed. B

Appeal dismissed but damages increased by £214 17s. 2d. agreed depreciation. Leave to appeal to the House of Lords refused.

Solicitors: *Sinclair, Roche & Temperley,* agents for *Botterell, Roche & Temperley,* Newcastle-upon-Tyne (for the plaintiffs); *Middleton, Lewis & Co.,* agents for *Middleton & Co.,* Sunderland (for the defendants). C

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

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HONG GUAN & CO., LTD. *v.* R. JUMABHOY & SONS, LTD.

[PRIVY COUNCIL (Lord Tucker, Lord Jenkins and Lord Morris of Borth-y-Gest), February 8, 9, 10, 12, April 4, 1960.]

Contract—Exception clause—" Subject to force majeure and shipment "—Sale of goods—Goods shipped but delivered in fulfilment of other contracts— E *Insufficient goods shipped to satisfy all contracts—Whether breach of contract.*

Privy Council—Singapore—Contract—Exception clause—Sale of goods " subject to force majeure and shipment "—Goods in fact shipped but delivered to other buyers in fulfilment of other contracts—Whether breach of contract.

By a contract dated Nov. 7, 1950, the respondents who were importers of cloves to Singapore agreed to sell to the appellants (who bought for re-sale) F fifty tons of Zanzibar second grade cloves, December shipment. The contract was made subject " to force majeure and shipment ". The respondents, also in November, 1950, entered into contracts to sell to various buyers quantities of cloves some of which (totalling about 760 tons) were to be of November shipment, and some (totalling 375 tons) of December shipment. The respondents procured only the shipment of 300 tons of cloves G from Zanzibar as a November shipment, and they delivered the whole of the 300 tons to buyers who were expecting November shipments. The only December shipment of cloves from Zanzibar on behalf of the respondents was of a quantity of fifty tons of which four tons were delivered to buyers of November shipments and forty-six tons to buyers of the December shipments. No cloves were delivered to the appellants. The appellants H claimed damages for breach by the respondents of the contract of Nov. 7, 1950. The respondents contended that the contract was made subject to force majeure and shipment and that no shipment of the goods contracted to be sold took place.

Held: the words " subject to force majeure and shipment " meant that the contract of Nov. 7, 1950, was conditional on the respondents (a) not I being prevented by circumstances amounting to force majeure from carrying it out, and (b) being able to procure the shipment in December, 1950, of cloves to the quantity and of the description referred to in the contract (see p. 106, letter A, post); as the respondents had, in December, 1950, shipped cloves to the quantity and of the description set out in the contract, and as the contract contained no words enabling the respondents to excuse themselves by reference to other commitments, they were in breach of contract and were liable in damages to the appellants.

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(54) [1926] All E.R. Rep. 125; [1926] A.C. 655; 17 Asp. M.L.C. 81.

Appeal allowed.

[As to clauses and conditions as to possibility in a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 181, para. 313; and for cases on the subject, see 12 DIGEST (Repl.) 441-452, *3370-3402*.]

Cases referred to:

Gray v. *Slater, Birds & Co.*, (1924), 19 Lloyd's Rep. 59.

Hollis Bros. & Co., Ltd. v. *White Sea Timber Trust, Ltd.*, [1936] 3 All E.R. 895; Digest Supp.

Kokusai Kisen Kabushiki Kaisha v. *Johnson*, (1921), 8 Lloyd's Rep. 434.

Pool Shipping Co., Ltd. v. *London Coal Co. of Gibraltar, Ltd.*, [1939] 2 All E.R. 432; Digest Supp.

Star Public Saw Mill Co. v. *Robert Bruce & Co., Ltd.*, (1923), 18 Lloyd's Rep. 7.

Tennants (Lancashire), Ltd. v. *C. S. Wilson & Co., Ltd.*, [1917] A.C. 495; 86 L.J.K.B. 1191; 116 L.T. 780; 12 Digest (Repl.) 449, *3387*.

Appeal.

Appeal by Hong Guan & Co., Ltd., from a judgment of the Court of Appeal of the High Court of the Colony of Singapore, Island of Singapore (KNIGHT, Ag. C.J., RIGBY and WEE CHONG JIN, JJ.), dated Nov. 15, 1957, dismissing the appellants' appeal from a judgment of TAN AH TAH, J., dated Oct. 9, 1956, whereby the appellants' claim against the respondents, R. Jumabhoy & Sons, Ltd., for damages for breach of contract for failure to deliver goods sold was dismissed. The facts are set out in the judgment of the Board.

B. J. M. MacKenna, Q.C., and *M. Mann* for the appellants.

C. P. Harvey, Q.C., and *J. F. Donaldson* for the respondents.

LORD MORRIS OF BORTH-Y-GEST: This is an appeal by leave of the High Court of the Colony of Singapore, Island of Singapore, against the judgment of the Court of Appeal of the said High Court dated Nov. 15, 1957 (RIGBY and WEE CHONG JIN, JJ., KNIGHT, Ag. C.J., dissenting), dismissing with costs the appeal of the appellants from the judgment of TAN AH TAH, J., dated Oct. 9, 1956, whereby the claim of the appellants (the plaintiffs in the action) was dismissed with costs. The claim made in the action was for damages for breach of contract of sale. The appellants wished to purchase fifty tons of Zanzibar cloves. It was their practice to buy goods in bulk and to make contracts of sub-sale also in bulk. The respondents, according to the testimony of Mr. Jumabhoy, their chairman of directors, were, down to December, 1950, the biggest inporters and stockists of cloves in Singapore. Mr. Jumabhoy stated in his evidence that there are two crops of cloves in Zanzibar in a year; one begins to come in July and the other, which is larger, begins to come in September. He stated that the total crop for the year 1949 was about 7,000 tons, and that the 1950 crop was three-and-a-half times larger. He further stated that cloves are usually re-exported from Singapore to Java, there being almost no use for cloves in Singapore. The only type of cloves exported to Singapore for use in Indonesia is the particular type known as second grade Zanzibar cloves. The incidence of rain in Zanzibar, particularly if it comes earlier than expected, may affect the picking and, accordingly, the selling by suppliers and the exporting.

The contract which was sued on was dated Nov. 7, 1950, and, bearing the respondents' number—number 106—was in one of a variety of forms used by the respondents. Its terms were as follows:

"Bought of R. JUMABHOY & SONS, LTD.
No. 24, MALACCA STREET.
Sold to MESSRS. HONG GUAN & CO., LTD.
24, TELOK AYER STREET.

Term: Cash in Silver or Bank Notes: A

Subject to conditions of sale of the Indian Chamber of Commerce, Singapore.

50 Fifty tons Zanzibar cloves second grade, December shipment at \$94½ per picul ex buyers godown.

Delivery to be taken within . . . days from date. In default of delivery being taken within the stipulated time, the undersigned have the option, without any notice to the purchaser, of either cancelling the above sale, B or of selling the goods by public or private sale at the risk and expense of the purchaser, or of retaining them, and if the goods are retained the usual charges for storage and fire insurance (on the value of the said goods) will be charged and also interest at the rate of 12 per cent. per annum from the date on which delivery should have been taken.

Subject to force majeure and shipment. C

It is at the option of the seller to demand cash before or any time after delivery of goods.

N.B.—Buyers must examine the goods before delivery, and no complaint may be made after delivery of same.

Bearing interest at 24 per cent. per annum after due date of this order.

Tare Four Catties per Bag. D

Broker for vendor and purchaser. Sd. R. Jumabhoy
Sd. [Illegible] R. JUMABHOY & SONS, LTD."

In fact, the appellants did not receive any cloves from the respondents. A letter, dated Dec. 29, was sent to them in these terms:

"RODYK & DAVIDSON E
Our Ref.: FGV/F

Dec. 29, 1950.

Dear Sirs,

Contract No. 106—50 tons
Zanzibar 2nd grade cloves

We are directed by your sellers, Messrs. R. Jumabhoy & Sons, Ltd., to F inform you that your shipment was not effected by the Zanzibar suppliers.

Your contract was made subject to force majeure and shipment in consequence of which please consider your contract as cancelled.

Yours faithfully,
Sd. Rodyk & Davidson.

Messrs. Hong Guan & Co., Ltd., G
14, Telok Ayer Street,
Singapore."

On Nov. 24, 1950, the appellants had entered into two contracts of sale, each for twenty-five tons of Zanzibar second grade cloves. One contract was with Messrs. Makhanlall & Co., and the other was with Messrs. Panachand & Co. Amongst other terms each contract included the following: H

"Quality: Zanzibar second grade—as received from the steamer.
Price: S.S.\$99/- per picul (\$ ninety nine only).
Shipment: December, 1950.
Delivery: At buyers godown.
Remarks: Subject to the safe arrival of the steamer and alls force majeures . . ." I

Evidence was given at the hearing of the action that the respondents had been informed by telephone that these two contracts of resale had been entered into. That evidence, contradicted by the evidence of Mr. Jumabhoy, was not accepted by the trial judge, who held that the respondents were not aware of the two contracts of resale until more than a month after they had been entered into and until the time when the appellants were contemplating bringing legal proceedings.

A The respondents effected shipments from Zanzibar as follows:—They shipped three hundred tons on a ship called the Tjibadak. Though the actual date of sailing of that ship from Zanzibar was Dec. 1, 1950, it was held, and it is not now disputed, that such shipment was properly to be regarded as a November shipment. The ship arrived at Singapore on Jan. 25, 1951. The only December shipment on behalf of the respondents was of a quantity of fifty tons. It had, B in fact, been hoped that this quantity would have been shipped on the Tjibadak. This quantity was actually shipped on the Ettrick Bank, which, sailing from Zanzibar on about Dec. 21, 1950, reached Singapore on Jan. 20, 1951, having overtaken the Tjibadak. Inasmuch as the appellants did not receive any cloves from the respondents, the appellants were in turn unable to deliver any cloves to Messrs. Makhanlall & Co., or to Messrs. Panachand & Co. In response C to the inquiries which these sub-purchasers addressed to the appellants, the solicitors for the appellants stated (in letters dated Jan. 18, 1951):

> " Our clients have pressed Messrs. Jumabhoy & Sons, Ltd., for delivery of the cloves but they replied on Dec. 29, 1950, to say that the Zanzibar suppliers have not effected our clients' shipment of cloves and our clients' contract with them must be considered as cancelled."

D Thereafter the appellants paid compensation to the two firms. Through what was called the respondents' arbitration, it was agreed that the sum to be paid by the appellants to Messrs. Makhanlall in full settlement of their claim should be $28,000. That sum was paid, as was likewise a sum of $15,000 to Messrs. Panachand & Co. with whom it was agreed that such sum would be accepted in full settlement.

E The appellants brought proceedings against the respondents and, by their statement of claim dated Apr. 7, 1951, claimed the sum of $113,820 as damages by reason of the failure of the respondents to give delivery of the cloves referred to in the contract of Nov. 7, 1950. The sum claimed was the difference between the market price (in December, 1950, and January, 1951) which was said to be $230 per picul, and the purchase price. The effective paragraph in the defence F of the respondents delivered on June 28, 1951, was in these terms:

> " Defendant states that the contract was made subject to force majeure and shipment and that no shipment of the goods contracted to be sold took place."

When the action came on for trial in October, 1955, the appellants were given G liberty to amend their statement of claim, and the trial was adjourned. The appellants added to their statement of claim by pleading their contracts of sub-sale with Messrs. Makhanlall and Messrs. Panachand and the settlements they had effected, and claimed the amounts paid under these settlements together with the amounts of costs they had paid and also their loss of profit, all by way of special damages. The appellants limited their claim to the sum of $48,280 H being the amount of the special damages shown in the amended statement of claim. The claim for damages on the basis of the difference between the contract price and the market price remained—but the amount of such claim was limited to $48,280. Apart from questions relating to damages the issue in the action was that which was raised in the paragraph in the defence set out above. The respondents relied on the words " Subject to force majeure and shipment "; I they claimed that no shipment of the goods contracted to be sold took place.

In order that the reasoning of the judgments under review may be understood, it is necessary to make brief reference to certain other arrangements made and other commitments entered into by the respondents. As will be seen, however, these were of no concern to the appellants. In November, 1950, the respondents entered into contracts (some sixteen in number) to sell to various buyers various quantities of cloves, which in total amounted to approximately 760 tons. Such cloves were all to be of November shipments. On various dates (mostly in November, 1950) the respondents entered into contracts (some thirteen in number) to sell various quantities of cloves, amounting in total to 375 tons, which were to be of December shipments. In November, 1950, the respondents entered into three contracts (being two in addition to the contract with the appellants now being considered) to sell Zanzibar cloves December shipment. In total, these three contracts amounted to 125 tons. There were various differences in regard to the conditions which appeared in the various contracts. After the respondents became aware that three hundred tons were to arrive on the Tjibadak and fifty tons on the Ettrick Bank, they consulted their solicitors as to what they should do. In the result, as was stated in his judgment by TAN AH TAH, J., the whole of the three hundred tons carried on the Tjibadak were delivered to the buyers who were expecting the November shipments. As the total quantity to be delivered to these buyers was approximately 760 tons, the respondents had to pay compensation for short delivery. As to this, Mr. Jumabhoy, in his evidence, said that, in regard to the " November contracted goods ", there were deliveries to the respective buyers proportionately. He said:

> " I did not take any profit by selling cloves at the market price which was then very high. I delivered the goods to buyers at contract price."

Of the fifty tons carried on the Ettrick Bank, four tons were delivered to buyers of November shipments, while the remaining forty-six tons were delivered to buyers of the December shipments which totalled 375 tons, in part performance of the contracts of sale. There was, therefore, a balance of 329 tons due to be delivered to such buyers. The learned trial judge held that, in order to satisfy the claims of these buyers, the respondents either had to buy cloves in Singapore for delivery to them or had to pay them compensation.

The learned trial judge held that the respondents were protected from liability by reason of the operation of the words of the contract. He based himself largely on the judgment of PORTER, J., in *Hollis Bros. & Co., Ltd.* v. *White Sea Timber Trust, Ltd.* (1). In that case, the parties had entered into a contract for the sale of parquet blocks c.i.f. for shipment from a port in the Arctic Circle which was only open to shipping for about one month in the year. In respect of one parcel of the blocks there was an undershipment of blocks of a particular size. There was a clause in the contract which provided:

> " In the event of undershipment of any item buyers are to accept or pay for the quantity shipped, but have the right to claim compensation for such short shipment."

There was also a clause which read:

> " This contract is subject to sellers making necessary chartering arrangements for the expedition and sold subject to shipment: any goods not shipped to be cancelled."

An arbitrators' award in favour of buyers was subject to the opinion of the court on the question whether the buyers' right to claim compensation for short shipment was negatived by the words " sold subject to shipment: any goods not shipped to be cancelled ". In the context of that case, PORTER, J., rejected the view that those words could be given the meaning that the sale was subject to the ability of the sellers to ship and that there was cancellation of any goods in respect of which there was inability to ship. He held that the words " subject to shipment " meant " provided the sellers in fact ship " and that there was an option in the sellers to ship or not to ship. He held, however, that, if the goods were shipped, they had to be attributed to the contract and that the sellers could not treat them as free goods unattributed to any contract. He said (2):

> " My view is that if they have shipped the goods the sellers are obliged,

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(1) [1936] 3 All E.R. 895.

(2) [1936] 3 All E.R. at p. 900.

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> at any rate if they have not been shipped in fulfilment of other contracts, to supply them under this contract."

Basing himself on this case, the learned trial judge considered that the three hundred tons of cloves carried on the Tjibadak and the fifty tons carried on the Ettrick Bank were shipped in fulfilment of definite contracts which had been entered into by the respondents and which were subject to no condition as to B shipment. He held that the respondents were under no obligation to supply the cloves to the appellants. One question raised in this appeal is whether, apart from questions of construction, it is correct on the facts to say that the fifty tons were shipped in fulfilment of definite contracts.

In the Court of Appeal, WEE CHONG JIN, J., agreed with the judgment of the learned trial judge. RIGBY, J., was also in agreement. He considered C that the learned trial judge was justified in holding that the total quantity of 350 tons carried on the two vessels was clearly shipped in fulfilment of definite contracts which contained no condition as to shipment. RIGBY, J., was further of the opinion that the presence of the words "Subject to shipment" had the result that there was no more than an executory and unenforceable agreement which would only be converted into a valid contract of sale between the parties D by the seller exercising his option to ship, coupled with some evidence, direct or circumstantial, that the goods shipped were intended to be appropriated to that contract. KNIGHT, Ag. C.J., was of the contrary opinion. He said:

> "As I see it the appellants are right and the words 'subject to shipment' must be strictly construed and can only mean 'subject to shipment of E fifty tons in December', which shipment was in fact made to the respondents."

He also said:

> "If the respondents wished to cover themselves against a failure to obtain the cloves in Zanzibar why did they not say in the contract 'subject to shipment of 350 tons'—or whatever numbers of tons it was that they F required to fulfil *all* their undertakings? Again, if the respondents meant to contract with the appellants only if they obtained the cloves and gave no undertaking that they would obtain them—surely this too could have been very simply embodied in the contract?"

Counsel for the appellants submitted that the phrase "subject to shipment" G contemplated a failure to ship which was beyond the control of the respondents and which might occur despite the exercise of reasonable diligence to effect shipment. He submitted that it was for the respondents, if they sought the protection of the contractual clause, to establish that they had used reasonable diligence, which, he submitted, they had failed to establish. In reliance on his submission that the contractual clause did more than to give the respondents H an option whether to ship any goods or not, he referred to *Star Public Saw Mill Co.* v. *Robert Bruce & Co., Ltd.* (3), and *Gray* v. *Slater, Birds & Co.* (4), and to cases where contracts were made subject to import or export licences being obtained. Counsel for the respondents referred to authorities such as *Kokusai Kisen Kabushiki Kaisha* v. *Johnson* (5). In that case, there was a charter which had the words "This charter is concluded subject to stem, same I to be confirmed in London not later than Monday the 7th inst." In the circumstances of that case, ROWLATT, J., held that it would be improper for him to read in a qualification that the words should only take effect if it could be shown that the charterers had taken all due measures to try to arrange a stem. Their Lordships were also referred to various authorities relating to the construction of phrases bearing some measure of resemblance to that now under consideration; but cases which relate to the construction of other words in other contexts do not yield effective guidance. It must furthermore be borne in mind that the clause now under consideration is not "subject to shipment" but "subject to force majeure and shipment." There is, therefore, a double barrelled condition in which there is a juxtaposition of "force majeure" and of "shipment". Having regard to this consideration, their Lordships think that the clause in the contract should be construed as meaning that the contract was (a) conditional on the sellers not being prevented by circumstances amounting to force majeure from carrying it out, and (b) conditional on the sellers being able to procure the shipment in December, 1950, of cloves to the quantity and of the description referred to in the contract. So far as the clause deals with force majeure, it appears to be designed to protect the respondents from liability in the event of their being prevented from performing the contract by circumstances beyond their control. It seems to their Lordships to be in consonance with this to construe the second branch of the condition as being designed to protect them from liability in the event of their being prevented from carrying out the contract through inability to procure the shipment. If the words were to be construed as covering a situation when shipment did not take place merely as the result of the arbitrary choice of the vendor, then there would be no contractual force in the document, which would merely give an option to the vendor. There may be cases where words in a contract will in certain events provide an excuse for a vendor who fails to deliver. Thus, in *Tennants (Lancashire), Ltd.* v. *C. S. Wilson & Co., Ltd.* (6), there was a condition in the contract which provided that

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(3) (1923), 18 Lloyd's Rep. 7.
(4) (1924), 19 Lloyd's Rep. 59.
(5) (1921), 8 Lloyd's Rep. 434.

> "deliveries may be suspended pending any contingencies beyond the control of the sellers or buyers (such as . . . war . . .) causing a short supply of labour, fuel, raw material, or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article."

So, in *Pool Shipping Co., Ltd.* v. *London Coal Co. of Gibraltar, Ltd.* (7), there was an exceptions clause in wide terms under which the court felt entitled to look beyond the buyer and seller and to consider the sellers' commitments under contracts with other buyers. There are no words in the present contract which enable the respondents to excuse their failure to deliver by reference to their other commitments.

The construction of the clause set out above seems to their Lordships to produce a more reasonable result than other suggested constructions. It would be strange if the clause had to be construed as making the contract conditional on (a) the sellers not being prevented by force majeure from carrying it out, and (b) the sellers choosing to ship the cloves which they were to be free to do or not to do at their own will and pleasure. It would be additionally strange if, following on the provision against the consequences of force majeure in its first branch, the second branch of the condition went on to make the contract conditional on the sellers choosing to ship the cloves and thinking fit to allocate them to the contract which they were to be under no obligation to do. It seems unlikely that a clause would be framed to provide that force majeure was to excuse a contracting party from doing that which he was under no obligation to do. In the courts below, the appellants appear to have relied mainly on a submission that, even if the respondents were free to ship or not to ship as they chose, they became contractually bound if they did, in fact, ship. The respondents, on the other hand, argued that the contract was only binding in the double event of the sellers in fact shipping cloves and allocating a sufficiency of the cloves shipped to this particular contract. The undisputed facts show that the respondents were able to ship and did, in fact, in December, 1950, ship cloves to the quantity and of the description set out in the contract for Nov. 7, 1950. The shipment by the respondents of fifty tons shows that shipment of the goods contracted to be supplied was not prevented by circumstances beyond their control. The condition, as their Lordships think it should be construed, was, therefore, satisfied. Stated otherwise, the respondents did not bring themselves within the excusing provision of the clause. It follows that, when the respondents failed to deliver to the appellants the cloves contracted for and when they purported to cancel the contract, they committed a breach of contract for which they became liable in damages to the appellants.

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(6) [1917] A.C. 495.

(7) [1939] 2 All E.R. 432.

It was strongly submitted by counsel for the respondents that the submissions made by the appellants in the courts below did not include any submission covering the construction referred to above. While this appears to be the case, their Lordships cannot regard themselves as being restricted or circumscribed in regard to a question as to the proper construction of the clause in question. There would have been more force in the objection if a new point not taken below was one which could have been met by further evidence, e.g., if there had been no shipment and if it were alleged that the sellers had not taken all the steps which were reasonably open to them to procure the shipment. Inasmuch, however, as the respondents, by shipping fifty tons, had themselves shown that they were able to ship fifty tons, no new issue of fact was involved. Their Lordships are clearly of the opinion that the respondents cannot be allowed to excuse their non-performance by reference to their other commitments or to seek to give those other commitments priority over the appellants' claim. The contract of Nov. 7 contains no reference to other contracts or to other commitments. Such other commitments were of no concern to the appellants. The contract was simply a contract for the sale by the respondents of cloves of the quantity and description set out in the contract, and the respondents failed to fulfil their obligations to the appellants. Apart from these considerations, their Lordships find it difficult to see how it can be said that the fifty tons were " shipped in fulfilment of other contracts ". If it is asked: " Which contract or contracts? ", no satisfactory answer can be given and none was given. The respondents urged that the words " subject to shipment " meant " subject to our in fact shipping enough to satisfy our commitments ", or " subject to our shipping enough to satisfy all contracts that we will have made up to the date of arrival of the last ship of December shipments ". In their Lordships' view, it would be quite unreasonable and would be an unwarranted straining of interpretation to place any such meaning on the words now being examined. To arrive at any such interpretation, a drastic series of additions to the words used would be necessary.

It is further to be observed that there are no additional words of limitation such as " subject to shipment of fifty tons which we, at the time of shipping, appropriate to you ". Doubtless, no such words were used for the reason that, in view of the nature of the respondents' business and operations, there would be no question of their appropriating or earmarking any particular cloves to any particular contract at the time of shipment. The respondents were importers and stockists, and their necessity was to secure that they arranged for sufficient goods to be shipped to themselves in Singapore, so that they could then meet all their obligations in Singapore. It is manifest that the respondents did not ship the quantities that they needed. But, when they shipped, they were merely shipping goods to themselves as merchants and importers and, so far as they are concerned, they had not arranged the particular ways in which they would deal with the cloves after the cloves had arrived in Singapore. The evidence shows that there was no allocation or attribution to any particular client of theirs. According to the evidence, what the respondents did was to go to their solicitors to take advice as to what they should do by way of allocating the tonnage available for them having regard to the arrangements that they had made. But those arrangements were no concern of the appellants, and there was no stipulation in the contract in regard to any other contracts.

For the reasons stated, their Lordships consider that, on the undisputed facts, the respondents were without excuse when they failed to deliver to the appellants. On this basis, there was agreement between the parties during the hearing before their Lordships' Board that the correct measure of the appellants' damages was the difference between the contract price and the market price at or about the date when the s.s. Ettrick Bank arrived in Singapore. The difference between the parties was whether the amount of such damages could be ascertained and had been satisfactorily proved by the available evidence. It had been stated in the Court of Appeal that, if an order were made directing the learned trial judge to reopen the proceedings and to assess the damages payable, no evidence could, after the intervening lapse of time, be called to establish what was the market price of cloves in January, 1951. The problem was, therefore, one of proof. In the Court of Appeal, KNIGHT, Ag. C.J., held that the evidence was sufficient to establish that the appellants were entitled to recover the sum of $46,783.80 damages. WEE CHONG JIN, J., concurred in this view. The reasoning of KNIGHT, Ag. C.J., was that evidence as to the market price at the relevant time could sufficiently and satisfactorily be found in the facts and circumstances relating to the settlements effected by the appellants with Messrs. Makhanlall & Co., and with Messrs. Panachand & Co. The contract price between the appellants and these firms was $99 per picul. The sum paid after a negotiated settlement with Messrs. Makhanlall was $28,000. The respondents took a part in negotiating and bringing about that settlement. It seems a reasonable inference as a matter of business common sense that the sum of $28,000 would certainly not be more than but would probably be less than the sum resulting from taking the contract price of $99 and the market price at the date when Messrs. Makhanlall should have received their cloves. In their Lordships' view, this is very reasonable. But by way of answer to or criticism of this, it was pointed out that the settlement made with Messrs. Panachand & Co. only involved a payment of $15,000. Both settlements, which incidentally were effected within a few days of each other in August, 1951, related to contracts for the same quantities and having the same figures of purchase price and the same times of delivery. It could not, therefore, be that both figures, since they differed, were direct calculations based on the market price. This criticism does not, however, diminish the force of the inference that no settlement would have been negotiated, particularly by the respondents, on the basis of paying more than the difference between the contract price and the current or market price at the time of non-delivery. It was common ground that there was at all material times an available market for cloves in Singapore. It was said that, though Mr. Jumabhoy had himself been under the necessity to make local purchases in Singapore in an endeavour to meet his obligations, yet he was not asked questions as to the prices he had had to pay. Though it was agreed that the evidence showed that, at the relevant time, the price of cloves was rising, it was submitted that the evidence was not adequate to enable the court to arrive at a conclusion as to what was the market price. Though there is some force in the contentions advanced, their Lordships consider, in agreement with the majority of the Court of Appeal, that it was a reasonable inference that the difference between the contract price of $94½ per picul for the appellants' fifty tons and the market price at the time when there should have been delivery was not less than $46,783.80.

For the reasons stated, their Lordships will humbly advise Her Majesty that the appeal be allowed, the judgments of the courts below be set aside and judgment entered for the appellants for the sum of $46,783.80. The respondents must pay the costs of the appeal and the costs in the courts below.

Appeal allowed.

Solicitors: *Amery-Parkes & Co.* (for the appellants); *E. F. Turner & Sons* (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

PRACTICE NOTE.

Practice—Appearance—Post—Appearance by post by defendants personally or by defendants' solicitors—London writs—District registry writs—Rules of the Supreme Court (*No.* 1), 1960 (*S.I.* 1960 *No.* 545).

The following notice has been issued by the masters of the Queen's Bench Division:

As from May 2, 1960, when R.S.C. (No. 1), 1960, comes into force, defendants' solicitors as well as defendants personally will be able to enter appearance by post.

In consequence of this new rule the masters of the Queen's Bench Division have prescribed modified forms of writs for use in London and also in district registries. These modifications refer to appearances by defendants mentioned in the footnotes on the writs and, in substance, are as follows:—

MEMORANDUM ON LONDON WRITS

> " The defendant may enter appearance personally or by solicitor either by handing in the appropriate forms, duly completed, at the Central Office, Royal Courts of Justice, London, or by sending them to that office by post. The appropriate forms may be obtained by sending a postal order for 10d. with an addressed envelope, foolscap size, to the Controller of Stamps, Royal Courts of Justice, London."

MEMORANDUM ON DISTRICT REGISTRY WRIT

> " A defendant who resides or carries on business within the above-named district must enter appearance either personally or by solicitor by handing in the appropriate forms, duly completed, at the office of the district registrar, or by sending them to that office by post.
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> " A defendant who neither resides nor carries on business within the above-named district may enter appearance personally or by solicitor either
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> (1) by handing in the appropriate forms, duly completed, at the office of the district registrar or by sending them to that office by post, or
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> (2) by handing in the said forms, duly completed, at the Central Office, Royal Courts of Justice, London, or by sending them to that office by post.
>
> " If a defendant enters an appearance in London personally or by solicitor there must be indorsed on the memorandum of appearance and on the copy thereof (1) the name of the district registry, (2) a statement that the defendant neither resides nor carries on business within the district of the district registry, and (3) the name of the plaintiff or his solicitor and his address for service."

There will be no fixed date for bringing these new forms into use—the existing forms may still be used until the supply is exhausted. It is for this reason in particular that the attention of solicitors is drawn to this new method of appearance so that they may ensure that the appropriate forms are filled up properly; as failure to do so may cause the memorandum of appearance to be rejected and before any corrections can be made in it the plaintiff may have signed judgment in default.

April 14, 1960.

DUPLE MOTOR BODIES, LTD. *v.* INLAND REVENUE COMMISSIONERS.

DUPLE MOTOR BODIES, LTD. *v.* OSTIME (INSPECTOR OF TAXES).

[COURT OF APPEAL (Lord Evershed, M.R., Pearce and Harman, L.JJ.), March 15, 16, 17, 18, 1960.]

Income Tax—Profits—Computation of profits—Accountancy method—Valuation of work in progress—Direct cost or on-cost method—Motor vehicle body building company.

In the computation of the profits for income tax purposes of a company producing motor vehicle bodies almost entirely to order, work in progress at the beginning and the end of the financial year, which had no market value, had been consistently valued by the company and its predecessor since 1924 on the direct cost method and that method had been accepted by the Inland Revenue. By that method the value of the work in progress comprised the direct cost of the materials and labour. For the year 1951-52 (based on 1950-51 accounts) the direct cost method attributed a value of £138,000 to the work in progress at the beginning of the year and of £136,000 at the end. Accordingly the taxable profits otherwise ascertained would be reduced by the difference (£2,000). If, however, the on-cost method were applied, a value at the end of the year £14,000 in excess of that at the beginning (increasing the profit by that amount) would be produced. Under the on-cost method the value included a proportion of the indirect expenditure, viz., business overheads. This increase was due to the fact that a higher proportion of the overheads was attributed to the work in progress at the end of the year than at the beginning (40.5 per cent. compared with 27.9 per cent.) owing to a slackening of business during the year and consequential increased costs of production. There had been no other change of circumstances. It was found that different accountants would apply different recognised variations of the on-cost method, that what items of overheads were to be included was not settled (the selection being arbitrary) and that either method was accepted by accountants as producing a true figure of profit. The company was assessed to income tax and profits tax on profits computed by adopting the on-cost method and this basis was affirmed by the Special Commissioners of Income Tax. On appeal,

Held: if there were alternative accountancy practices which might be applied, that practice should be adopted which on the facts of the particular case would produce the fairest result; in the present case the profits should be computed by applying the direct cost method since—

(i) which of the alternatives was the correct method was a question of law or of mixed fact and law depending on the facts of each particular case, and was not determinable as a matter of principle applicable generally, nor was it dependent on the method of accountancy sanctioned by the directors for the company's accounts and chosen in the interests of the company, and

(ii) on the facts relating to this particular company in the particular year, there being some onus on the Inland Revenue to justify a departure from a long-accepted practice, the direct cost method was the correct accountancy method by which to compute profits for income tax purposes, for the on-cost method would produce an unfair result.

Appeal dismissed.

[As to valuation of stock-in-trade in the computation of profits for income tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 145, 146, paras. 254-256; and for cases on the subject, see 28 DIGEST (Repl.) 71-75, *268-286*.]

Cases referred to:

Patrick v. *Broadstone Mills, Ltd.*, [1954] 1 All E.R. 163; 35 Tax Cas. 44; [1954] 1 W.L.R. 158; 28 Digest (Repl.) 74, *281*.

Sun Insurance Office v. *Clark*, [1912] A.C. 443; 81 L.J.K.B. 488; 106 L.T. 438; 6 Tax Cas. 59; 28 Digest (Repl.) 81, *307*.

Whimster & Co. v. *Inland Revenue Comrs.*, 1926 S.C. 20; 12 Tax Cas. 813; 28 Digest (Repl.) 424, *944*.

Cases Stated.

The taxpayer company appealed to the Special Commissioners of Income Tax against assessments to income tax under Case I of Sch. D. for 1951-52, 1952-53 and 1953-54 in the sums of £250,000, £200,000 and £1,000 respectively. The questions for determination were: (i) whether, in arriving at the cost of work in progress for the purpose of computing the profits of the company for income tax purposes, the cost of direct materials and labour only (direct cost) should be taken into account or whether there should be added to the direct cost a proportion of indirect expenditure (on-cost); and (ii) if on-cost was to be taken into account, what items of indirect expenditure fell to be included therein. It was common ground that there was no question of market value of work in progress, as it could not be regarded as saleable in its unfinished state.

The company was incorporated in 1946, and took over the business of a company which had been incorporated in 1919. Its annual turnover from 1948 to 1954 was in excess of £1,000,000. Its business was that of building to order bodies for different types of road vehicles, at the time mostly motor coaches, the bodies being built almost entirely to the specifications of the individual purchasers and the business not being that of mass production (the company never bought a chassis). The business was at the time seasonal, the busy season ending about the end of June. Since the business was almost entirely that of building bodies to order, very few finished bodies were included in the work in progress at the end of an accounting period. Since 1924 the company or its predecessor had used the direct cost method in ascertaining the cost of work in progress in its annual accounts.

The company contended: (i) that, in computing profits for income tax purposes, the amount to be taken into account in respect of work in progress was the amount of expenditure actually incurred directly and proximately in producing it, i.e., the cost of materials used, labour expended and other direct expenses; (ii) that all other expenses were properly deductible in arriving at the profits of the year in which they were incurred; (iii) that the level of overhead expenses of a business depended on the general extent and organisation of that business, did not vary directly with the volume of production and so was not directly connected with that production; (iv) that on the evidence it could not be said either that the direct cost method of valuation was inconsistent with the principles of commercial accounting, or that it did not produce a true figure of profit for income tax purposes; (v) that the direct cost method adopted by the company in computing its profits could not be displaced by the Crown unless it was shown to be inconsistent with the principles of commercial accounting or of income tax (which was not the case); (vi) that the direct cost method contained no element of arbitrary selection, whereas the on-cost method did contain such an element; (vii) that, for the purpose of ascertaining the true income tax profits for a year of assessment, a method which contained no element of arbitrary estimation was preferable to a method which did contain such an element; and (viii) that therefore the direct cost method should be applied.

The Crown contended: (i) that, where there was more than one method for arriving at the profits for a relevant period, that one which showed most accurately the position between the Revenue on the one hand and the taxpayer on the other so as to give the true profit of a particular accounting year, should be adopted;

(ii) that accordingly, in arriving at the company's true profits for income tax purposes, the value of the work in progress and finished goods at the end of an accounting period must be credited in the accounts at full cost, i.e., the direct cost with the addition of the proportion of overhead expenses referable to such work in progress and finished goods; (iii) that to exclude all overhead expenditure from the cost of work in progress was in effect to allocate the whole of such expenditure to the sales which had been effected during the accounting period; (iv) that at least some part of indirect expenditure had been expended on work in progress, and that it could not be correct in arriving at the Case I profits of an accounting period to allocate the whole of the indirect expenditure (as the direct cost method did) to sales which had been effected during that accounting period; and (v) that the on-cost method produced the true view of the Case I profit for a year of assessment and the direct cost method did not and that the on-cost method should therefore be applied.

The commissioners held that there was something more in the true cost of producing an article than the mere cost of labour and materials and that the object of the on-cost method was to get at the cost. They therefore decided in favour of the on-cost method but considered that any proportion of overheads to be attributed to the cost should be limited to factory overheads, viz., the overheads of the place where the thing was actually being made. On July 3, 1959, Vaisey, J., allowed the taxpayer company's appeal, holding that, both the direct cost method and the on-cost method being proper methods and producing a true profit for income tax purposes, the commissioners should accept the method adopted by the directors of the company. The Crown appealed to the Court of Appeal. There was a like appeal with regard to profits tax.

F. N. Bucher, Q.C., and *A. S. Orr* for the Crown.

R. E. Borneman, Q.C., and *C. N. Beattie* for the taxpayer company.

LORD EVERSHED, M.R.: The question for the decision of this court may be taken as it was formulated by the Special Commissioners at the end of the Case Stated. It is as follows:

> "Whether, on the evidence, and in view of our findings, our decision that the 'on-cost' method should be applied in arriving at the cost of work in progress for the purpose of computing the company's Case I profits was erroneous in law."

The question as formulated did not limit (I will assume deliberately) the subject-matter to the taxpayer company's Case I profits for particular years; but the problem before the Special Commissioners and before us should be treated as so limited. At the beginning of the Case three years are referred to, 1951-52 and the two succeeding years (though, for the purposes of this judgment and of the argument, one particularly has been mentioned). I shall treat the question posed as relating to those three years. The Special Commissioners then put a second question, to which I may make some brief allusion hereafter.

The question arises in connexion with the computation of the profits of the company, Duple Motor Bodies, Ltd., for the purpose of income tax under Case I of Sch. D. Put in the language of the statute, now enshrined in s. 127 of the Income Tax Act, 1952, the real question is: For the years in question, what were the full amounts of the profits or gains of this company's trade? Before *Whimster & Co.* v. *Inland Revenue Comrs.* (1) the profits or gains of a trade of a company such as this, I understand, were ordinarily arrived at by discovering what the trading receipts were for the year in question and then deducting from those receipts the proper expenses which were allowable according to income tax legislation. Since *Whimster & Co.* v. *Inland Revenue Comrs.* (1) it has been recognised that, for the purpose of ascertaining the full amount of the profits or gains of a trade, it is or may be also necessary to bring into the account at the

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(1) 12 Tax Cas. 813.

A beginning and at the end respectively of the relevant period the values of the work in progress or the stock-in-trade, or perhaps both; and that, again in the ordinary case, such values will be arrived at by looking at the market value or the cost, whichever is the less. The effect of bringing these matters into the account is this, that, if at the end of the year the value of the work in progress or stock-in-trade is shown to be greater than it was at the beginning, then to B that extent the full amount of the profits will be increased; and vice versa if, at the end of the year, the value of such items is less than it was at the beginning. In the present case we are concerned, not with stock-in-trade but with work in progress. The reason for that is the nature of this company's business. As its name implies, its business is that of manufacturing motor bodies, and we were informed by counsel for the Crown in his opening that the business wholly or C very substantially consists of making these bodies to order. That being so, there would of course be no question of a market value for any bodies either partly finished or wholly finished but still on the premises of the company; that is stated at p. 13 of the Case Stated, where, in the course of formulating their decision, the commissioners say: "It is agreed that there is no question before us of market value."

D I can now state more precisely the nature of the question that we have to decide, and I can further explain the reference to on-cost in the question as it was posed by the Special Commissioners. The problem is, in relation to this company's trading for the years mentioned, how one should arrive at the value of its work in progress at the beginning and end of the periods. In the accountancy profession two methods or theories are current, both of which appear to E have their devotees. One is known as the "direct cost" method and the other as the "on-cost" method. The direct cost method, as the words naturally import, means that the subject-matter—in this case the work in progress—is valued by looking at what has been expended exclusively on the work in progress at the beginning and end of the relevant periods, viz., for practical purposes (at any rate in this case) the cost of the materials used and the wages F of the labour directly employed. The on-cost method goes further; it says that one should not exclude a proper proportion of other, more general costs of the company's business, some part of which should be attributed to the work which was in progress at the relevant dates.

When counsel opened the case for the Crown before us, he made it plain that the Crown desired that we should decide this matter as one of broad principle: G that, of the two champions being displayed before us, we must decide as a matter of broad principle between Sohrab and Rustum. Similarly, counsel for the company invited us to decide that the direct cost method was the one that, generally speaking, should receive the imprimatur of this court. In support of these views, general arguments were put before us which clearly have much force. It was said by counsel for the Crown that, if one is inquiring what is the H value of, say, stock-in-trade, and if in the circumstances the value is to be reached by looking at what the stock-in-trade has cost to produce, then it is not realistic to exclude any part of the general costs of the company's business, and so to do simply loads those costs unduly on the sold articles. On the other side, counsel for the company has said that here one is concerned only to arrive at a valuation, and in arriving at it—because, after all, one is merely comparing I two dates—it is only necessary and only safe to look at the costs which can be certainly ascertained, and one should not go beyond that into territory which at once becomes vague and uncharted. He supports that by saying that in this case the Special Commissioners, having decided in favour of on-cost, were then unable to express any concluded view which of the possible items of indirect expenses were those that should be included.

The Special Commissioners were persuaded to deal with this matter as one of general principle, and they so stated; and, as a matter of general principle, they expressed their own preference in favour of the on-cost method, for reasons

A to which I shall allude. In so far as they did that, it seems to me inevitable that they were deciding, not a question of fact, but a question of law—or, at least, of mixed law and fact. I am clear that it would be wrong for this court to deal with this matter as one of principle and to decide now that one method is the right method and the other is not, either for all purposes of this company or, still less, for all purposes in the case of trading companies. I think that so to do would go altogether outside the function of the court, which is to decide B the particular problem presented by the particular case before it. As counsel for the Crown more than once emphasised, we are only concerned with the full amount of this particular company's profits or gains for tax purposes for certain years. Moreover, to decide the matter as one of principle, one way or the other, I think, would fly in the face of what has been found to be professional opinion among chartered accountants. I entertain the strongest inclination to the view C that, if we decided now in favour of one method rather than the other, in a very short time a case would arise which would show clearly that on those facts the decision of this court could not be right. If we were to decide in favour of the on-cost method as a general proposition, so far as I can see, the result would at best be inconclusive; and certainly, if we adopted the drawing of the line which was indicated by the Special Commissioners and which I think counsel for the D Crown was inclined to accept, though he thought it was wrong, we should be giving our sanction to a purely arbitrary definition of the limits of indirect costs which should be taken into account. I emphasise that we have to apply our minds to the question of the proper way of valuing work in progress at the beginning and end respectively of the three years with which we are concerned as it affects the profits or gains of the taxpayer company. E

Two statements were cited by SINGLETON, L.J., in *Patrick* v. *Broadstone Mills, Ltd.* (2). The first citation, from the opinion of LORD PRESIDENT CLYDE in *Whimster & Co.* v. *Inland Revenue Comrs.* (3) is as follows (4):

> " 'In computing the balance of profits and gains for the purposes of income tax, or for the purposes of excess profits duty, two general and fundamental F commonplaces have always to be kept in mind. In the first place, the profits of any particular year or accounting period must be taken to consist of the difference between the receipts from the trade or business during such year or accounting period and the expenditure laid out to earn those receipts. In the second place, the account of profit and loss to be made up for the purpose of ascertaining that difference must be framed consistently with the ordinary principles of commercial accounting, so far as applicable, and in G conformity with the rules of the Income Tax Act, or of that Act as modified by the provisions and schedules of the Acts regulating excess profits duty, as the case may be. For example, the ordinary principles of commercial accounting require that in the profit and loss account of a merchant's or manufacturer's business the values of the stock-in-trade [and I would add here, though it is not in the opinion, " or work in progress "] at the beginning H and at the end of the period covered by the account should be entered at cost or market price, whichever is the lower; although there is nothing about this in the taxing statutes '."

The second citation (5) is a brief citation from the speech of LORD LOREBURN, L.C., in *Sun Insurance Office* v. *Clark* (6), where the Lord Chancellor said: I

> " 'An estimate being necessary [i.e., for the purpose of arriving at the value of the work in progress] and the arriving at it by in some way using averages being a natural and probably inevitable expedient, the law, as it seems to me, cannot lay down any one way of doing this. It is a question

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(2) [1954] 1 All E.R. 163; 35 Tax Cas. 44. (3) 12 Tax Cas. at p. 823.
(4) [1954] 1 All E.R. at p. 171; 35 Tax Cas. at p. 65.
(5) [1954] 1 All E.R. at p. 173; 35 Tax Cas. at p. 67.
(6) [1912] A.C. at p. 451; 6 Tax Cas. at p. 75.

> of fact and of figures whether what is proposed in each case is fair both to the Crown and to the subject '."

Founding myself on those two citations, it seems to me that one proceeds in this case and in other cases to say: What is the normal, proper accounting practice in regard to this matter, and does what is normal produce a fair result? Or, if there are alternatives, which is shown on the facts of the particular case to produce the fairer result?

The Special Commissioners, who are persons of great experience, refer in para. 7 of the Case Stated to certain expert evidence given, and then, in para. (b), they say:

> " On the evidence adduced before us we find—and this naturally has caused us difficulty—that the accountancy profession as a whole is satisfied that either method will produce a true figure of profit for income tax purposes."

Counsel for the Crown somewhat criticised the addition of the last four words, but I do not think that criticism is justified. If either method is a proper method for arriving at profits for general commercial purposes, then it satisfies the test which is suggested by LORD PRESIDENT CLYDE, but of course it still leaves it to be debated whether it is fair in the particular circumstances of a particular case. The commissioners went on:

> " In this state of affairs we find that it is very much a matter of policy for the decision of the directors of a company which method should be used."

I shall come back to that presently; but a little lower down the commissioners deal with the still more vexing problem, as they thought and as I think: If in any particular case one does choose the on-cost method, then what of the indirect costs does one include? As regards that, they said:

> " If the on-cost method is applied, different accountants may apply different recognised variations of this method; and, whatever recognised variation of this method is applied, the accountancy profession as a whole would not condemn any particular recognised variation as being unsound. Furthermore, we find that there is considerable scope for difference of opinion as to how a recognised variation of the on-cost method should be applied to the facts of each particular case."

I pass at once to that part of the Case in which their decision is recorded, para. 11, and I will first read four or five passages without comment. They begin:

> " We have been asked to decide this appeal on a broad question of principle, and we are going to do that, fully aware that in doing so we shall be leaving open a wide field for discussion between the parties; but we feel that, having to decide this as a broad question of principle, that is really inevitable and cannot be helped."

Then, after stating what the problem was, and referring briefly to certain arguments, they say at the foot of p. 13:

> " The Crown contend that some part of these overheads [i.e., the general business overheads] must go into the cost of work in progress. When the factory is not running at full capacity, the Crown say it is obvious that production costs more—that is, it costs more if the factory is not running at full production to make a particular vehicle. That is a fact, the Crown contend, and that kind of fact ought to be reflected in the accounts, and the on-cost method does reflect that kind of fact."

In the next paragraph they deal with the expert evidence, and as regards one of the accountants, Mr. Clark, they say:

> " Mr. Clark's evidence comes really to this, that the two methods are both accepted in the accountancy profession, and that you cannot say there is a

> general opinion in the accountancy profession that the on-cost method is unsound. Mr. Clark told us that each method will produce a true view of profits for income tax purposes "

—and I emphasise the last words, to show justification for what I have already read—

> " and I think we might say here that we consider it important that ascertaining profits for income tax purposes does involve ascertaining profits year by year."

I should add that it had earlier appeared to have been Mr. Clark's evidence that, although, as he stated, both methods were regarded as acceptable and proper, there seemed recently to be a swing against the on-cost method within the accountancy profession. The commissioners then say this:

> " We feel in the end that to get at the true cost of producing an article—that is the cost of making the thing—there is really something more in the cost than the mere cost of labour and the cost of the material that has gone into that particular article. It seems to us that it has really cost more to build a vehicle body than just the cost of labour and material. The object of the on-cost method—whether we are right or wrong about this—is really to get at the cost; and as we are coming down on the side of the on-cost method it appears to us that any proportion of overheads, which on that method is to be attributed to cost, should be limited to factory overheads, namely, the overheads of the place where the thing is actually being made. We realise that the expression ' factory overheads ' is rather vague; but, since we are asked to decide this matter on a broad question of principle, we feel, as we have already said, that it is inevitable that a wide field for discussion should be left open and we do not feel able to define the term ' factory overheads '."

They conclude:

> " We finish where we began by saying we know full well that we have left a wide area open. We do not think we can help that."

It seems to me an obvious criticism of the Crown's argument that, if we must give our imprimatur to the on-cost method as a broad principle, then, according to the Special Commissioners, that leaves quite undecided (and they thought really incapable of decision) what are the exact items which should be included. That is not indirectly to say that I am intimating that the direct cost method is the proper method as a broad matter of principle, but it shows what has been emphasised in the passages I have cited: that the court should deal—and, as I think, deal only—as a question of fact and figures with the particular circumstances of particular cases, and say: On these facts, on these figures, is this way of doing it fair as between the Crown and the subject, or is that way the fair way of doing it?—and I do most strongly emphasise that aspect of the matter.

The learned judge, VAISEY, J., resolved the conflict in a different sense from that of the Special Commissioners. Counsel for the Crown somewhat criticised his judgment, because he said that the commissioners had found that it was proper accounting practice to use either method, whereas, said counsel, the commissioners said that they had found that the accountants were satisfied that it was proper to use either method; but in my judgment that is exactly the same thing for this purpose, having regard to the Lord President's opinion. I do not therefore think that there is anything in that criticism. On the other hand, I agree with counsel that for income tax purposes one cannot say: " Well, it is a matter for the directors. If the directors had decided to adopt in a particular year or years the direct cost method, that concludes it for income tax purposes ". The duty of the directors is to make their decision on this matter in the best interests of the company, looking at it as a business entity, and quite plainly it could not be said that their conclusion, quite properly come to by them as persons

A responsible for the company's management, was decisive of the matter for income tax purposes.

As already stated—and I wish to emphasise it as strongly as I can—I think it would be wrong to decide this matter on general principle. I base that view partly on the citations made from *Patrick* v. *Broadstone Mills, Ltd.* (7) and also
B on the results it might appear to lead to, of which the citations from the Case Stated will have given sufficient illustration. I take by way of example what was said at the beginning of p. 13. The Crown's contention—and I gather the Special Commissioners in some sense founded themselves on this—was that obviously, if one is asking how much it costs to produce something, one should not exclude overheads altogether, and it is unrealistic to do so. But the conclusion of the
C passage I have read seems to me to be this, that, if production is slack, it follows that the proportion of overheads attributable to the work in progress is larger, from which they apparently are led to the conclusion that the taxable profits are necessarily larger—a proposition which I think is self-condemnatory.

Certain schedules have been exhibited to the case. For the first year which has been the subject of debate, ended Mar. 31, 1951—since, by s. 127, one looks
D at the preceding year—the work in progress at the end of the year according to the company's method of computation, based on direct cost, was worth £136,000 odd; at the beginning of the same year it was worth £138,000 odd. The work in progress was therefore £2,000 less in value at the end of the year than at the beginning, with the result, no doubt, that the taxable profits would be reduced by £2,000. The application for the same year of the on-cost method shows that,
E if at the beginning and end of each year the sums are added, which the Crown suggests should be added, however arbitrarily selected from overheads—and I repeat that the Crown seem to have accepted the arbitrary selection, though they said in the plainest language in opening the case that this geographical limitation is quite wrong—the curious result is that the value of the work in progress at Mar. 31, 1951, is, not £2,000 less, but £14,000 more than it was at the
F beginning of the year in question. So that, according to this computation, the full amount of the profits or gains to be taxed must be increased by £14,000 instead of being reduced by £2,000 in respect of that item.

Of course, if on a fair view the profits were £14,000 more and not £2,000 less, then it would be unfair that the tax liability should depend on the latter and not the former calculation. But what evidence is there to show that the right view is
G that work in progress should be taken in at £14,000 more at the end than at the beginning? We have no idea, because, e.g., there is no evidence whatever of the number of unfinished motor bodies on the company's premises at the beginning or at the end of the year in question. What we do know, however, is that during this year ended Mar. 31, 1951, there was a considerable slackening off of the company's business. Whereas for the year ended Mar. 31, 1950, the wages paid
H to labour were £534,000 odd, for the year ended Mar. 31, 1951, they were £347,000 odd—nearly £200,000 less. I suppose that, as a judge, I may take some account of the general knowledge that there has been no general tendency towards a reduction in wages, at any rate on that scale, during the past decade, and it therefore seems plain that far less work was being done.

That of itself, of course, supports what I indicated earlier, that the Special
I Commissioners seemed to be basing themselves on the passage which I have read at p. 13 of the Case Stated (8), i.e., they were saying that, because, owing to a slackening off of business, a greater share of overheads must be applied to work in progress, therefore the taxable profits of the company were greater. I add only that, in order to arrive at the figure for which the Crown contend—viz., £14,000 excess of value of work in progress at the end as compared with the beginning—the proportion of overheads taken in as at Mar. 31, 1950, was 27.9 per cent. of the whole, and at the end it was 40.5 per cent. The justification for

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(7) [1954] 1 All E.R. 163; 35 Tax Cas. 44.

(8) Page 115, letter I, ante.

these percentages has not been debated, but they make it perfectly plain that the increased value of the work in progress depends obviously on the fact that this company was doing less work.

There was some discussion before us on onus of proof, and I accept it that, where the taxpayer is assessed and complains that the charge made on him is wrong, he must show it to be wrong; but also, as counsel for the Crown naturally and frankly conceded, in discussing the case the onus may shift from time to time from one party to the other. In considering the proper way to formulate a conclusion here, I think that certain facts are relevant in this particular connexion. In the first place, it is conceded by the Crown that this company, and its immediate predecessor, have been taxed on the full amount of profits and gains, arrived at so as to include the value of work in progress calculated by reference to the direct cost method, for rather more than a generation, and throughout that period the Crown have accepted that method of arriving at the value, or the comparative values, of the work in progress, as being fairly represented by the application of the direct cost method. Further, as counsel for the Crown again frankly conceded, in the tax years with which we are concerned there was no relevant change of circumstances in this company's general affairs at all. In those circumstances, I should have thought that at any rate there was some obligation on the Crown to show why they have now come to the conclusion that the on-cost method should be adopted and the direct cost method should be discarded. What I have said perhaps supports the view that, for reasons which I assume may be quite good—at any rate, it is not a matter on which we have to express an opinion—it is thought that now is the time to strike a blow for the on-cost method in this sort of case. It may also support the view or the suspicion —which accounts for this matter of principle not having been raised before— that in the end (i.e., over a period of years) it matters not at all which method is adopted; in the end, it comes to the same thing.

In the result, however, if on the figures, on the facts, on the evidence, it were necessary for this court to reach an affirmative decision, I must say I would be prepared to conclude that, for these particular years and in relation to this particular company, the on-cost method was shown to produce, on the face of it, an unfair result; but again let me say that this is not an oblique way of saying that I am affirming the view as a matter of principle that the direct cost method is the right one. In those circumstances, I think I am content to put it in this way: referring back to the question posed by the Special Commissioners, which I need not repeat, I think that, in relation to the particular years and to this particular company, which is the only matter with which this case is concerned, the decision of the Special Commissioners was wrong in law. Having come to that conclusion, I would therefore dismiss this appeal.

PEARCE, L.J.: I agree. There is a divergence of view in the accountancy profession as to the respective merits and defects of the direct cost and the on-cost methods. The commissioners were asked by both sides to regard this case as a conflict à outrance between the two methods, and to give their verdict to the winner. We, too, have been asked to give such a verdict, but it would be wrong to lay down such a general rule as if it were a matter of law. It is a question of fact in each case to ascertain the true profit.

The result has been that the ascertainment of the particular profits for the particular year—which, after all, was the real object of the inquiry —has been a little submerged by this ideological dispute. It must be remembered that the costing of the work in progress, though it is a necessary part of accounting both from a commercial point of view and, since *Whimster & Co.* v. *Inland Revenue Comrs.* (9), from the income tax point of view, yet is only a means to the ascertainment of the profit and not an end in itself. Moreover, one year will correct the errors of another. It would be unfortunate if dogmas of method obscured the

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(9) 12 Tax Cas. 813.

A real purpose—the finding of a fair, true and reasonable assessment of the real profit of the business for the year. Whatever the merits of the on-cost method as seen from one point of view, in a certain set of circumstances it can produce an unfair result. As the Master of the Rolls pointed out in argument, not only can it produce such a result, but that particular set of circumstances does apparently arise in this particular case.

B When a factory has an idle and unprofitable year, the costing of the work in progress is inflated by the fact that, under the on-cost method, it has to bear an abnormally high proportion of the overheads during an uneconomic period. As a result, the profits are notionally increased, whereas in fact there are no true profits to justify that increase. In such a case, an actual loss could be converted on paper into a theoretical and untrue profit.

C Both theories rest ultimately on the fact that cost is a guide to value. When, owing to trade difficulties, cost parts company from value, difficulties arise; and it may well be that the more realistic the costing the greater the difficulty. It has been argued that an unfair result can always be avoided by the proviso that the market value can be taken as the touchstone wherever the on-cost calculation would produce too high a figure; but here it was common ground that the D market value was not appropriate to the facts of this case. Here it would seem that a substantial amount of the figure added by the on-cost method is due to lack of work in the factory. The profits are thereby notionally increased owing to that unprofitable lack of work. That result—which, owing to the general nature of the argument, had not received the prominence to which it was entitled—must be of very great importance in these assessments; and once it is fully E appreciated it becomes plain, in my view, that it would be wrong in the circumstances of these particular assessments, in these particular years, to depart from the simpler, direct cost method that had always been used by this company over so many years. For that reason, and for those that have been given in greater detail by my Lord, I agree that the appeal fails.

F **HARMAN, L.J.:** I, too, agree. This case has been a good illustration of the sometimes forgotten fact that an English law suit is not a moot or a debate, but an attempt to arrive at a result on the facts before the court; broad academic arguments are quite unsuited to the processes of the English law. Here, on-cost has been declared by the commissioners to have their vote as a general matter, regardless of the fact that when the details are looked into it produces an absurdity. Judged by that touchstone, the commissioners could not have come G to the conclusion they reached; but they were looking at the theories which were so largely debated before them, not at the facts. The result is that, taking their eyes off the ball, so to speak, they came to a conclusion which, when the facts are looked at, is not tenable. The appeal must therefore be dismissed, though not quite on the ground on which the learned judge below dismissed it, for he decided on the footing that the directors had the right to choose the method of costing H for income tax purposes. In fact, of course, they have the right to choose the method vis-à-vis their shareholders and for the good of the company, but it cannot be that they are the arbiters when it comes to assessing the costs from any income tax point of view. It is well known that many things—reserves, and so on —which are not allowable as deductions for income tax purposes are proper deductions when setting out the profits of the company. Although we do not I agree with all the reasoning of the learned judge, we do agree with his conclusion.

LORD EVERSHED, M.R.: These judgments will be treated as the judgments in both Cases Stated.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Wilkinsons* (for the taxpayer company).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

NOTE.

LONG *v.* LONG.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), March 9, 10, 1960.]

Divorce—Costs—Discretion case—Husband's petition alleging desertion and seeking decree in discretion of court—Wife's answer containing cross-prayer for divorce and alleging adultery by husband with unknown woman in 1951 *—Reply by husband that wife had condoned the alleged adultery—No inquiry by wife whether any other adultery by husband—Husband's subsequent uncondoned adultery with another woman disclosed in discretion statement—Leave to amend answer granted—Wife granted decree—Whether wife entitled to full costs—Whether her solicitors under duty to inquire as to grounds on which court's discretion sought.*

[As to costs in divorce proceedings, see 12 HALSBURY'S LAWS (3rd Edn.) 398, para. 883.]

Petition.

By a petition, dated Apr. 15, 1958, the husband sought a divorce on the ground of the wife's desertion since the end of June, 1951, and he asked for the exercise of the court's discretion in respect of his own adultery. The wife, by her answer, dated June 23, 1958, denied desertion and sought a divorce on the ground of desertion, cruelty and adultery, alleging that in June, 1951, the husband had confessed to her that he had committed adultery with a woman whom he had met (and whose name was not known). By his reply dated Aug. 13, 1958, the husband admitted the adultery alleged in the answer, and pleaded that the wife had condoned it by cohabiting with him with full knowledge of it. At the hearing of the petition on Mar. 9, 1960, when the husband's discretion statement was put in, the wife learned for the first time that he had committed adultery with a named woman in and since August, 1953, i.e., after the separation of the parties. The wife was granted leave by KARMINSKI, J., to amend her answer by adding an allegation of adultery with this named woman. KARMINSKI, J., having found that the separation was consensual, granted a decree nisi to the wife on the ground of the husband's admitted adultery, the allegations of cruelty not being proceeded with, and dismissed the husband's petition. On the question of costs, it was contended by counsel for the husband that the wife was not entitled to the full costs of the proceedings, as she had succeeded only on her amended answer (since the husband's admitted adultery in and since 1953 revived the earlier condoned adultery); that she need not have assumed that there was no adultery by the husband other than that alleged in her original answer; and that a careful solicitor would, in accordance with practice, have made inquiries which would have disclosed that the husband was living in adultery; and that the costs which had now been incurred in raising the allegations of cruelty would have been avoided.

L. Pearl for the husband.
K. M. McHale for the wife.

KARMINSKI, J.: In this case a somewhat unusual position on costs arises because of the course which the action has taken. The answer as originally filed charged the husband with adultery in 1951 with a woman unknown. No other charge of adultery was made. The husband, in his petition, had sought the exercise of the discretion of the court notwithstanding his own adultery. The husband replied to the wife's charge of adultery, and to other matters pleaded in the answer, and said that the wife went on cohabiting with him until he left on about June 29, 1951, and that thereby she condoned his adultery. At the appropriate moment in evidence-in-chief, the husband's discretion statement was put in and sworn to by him, and it was there revealed that from about August, 1953, he had regularly at intervals committed adultery with a woman who is now the woman named, namely, Miss Mary Burn. It is said by him that they desire to inter-marry. It was submitted by counsel for the husband that the wife's advisers, when faced with the prayer for discretion, should have made certain inquiries of the husband's solicitors in order to ascertain the nature of the adultery in respect of which he sought the court's discretion. I do not, however, think that in the circumstances of this case any such obligation attached to them, and for these reasons. It is clear from the form of the answer that the wife instructed her solicitors as to the adultery in 1951 which the husband had confessed to her, that it was one act which took place when they were living apart but before the final separation. The wife had no knowledge of the adultery admitted by the husband with Miss Mary Burn until the husband swore to his discretion statement. It is not suggested that she had any means of finding out, nor that she was in any way put on inquiry by suspicious circumstances, or by any information as to the possibility of an adulterous association between the husband and any other woman since 1951. Looking at the reply, the advisers to the wife may well have been confirmed in their view that the prayer for discretion related only to the adultery with the unknown woman in 1951, and for this reason: if that adultery had been condoned, as pleaded in the reply, by the wife's cohabiting with the husband, then it would require some other matrimonial offence to revive it. The inference to be drawn from the reply is that the husband has not by his conduct been guilty of any other matrimonial offence sufficient to revive the condoned adultery.

On the pleadings, therefore, as it seems to me, any careful solicitor would be put off his guard or relieved from the duty of making further inquiries, and that, in my view, is what happened here. I cannot for my part see that the wife or her advisers could have, or should have, made these inquiries from the other side. That being so, I see no reason to abate the full order for costs and I condemn the husband in the costs of these proceedings.

Order accordingly.

Solicitors: *Walford & Co.*, Cricklewood (for the husband); *Beach & Beach*, Cricklewood (for the wife).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

TRUSTEES OF TOLLEMACHE SETTLED ESTATES *v.* COUGHTRIE (INSPECTOR OF TAXES).

[Court of Appeal (Lord Evershed, M.R., Pearce and Harman, L.JJ.), February 26, 29, March 1, 24, 1960.]

Income Tax—Profits—Lease—Sand pit—Rent received by lessors in excess of Sch. A assessment—Computation of excess rent—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 175 (1) (*a*), *s.* 82, *Sch. A, para.* 2.

A sand pit was let to tenants on a lease for twenty-one years from March, 1946, at a surface rent of £10 per annum plus £5 per acre for each additional acre of land occupied (five acres were so occupied) and a royalty of 6d. per ton for all sand worked. For 1953-54 the sand pit was assessed to Sch. A in the sum of £3 5s., and an assessment of excess rents was made under Sch. D pursuant to s. 175 of the Income Tax Act, 1952. The amount of the excess rents was the excess of £681 (comprising £35 in respect of the fixed rent and £646 in respect of royalties received in that year) over the amount of the Sch. A assessment as ultimately allowed after being amended and increased. On appeal the taxpayers contended that, if tax were chargeable under s. 175 and Case VI of Sch. D, it was chargeable on a notional amount to be assessed on Sch. A principles and not on the excess of the actual rents and royalties.

Held: the amount by reference to which the taxpayers should be assessed to income tax under s. 175 and Case VI of Sch. D for a particular year was the actual amount of the excess rent or royalties for that year (viz., in the present case £681 for 1953-54), and was not an amount to be ascertained by notional valuation on Sch. A principles; but in computing the net sum on which tax was chargeable for the year there must be made such deductions and allowances as would have been made if the whole assessment had been under Sch. A, such as maintenance allowance.

Judgment of Upjohn, J. ([1959] 2 All E.R. 582) reversed.

[As to excess rents chargeable to tax, see 20 Halsbury's Laws (3rd Edn.) 291, para. 530; and for cases on the subject, see 28 Digest (Repl.) 216-221, *913-954*.

For the Income Tax Act, 1952, s. 82, Sch. A, paras. 1 and 2, and s. 175 (1), see 31 Halsbury's Statutes (2nd Edn.) 80, 172.]

Cases referred to:

Barron v. *Littman,* [1952] 2 All E.R. 548; [1953] A.C. 96; 33 Tax Cas. 398; 28 Digest (Repl.) 220, *947*.

Gundry v. *Dunham,* (1915), 85 L.J.K.B. 417; 114 L.T. 106; 7 Tax Cas. 12; 28 Digest (Repl.) 384, *1675*.

Inland Revenue Comrs. v. *Dickson,* 1928 S.C. (Ct. of Sess.) 752; 14 Tax Cas. 69; 28 Digest (Repl.) 10, *2*.

Strick v. *Longsdon,* (1953), 34 Tax Cas. 528; 28 Digest (Repl.) 220, *949*.

Appeal.

The taxpayers appealed to the General Commissioners of Income Tax for the Drayton Division of Shropshire against an assessment to income tax made on them under Sch. D to the Income Tax Act, 1952, for 1953-54 in the sums of £5 in respect of excess rents and £1,000 in respect of royalties, as lessors of a sand pit at Beeston in the county of Chester under a lease for twenty-one years from Mar. 25, 1946. The lease reserved a surface rent of £10 annually together with a further £5 per acre for additional land taken; five acres of additional land were taken. For the year 1953-54 an assessment of £3 5s. under Sch. A was made on the tenants of the sand pit in respect of the area originally demised, the additional five acres being covered by a separate assessment on the farm of which the land then formed part. The taxpayers, the lessors, contended that there was no provision of the Income Tax Act, 1952, under which an assessment in respect of royalties could be made and that the only rent to which they were entitled in respect of which an excess rent assessment could be made under s. 175 of the Act was the fixed surface rent of £10 payable under the lease and any additional surface rent; the section did not justify an assessment being made after the end of the year of assessment by reference to royalties actually paid in that year and could only operate where the rent payable under a lease could be quantified at the beginning of the year of assessment. If s. 175 were applicable, it required a notional Sch. A assessment to be made in accordance with para. 2 (1) of s. 82 of the Act, and such notional assessment should be on the footing that the rack rent did not exceed £292. The Crown contended that the royalties payable under the lease were rent for the purposes of s. 175 and that an assessment fell to be made under that section by reference to the rent paid including royalties, and the other terms of the lease. Alternatively, if the value of the taxpayers' rights had to be ascertained before the beginning of the year, it should be estimated afresh at the beginning of each year in the light of the facts then known; or, if an annual value over the whole term of the lease had to be ascertained, that value should be £500.

The commissioners held that the royalties were covered by s. 175 of the Income Tax Act, 1952, and should be taxed as excess rents under Case VI of Sch. D. The assessment would be the excess received above the Sch. A assessment. The amount of this excess was £35 (the amount of the fixed rent received) plus £646 actual royalties received during the tax year, less the Sch. A assessment. A further assessment under Sch. A having, however, been raised on the sand pit in respect of additional land occupied, the aggregate figure at which the assessment should stand on the basis determined by the commissioners was agreed at £577. On May 11, 1959, UPJOHN, J. ([1959] 2 All E.R. 582) allowed the taxpayers' appeal against the commissioners' decision, holding that the taxpayers were chargeable to tax under Case VI of Sch. D in relation to the royalties and rents; that the assessment should be a rent computed on Sch. A principles, a notional figure ascertained either by averaging the variable rent comprising the royalties or by estimating the rack rent under s. 82, para. 2 (b) of the Act of 1952; and that royalties were rent for the purposes of these provisions. The Crown appealed to the Court of Appeal on the second point.

R. O. Wilberforce, Q.C., and *A. S. Orr* for the Crown.

Hubert H. Monroe for the taxpayers.

Cur. adv. vult.

Mar. 24. The following judgments were read.

LORD EVERSHED, M.R.: I have asked PEARCE, L.J., to deliver the first judgment.

PEARCE, L.J.: This case concerns the assessment of certain royalties received by the taxpayers in respect of sand pits let by them. These royalties are admittedly covered by s. 175 of the Income Tax Act, 1952, and fall to be taxed as excess rent under Case VI of Sch. D. The Crown contend that the assessment should be made year by year on the basis of the actual receipts, subject to certain deductions. The General Commissioners adopted that view. On an appeal by the taxpayers, who contended that there must be an assessment on Sch. A principles with evidence as to value, the learned judge accepted their contention and remitted the Case to the commissioners.

The material part of s. 175 (1) reads as follows:

> "If, as respects any year of assessment, the immediate lessor of a unit of assessment is entitled in respect of the unit to any rent payable under a lease or leases to which this section applies, he shall be chargeable to tax under Case VI of Sch. D in respect of the excess, if any, of the amount which would have been the amount of the assessment of the unit for the purposes of Sch. A, as reduced for the purpose of collection, if the annual value of the unit had been determined (in accordance, in whatever part of the United

> Kingdom the unit is situated, with the provisions of Part 3 of this Act) by reference to that rent and the other terms of the lease or leases, over whichever is the greater of—(a) the actual amount of the assessment of the unit for the purposes of Sch. A, as reduced for the purpose of collection; or (b) the amount of any rent payable by the immediate lessor in respect of the unit under any short lease or short leases." A

B The problem here is to find what is the amount which would have been the amount of the assessment for the purposes of Sch. A if the annual value had been determined " by reference to that rent and the other terms of the lease ". " That rent " is the rent to which the lessor is entitled in the year in question, the rent whose excess over the Sch. A assessment has provoked the incidence of s. 175—viz., in this case, £681. The opening words, " If, as respects any C year of assessment ", indicate that the section envisages a yearly operation. The fact that the charge is under Case VI of Sch. D makes it clear that the assessment is aimed at a year's profit or gain.

According to the taxpayers, the section really does no more than provide for a revaluation of Sch. A assessments, and the resulting excess liability is only put into Case VI, Sch. D, because that is a receptacle for oddments. It is said D further that the resulting assessment would have to be an inquiry on Sch. A principles; viz., what the unit is worth to be let by the year having regard, not only to the rent of £681 received this year, but also " to the other terms of the lease ", including the fact that there are several years of the lease to run. It is not disputed that this procedure will produce a different and practically always a lower figure than that produced by an assessment on the actual figure of the E excess rent. In spite of Mr. Monroe's forceful argument, I cannot accept this view of the section.

The Sch. A assessment under s. 82 is an attempt to find the annual value. If a rack rent has been fixed within the preceding seven years, then that is the annual value; if such a useful guide cannot be found, and the premises are not let at a rack rent so fixed, the inquiry is to ascertain the rack rent which the F premises are worth to be let by the year. From a practical point of view, s. 175 comes into play because, during the year in question, there is an extra profit to be taxed and the rent to which the lessor has become entitled has shown the inadequacy of the Sch. A assessment; it has shown that either the actual rack rent or the estimate of the rack rent at which the premises are worth to be let by the year has produced an annual value that is incorrect for the year in question. G The section directs that the lessor shall be chargeable on the amount which would have been the Sch. A assessment if the annual value of the unit had been determined by reference to " that rent "—viz., a rent of £681; i.e., if the actual rack rent or the rack rent at which it is worth to be let had been £681. There is no need for further valuations or for calculations under s. 82, Sch. A, para. 2 (a) or s. 82, Sch. A, para. 2 (b). The words " by reference to that rent " provide an H ad hoc formula for the ascertainment of the annual value; a formula which excludes further estimation. The figure of £681 is, as it were, written into s. 82 or is a tertium quid to Sch. A, para. 2 (a) and Sch. A, para. 2 (b). The case has to be considered as a Sch. A case only for the purpose of deductions and allowances. When s. 175 refers to the annual value being determined by reference to " that rent and the other terms of the lease ", the " other terms " mean those which I are relevant to allowances, such as liability for rates and maintenance.

The Master of the Rolls in argument pointed out that, if the excess rent is lower than the rent at which they are worth to be let (as it well might be), the computation could not be made under s. 82, Sch. A, para. 2 (b), as counsel for the taxpayers contends should be done in each case. For the computation has to be done by reference to " that rent "—i.e., the actual rent for the year—while s. 82, Sch. A, para. 2 (b) demands the computation of the rack rent at which they are worth to be let. In such a case, a tertium quid is necessary in s. 82, Sch. A, para. 2, and that tertium quid must surely be the actual rack rent for the year in question, which is the objective of s. 175. It would be thus more analogous to s. 82, Sch. A, para. 2 (a), which uses a recent actual rack rent where it can be found.

It would be contrary to good sense that the section, whose object was to ensure that certain actual profits did not go untaxed, should throw the assessment away from the realm of actual and exact figures, and back into the realm of estimation, in which the profit had once already been allowed to escape. Seeing that the assessment under s. 175 is a yearly one, intended to catch a particular year's profit, it is hard to believe that it intended to send each case back to s. 82 for a valuation focussed, not on the particular year, but on a period of years and calculated to assess

> ". . . what a tenant, taking one year with another, may fairly and reasonably be expected and required to pay "

(per SWINFEN EADY, L.J., in *Gundry* v. *Dunham* (1)). Had such an odd result been intended, it would have been very easy to say so.

The normal case of excess rents is dealt with by direct calculation without a further assessment on Sch. A principles. For instance, in *Strick* v. *Longsdon* (2), the direct figures of the excess rents were used without embarking on further computation (except as to deductions). I see no reason why this case should differ from it. This view accords with that expressed by LORD REID in a somewhat different context in *Barron* v. *Littman* (3), where he said:

> " The calculation which s. 15 (1) [now s. 175] directs is simply the method by which the profits from the transaction are to be measured for income tax purposes, and the assessment and charge to tax under the section are in respect of the profits so measured."

The point is not an easy one, but for these reasons I would allow the appeal.

HARMAN, L.J.: I agree. Section 175 of the Income Tax Act, 1952, is designed to deal with the injustice caused by the delay in re-assessing freeholds under Sch. A. These assessments were intended to represent rack rents, but first they were allowed as a matter of convenience to run for a quinquennium, and then, owing to the war, even these re-assessments were pretermitted. Meanwhile, in a period of inflation, values were continually going up, and landowners were more and more escaping from making a fair contribution to taxation. Hence s. 175, the object of which was to tax " excess rents ": excess over what? —over the out-of-date Sch. A values. It follows that one expects to find in the section provisions designed to tax the difference between the existing Sch. A assessment and the rent actually being received. This is what is found, the words " that rent " being the actual rent receivable by the landlord in the year of assessment. The words are, slightly re-arranging them: He shall be chargeable to tax under Case VI of Sch. D in respect of the excess over the actual Sch. A assessment of the amount which would have been the Sch. A assessment if the annual value of the unit had been determined by reference to that rent and the other terms of the lease. Note that this is a Sch. D assessment, and therefore not concerned with any but the one year in respect of which it is made. The reference to the " other terms of the lease ", in my judgment, refers to such things as covenants to repair, to pay rates, and so forth, not to the " term " of the lease.

If this were all, there would be an injustice to the landlord, who would be unable to deduct from the actually receivable rent those allowances which Sch. A provides. Hence the reference to the hypothetical Sch. A assessment. This does not entail a new valuation; that is precluded by laying down " that rent " as the gross figure. The net figure is to be arrived at on Sch. A principles —i.e., with the deductions and allowances which that Schedule prescribes—

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(1) 7 Tax Cas. 12 at p. 22. (2) 34 Tax Cas. 528.

(3) [1952] 2 All E.R. 548 at p. 559; 33 Tax Cas. 398 at p. 409.

and will thus be truly comparable with the actual Sch. A figure which has undergone the same process. A To postulate a new valuation—which ought, I should have thought, if properly done, to make no difference—is to my mind to reject the words "that rent", and is unjustified. If counsel for the taxpayers were right, the section should simply have provided that, wherever the receivable rent is in excess of the actual Sch. A assessment, there shall be a new Sch. A assessment, and that it did not do. B

LORD EVERSHED, M.R.: It has been agreed on both sides that the case before the court falls within, and is governed by, s. 175 of the Income Tax Act, 1952. The question therefore is one of the interpretation, as applied to the facts of the case, of s. 175. The taxpayers are "entitled . . . to . . . rent payable under a lease . . . to which this section applies". They are therefore chargeable C to tax under Case VI of Sch. D in respect of

> "the excess . . . of the amount which would have been the amount of the assessment of the unit for the purposes of Sch. A, as reduced for the purpose of collection, if the annual value of the unit had been determined (in accordance . . . with the provisions of Part 3 of this Act) by reference to that rent and the other [relevant] terms of the lease . . . over [in this case] D (a) the actual amount of the assessment of the unit for the purposes of Sch. A [viz. £10 15s.] as reduced for the purpose of collection . . ."

I have set out the material language, with the insertion of the word "relevant" before the phrase "terms of the lease" and of the figure of the actual amount of the Sch. A assessment; and I have emphasised in reading what appear to me E to be the most important words.

It was conceded clearly (as I understood) by counsel for the taxpayers that the necessary calculation or re-assessment has to be made every year—not, that is to say, notionally in 1946 or at the beginning or end of the tax year in question (1953-54) and so as to persist for the whole period of the lease, or for the period for which the actual assessment of £10 15s. lasts, or for any other indefinite period. F It also seems to me clear that what I will call the Sch. A re-assessment (which the section postulates as the "top figure" for the purposes of arriving at the subject-matter to be taxed) is to be based on the actual rent and other relevant terms of the lease—which I take to mean, in this case, the royalty provisions. In my view one is not, therefore, required to look for or discover in accordance with s. 82 of the Act a rack rent properly so called. For the purpose of the G calculation which s. 175 requires, the rent plus royalty (in the present case) actually paid or assumed or contemplated as payable takes the place of the rack rent. If the present lease provided for a rent (in the ordinary way) greater than the actual Sch. A assessment but less than the true rack rent, the lease rent would clearly in my view form the basis of the Sch. A re-assessment and not the true rack rent. The result, in my view, is that, in spite of the reference in s. 175 H to Part 3 of the Act, the case is outside the strict language of s. 82, para. 2. In other words, it is neither a para. 2 (a) nor a para. 2 (b) case—and in this respect, like my brethren, I have ventured to differ from UPJOHN, J.

So far, as it seems to me, and as a result of the discussion before us, there is no real dispute between the parties. The sole issue appears to be this: the Crown say, "You arrive each year at the top figure by reference solely to the actual I rent and royalty figures for that year"; the taxpayers say, "No; you arrive each year at a valuer's figure of annual value at the date of the valuation, based on the known facts as to rent and royalty but not arithmetically limited to the figures of rent and royalty for the year in question." Common sense at any rate seems to point to the two figures being the same. But there appears no doubt from the fact that the case has come before us, and from what counsel for the taxpayers had said (and I therefore assume) that the taxpayers' figure will in practice be found to be somewhat less than that based on the Crown's view.

Which, then, is right? It is on this matter that I confess to having felt greater difficulty than my brethren, and to have doubted whether we should not prefer, as I understand the learned judge did, the taxpayers' method of assessment.

The reasons for my doubt are as follows. True, the relevant premises for the re-assessment are the rent and royalty figures and not a rack rent, so that the case, as I have already stated, is neither a para. 2 (a) nor a para. 2 (b) case; still, apart from the substitution of these rent and royalty figures for the rack rent, you are directed by s. 175 to make your assessment in accordance with Part 3 of the Act. What is more, you are directed by s. 175 to arrive at your re-assessment by determining the annual value of the unit: and this conception of annual value is, according to s. 82, inherent in all Sch. A assessments. If the rent under the present lease were a flat rent of £681 per annum, there being no royalties, there would, of course, be nothing in it; but if the rent were a flat rent but increasing, say, every three or five years, then I am not satisfied that you would not in any year work on the basis of an average for the term rather than on the actual rent payable in any particular year (see *Inland Revenue Comrs.* v. *Dickson* (4)). If this is right, then it may be said that a similar principle of valuation should apply in the present case. I have also felt the force of the argument that the contrary view involves the result that s. 175 is construed as though it had said that the " top figure " in any year was the actual sum received in that year for rent, including royalty, subject to the deduction appropriate to a Sch. A assessment: and the section does not in terms so provide. Instead there is the express reference to " annual value ", which is of the essence of the Sch. A code. If this view were right, then the question that, in respect of the year 1952-53, the assessors would have to answer is: What is the annual value, this year, of this unit (according to Sch. A principles) on the basis that the rent it commands is the fixed rent and royalties payable now and henceforth according to the subsisting lease? In other words, the " top figure " would be arrived at by the taxpayers' method of assessment.

This difficult and somewhat artificial case has required s. 175 of the Act to be applied to circumstances to which I cannot think it was ever intended to be applicable. I have therefore, and in deference to the view taken by the learned judge, thought it right to express my doubt, and my reason for it. But I have in the end thought that the claims of simplicity and common sense should prevail, and I am not therefore prepared to dissent from the clear conclusion at which my brethren have arrived. I agree with them that the appeal should be allowed.

[In the course of the discussion following the judgment LORD EVERSHED, M.R., indicated that the form of order made in the court below

> " It is ordered that the case be remitted for them [the commissioners] to adjust the assessments in accordance with the judgment of the court "

was incorrect and that the order should be self-contained. Semble it should specify the figure to which the assessment should be adjusted as a result of the judgment. He also stated that " Trustees of the (blank) Settled Estates " was not the correct title of an action, if they were not a corporation sole, etc.]

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue; Peake & Co.* (for the taxpayers).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(4) 14 Tax Cas. 69.

Re THE PHENOL PRODUCERS' ASSOCIATION'S AGREEMENT.

[RESTRICTIVE PRACTICES COURT (Pearson, Diplock and Russell, JJ., Sir Stanford Cooper, Mr. W. L. Heywood, Mr. W. Wallace, and Mr. W. G. Campbell), February 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, March 1, April 7, 1960.]

Restrictive Trade Practices—Reference—Phenol Producers' Association—Agreement not to sell except at prices fixed by Association—Whether removal of restriction would deny public substantial benefit—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2 c. 68), *s.* 21 (1) (*b*).

The Phenol Producers' Association consisted of fourteen members. The Association had no written constitution, but its activities could be stated to comprise: (a) exchange of information on market conditions, production and foreign competition; (b) collection of statistics; (c) provision of a means of contact with government departments and with the consuming industries, and (d) agreement of a schedule of prices. The agreement between the members was not intended to be legally enforceable and did not provide for any penalty for non-compliance, but each member signed an undertaking to adopt the schedule of prices, terms and conditions for sales fixed by the Association at the date of the member's entry into the Association and any alterations thereto subsequently agreed on by the members. The price schedule in force provided for a fixed basic price which had been unchanged since July, 1953, though the price schedule was normally reviewed by the members every six months. Phenol was an important raw material in the chemical industry, and was used in the manufacture, inter alia, of plastics, plasticisers, pharmaceutical preparations, paints and synthetic dyestuffs. It occurred naturally in coal-tar, together with other hydroxyls of similar chemical characteristics, of which the most important were cresols and xylenols. These were sometimes called generically " tar acids ". Phenol and the other tar acids could be extracted from coal-tar by chemical action followed by fractional distillation, and the phenol produced in this way was known as natural phenol. Phenol could also be produced industrially by synthesis from benzene, when it was known as synthetic phenol. The total productive capacity of the synthetic phenol industry in the United Kingdom was expected to be 39,000 tons in 1960 rising to 42,000 tons in 1961 and after, of which one-third would be produced by members of the Association. On a reference by the Registrar of Restrictive Trading Agreements under s. 20 (1) and s. 20 (2) (a) of the Restrictive Trade Practices Act, 1956*, the court found that there was four main features of the Association's price-fixing scheme: (i) the fixed price was substantially above the level at which the price would tend to settle, or round which it would tend to fluctuate, if it were freed from restrictions and left to be determined by the interplay of supply and demand in competitive conditions; (ii) the price fixed by the Association from time to time was not and never had been based on or related to or limited by any figures of costs of production, and the fixing of the price was left entirely to the unfettered discretion and decision of the members of the Association without regard to any formula; (iii) the Association's policy in their price-fixing had been and still was " to charge what the traffic would bear ". Their dominant object was to obtain a good return for themselves and for their suppliers associated with them. It was a producers' price scheme, operated with some degree of caution but predominantly in the interests of the producers; (iv) there was the usual rigidity of a price-fixing scheme. The customer could not negotiate for any preferential terms or concessions to assist him in his export trade, or in recognition of the proximity of his premises to the sellers' works, or to reward him for fetching the goods in his own vehicles, or even in consideration of a long-term or large-scale purchase contract. Prima facie those four main features of the scheme were not benefits or advantages but detriments to the public as purchasers, consumers or users of phenol and goods partly made from phenol and any other relevant goods. The Association alleged that (a) there was now for the time being an excess of supply over demand, and the probability was that that excess would increase in the near future and persist for about a period of five years, but that after that there would be a shortage of supply in relation to demand; (b) the removal of the fixed price restrictions would cause a fall of about twenty-five per cent. in the price of phenol and each of its related products; (c) those falls in price would so reduce the revenue accruing to the coal-tar producers from the distillation of tar and the refining of the tar acids that they would be able to obtain greater financial advantages by using the tar as fuel or selling it for use as fuel, and, consequently, within three or four years a large proportion (estimated at fifty per cent.) of the tar would be diverted from distillation to burning with the result that some of the distilleries and refineries would be closed down and it would not be feasible to re-open them on a subsequent rise in the prices of phenol and its related products, so that (d) the products of tar distillation would be permanently lost to the detriment of the public. The Association also contended that their system of price control when demand exceeded supply operated to keep prices down and that the result of the stability of price at that lower level was for the benefit of the public, and that their system of price control had ensured the increase of the supply of phenol to meet an erratically increasing demand and that the continuance of that system gave the best security that the future supply of phenol would be in line with the future demand. The Association sought to support the operation of the restriction of the fixed basic price under s. 21 (1) (b)* of the Act of 1956.

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* Section 20, so far as relevant, provides: " (1) The court shall have jurisdiction, on application made in accordance with this section in respect of any agreement of which particulars are for the time being registered under this Part of this Act, to declare whether or not any restrictions by virtue of which this Part of this Act applies to the agreement (other than restrictions in respect of matters described in paras. (b) to (d) of s. 8 (8) of this Act) are contrary to the public interest.

" (2) An application to the court under the foregoing subsection may be made—(a) in any case, by the registrar . . ."

Held: the restriction was deemed by s. 21 (1) of the Act of 1956 to be, and was declared to be, contrary to the public interest, because—

(i) (as regards allegation (a), ante) there was no sufficient evidence of excess of supply over total demand when the demand for exports as well as the home demand was taken into account and indeed lower prices might generate new uses and new demands; moreover, it could not be assumed that the supply would remain stationary, so that the expected scarcity in a few years' time might not occur (see p. 142, letters B and E, post).

(ii) (as regards allegations (b), (c), (d), ante) although the price of phenol would fall if the restrictions were removed, the fall might well not be of so much as twenty-five per cent., but even if it were the price of related products was not likely, on the evidence, to fall so much; assuming, however, that prices fell by twenty-five per cent., it was not shown on the evidence that diversion from distillation to burning would result, and, accordingly, no question arose of such prospective diversion denying benefits to the public (see p. 142, letter I, p. 143, letter B, and p. 144, letter C, post).

(iii) the rigidity of the fixed price and its ancillary terms and conditions was a disadvantage to purchasers, and stabilisation of price, as an alternative to a free market, was not of itself a benefit to the consuming public (see p. 144, letters H and I, post).

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* The relevant terms of s. 21 (1) are set out at p. 131, letter C, post.

Re Yarn Spinners 'Agreement ([1959] 1 All E.R. at p. 317) and *Re Scottish Assocn. of Master Bakers' Agreement* ([1959] 3 All E.R. at p. 109) applied.

(iv) the Association's price-fixing scheme was not the effective reason for the increase of the supply of phenol, but the increase was due principally to a rapidly increasing demand from, in particular, the plastics industry (see p. 145, letters A and B, post).

[For the Restrictive Trade Practices Act, 1956, s. 21, see 36 HALSBURY'S STATUTES (2nd Edn.) 954.]

Cases referred to:

Scottish Assocn. of Master Bakers' Agreement, Re, Wholesale and Retail Bakers of Scotland Assocn.'s Agreement, Re, [1959] 3 All E.R. 98; L.R. 1 R.P. 347; [1959] 1 W.L.R. 1094.

Yarn Spinners' Agreement, Re, [1959] 1 All E.R. 299; L.R. 1 R.P. 118; [1959] 1 W.L.R. 154.

Reference.

Pursuant to the Restrictive Trade Practices Act, 1956, s. 20 (2) (a), the Registrar of Restrictive Trading Agreements, on Nov. 22, 1957, referred to the Restrictive Practices Court an agreement made between the members of the Phenol Producers' Association. The Association had no written constitution. The chairman for meetings of the Association was appointed from amongst the members annually. The expenses of the Association were met by a tonnage levy on all members. The agreement was not intended to be legally enforceable and did not provide for any penalty for non-compliance. Each member producing phenol signed the following undertaking: " We undertake to adopt the schedule of prices, terms and conditions fixed by the Phenol Producers at the date of entry into the Association and any alteration thereto subsequently agreed upon by the Phenol Producers. This undertaking is given on the understanding that all the producers who are set out hereunder give a similar undertaking ". There were fifteen members participating in the agreement at the time of the reference but one had since resigned. The activities of the Association could be stated to comprise: (a) exchange of information on market conditions, production and foreign competition; (b) collection of statistics; (c) provision of a means of contact with government departments and with the consuming industries, and (d) agreement of a schedule of prices. The price schedule was normally reviewed by the members every six months. Unless otherwise decided, the price and period of contract in the export market was free. The facts are set out in the judgment of the court.

B. J. M. MacKenna, Q.C., and *D. A. Grant* for the Phenol Producers' Association.

T. G. Roche, Q.C., and *R. H. W. Dunn* for the Registrar.

Cur. adv. vult.

Apr. 7. **PEARSON, J.,** read the following judgment of the court: On Nov. 22, 1957, the Registrar, under s. 20 of the Restrictive Trade Practices Act, 1956, referred to this court an agreement subsisting between the members of the Phenol Producers' Association, to which we shall refer as " the Association ". There were then fifteen members, but one has since resigned, so that there are now fourteen members. The agreement is not intended to be legally enforceable and does not provide any penalty for non-compliance, but each member has signed an undertaking to adopt the schedule of prices, terms and conditions for sales of phenol fixed by the Association at the date of the member's entry into the Association and any alterations thereto subsequently agreed on by the members. The price schedule now in force provides a fixed basic price of 1s. 4d. a lb. for contracts for ten tons and over for delivery at the buyers' premises in the seller's road tanks or rail tanks. There is a scale of additions to be made to the basic price for deliveries in smaller quantities or in drums or other packages, and certain terms and conditions are prescribed. There is not now any separate question to be considered as to the suitability of the scale of additions and the terms and conditions, because, at the hearing, it was agreed between counsel and it was clear to the court that the scale of additions and the terms and conditions are merely ancillary to the fixed basic price and must, in these proceedings, stand or fall with it. Thus, the question to be decided is whether the restriction involved in the fixed basic price (accompanied as it necessarily is by the ancillary restrictions) can be justified under sub-s. (1) of s. 21 of the Act. The provisions of that subsection which are material for the present case are the following:

> " For the purposes of any proceedings before the court under the last foregoing section, a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the court is satisfied of any one or more of the following circumstances, that is to say . . . (b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom; . . . (g) that the restriction is reasonably required for purposes connected with the maintenance of any other restriction accepted by the parties, whether under the same agreement or under any other agreement between them, being a restriction which is found by the court not to be contrary to the public interest upon grounds other than those specified in this paragraph, or has been so found in previous proceedings before the court, and is further satisfied (in any such case) that the restriction is not unreasonable having regard to the balance between those circumstances and any detriment to the public or to persons not parties to the agreement (being purchasers, consumers or users of goods produced or sold by such parties, or persons engaged or seeking to become engaged in the trade or business of selling such goods or of producing or selling similar goods) resulting or likely to result from the operation of the restriction."

Then reference should also be made to s. 6 (3), where it says:

> " In this Part of this Act ' agreement ' includes any agreement or arrangement, whether or not it is or is intended to be enforceable (apart from any provision of this Act) by legal proceedings . . ."

In setting out the material facts, we shall first describe the nature and methods of production of phenol and certain related products, and the uses of them; next we shall refer to the history of the Association and its price-fixing activities, mainly for the purpose of ascertaining the basis or method or principle which has been adopted by the Association in fixing the price of phenol from time to time; thirdly we shall mention aspects of the present market situation and prospects, so far as disclosed by the evidence; and fourthly we shall refer to the evidence and lack of evidence relating to costs of production.

Phenol, or benzene hydroxyl, is an important raw material in the chemical industry. It is used in the manufacture, among other products, of plastics, plasticisers, pharmaceutical preparations, paints and synthetic dyestuffs. It can be produced industrially by synthesis from benzene. It occurs naturally in coal-tar together with other hydroxyls of similar chemical characteristics, of which the most important are cresols and xylenols. These are sometimes called generically " tar acids ". Phenol and the other tar acids can be extracted from coal-tar by chemical action followed by fractional distillation. The phenol produced in this way is known as " natural phenol ".

Synthetic phenol is manufactured as pure phenol without admixture with other tar acids. Three different processes are used in this country. In each of these, benzene, itself obtained as a by-product from the distillation of coal, is the principal raw material. The oldest process is the sulphonation process. It is used by a company which is a member of the Association and produces as a by-product sodium sulphite, which is used in the paper industry. It is the only synthetic process for which any costings are available to us. The annual output of phenol manufactured by this process is 14,000 tons. The second process, the chlorbenzene process, has been used in this country for nearly ten years by a company which was until 1956, but is no longer, a member of the Association. We have no evidence as to its costings and little information as to its by-products. The annual output of phenol manufactured by this process is 15,000 tons. The most modern process is the Cumene process for which a plant has recently been constructed by a company which is not a member of the Association. Acetone is the main by-product. This process has been operated in the United States of America for some years. Its profitability is dependent to a greater extent than the other two processes on the market for the by-product. We have no costings and no information on which we think that we could safely rely as to its profitability relative to the other two synthetic processes. The annual output from this process is expected to be 10,000 tons in 1960 and to rise to 13,000 tons thereafter. The total productive capacity of the synthetic phenol industry in the United Kingdom is thus expected to be 39,000 tons in 1960, rising to 42,000 tons in 1961 and after, of which two-thirds, namely, 28,000 tons per annum, will be produced by non-members of the Association. To operate economically, a synthetic plant must be large, that is to say its capacity should be not less than 10,000 tons per annum and it should be operated at maximum throughput. The Association have, however, called no evidence in relation to any of these processes as to the practicability or effect on costs of production of reducing annual output by closing down the plant as a whole or some units of the plant for temporary periods, although the assumption that this cannot be done economically would appear to be an important part of their case.

The current output of natural phenol is between 14,000 and 15,000 tons per annum, or about one-quarter of the total output of natural and synthetic phenol. In view of the important part which natural phenol plays in the Association's submissions, however, it is necessary to consider its production in some detail. As already mentioned, it occurs in the natural state in coal-tar together with other tar acids. Coal-tar itself is a by-product of the distillation of coal. When coal is subjected to dry distillation, that is to say heated in retorts in the absence of air, five primary products are produced, namely, gas, coke, ammonia liquor, benzene and coal-tar. The dry distillation of coal is undertaken by two main industries, the gas industry, in which the object is to obtain the largest quantity of gas, and coke ranks as a by-product—though the most important by-product—and the steel industry, in which the object is to obtain the largest quantity of coke suitable for use in blast furnaces, and the gas is a by-product. The technical processes differ in the two industries and, as a result, not only the quantity of coal-tar produced but also its chemical composition varies according to whether it is a by-product of the gas industry or the steel industry. One member of the Association uses a third process, namely, low-temperature carbonisation, of which the main product is a smokeless fuel. The chemical composition of the coal-tar produced in this process resembles that produced by the gas industry.

Coal-tar in its crude form is thus an inevitable by-product of the manufacture of gas for domestic and industrial consumption and of the manufacture of blast furnace coke for use in the steel industry. It will continue to be produced in the future so long as those two industries continue. The quantity produced is strictly related to, and dictated by, the amount of coal used in those industries, although it is anticipated by the Association that, as a result of changing techniques in the gas industry, the production of coal-tar by that industry will diminish. The current annual production of crude coal-tar in the United Kingdom is of the order of 3,000,000 tons per annum. It is combustible and capable of use in its crude form as a fuel. About 250,000 tons per annum are so used, almost exclusively

A by steel companies burning in their own works the crude tar produced in the coking plants at those works. The presence of carbon particles which provide radiant heat makes it suitable for use in open hearth furnaces. Conflicting views have been expressed to us by experts as to the suitability of crude tar as a liquid fuel for steam raising and other industrial purposes. It is, however, clear that, whatever its theoretical utility may be, there has hitherto been no market for B crude tar as an industrial fuel and, save for trivial quantities, its use as a fuel is restricted to the use of tar produced at their own works by some eight steel companies.

More than ninety per cent. of crude tar produced is distilled. Crude tar is a mixture of a large number of organic chemicals which vaporise at different temperatures—a physical characteristic which makes it possible to separate its C constituents into various groups or fractions by distillation. The normal fractions produced on distillation in descending order of volatility are: crude naphtha, carbolic oil, naphthalene oil, creosote oil, and anthracene oil, leaving a residue of pitch which, in bulk and weight, is the largest product. Each of the five fractions is itself a mixture of many different organic chemicals. Tar acids occur in the first four of them, from which they can be abstracted by a chemical process. D Phenol, which has the lowest boiling point of the tar acids, is present in greater quantities in the lower boiling point fractions, namely, crude naphtha and carbolic oil, but is to be found to some extent in naphthalene oil, while cresols and xylenols are more abundant in naphthalene oil but are present with phenol in carbolic oil and even crude naphtha, and with the higher boiling point tar acids in anthracene oil. The product of the chemical extraction of phenol, cresols, xylenols and E high boiling point tar acids from these various fractions is known as crude tar acids, and constitutes the raw material for the final stage in the preparation of natural phenol, namely, the refining of the crude tar acids. In addition to tar acids, the five fractions contain other valuable chemicals such as pyridine bases and naphtha in the crude naphtha fraction, Coumarone resins in the crude naphtha and carbolic oil fractions, and naphthalene in the naphthalene oil, and F anthracene in the anthracene oil fractions. Creosote oil is used by itself as a wood preservative, but in the main is mixed with the residual pitch to make either road tar or creosote-pitch mixture, which is widely used as an industrial fuel in competition with heavy petroleum oil. All these products play an important part in the economics of tar distillation. The pitch-creosote mixtures, both road tar and fuel, account for about two-thirds of the total value of the products, the G balance being split between the tar acids and the other products of distillation in the ratio of about three to two. Phenol itself accounts for about five or six per cent. of the total value of the products of distillation and the other tar acids for about 13½ to 15½ per cent.

The crude tar acids chemically extracted from the coal-tar fraction have little or no commercial use in their crude form and have to be subjected to a fresh H process of refining by further fractional distillation. Phenol, the lowest boiling point tar acid, can, in this way, be obtained either commercially pure, namely, ninety-nine per cent. pure, or mixed with other tar acids, mainly cresols, to a purity of ninety per cent. phenol (a mixture which has large commercial uses) or even less, the less pure mixtures being cheaper to produce. Ortho-cresol, which has the next lowest boiling point, is generally prepared for commercial use in a I purity of about ninety per cent. Meta- and para-cresols boil at the same temperature and thus cannot be separated by fractional distillation. Their value is dependent on the proportion of meta- and para-cresols in the mixture, which in turn depends on the natural chemical composition of the tar. The various xylenols, of which there are several isomers, are not normally separated one from another but are sold in various mixtures classified by their boiling point range. It is, however, not possible to generalise as to the various mixtures of refined tar acids which can be and are in practice produced, since the nature of the process of fractional distillation enables a great variety of mixtures of varying degrees A of purity to be made to meet varying commercial demands.

As already indicated, the refined tar acids represent at current prices about twenty per cent. of the total value of the products of distillation of crude coal-tar. Even if they were valueless, however, it would be necessary to extract them in whole or in part in order to obtain some of the other commercially valuable products from coal-tar. In particular, the yield of naphthalene (the raw material B from which phthallic anhydride used in the plastic and plasticising industries is synthesised), of which there is at present a national and world-wide shortage, would be substantially reduced if the crude tar acids were not extracted from the naphthalene oil fraction, and the yield of pyridine and Coumarone resins would be reduced if the tar acids were not extracted from the carbolic oil and naphtha fractions. Road tar could not comply with current specifications unless the C greater part of the tar acids were removed from the creosote oil which goes into road tar.

The relative values of the various products of the distillation of coal-tar which have been mentioned above represent an average for the whole of the tar distillation industry. They vary, however, very substantially between different types of tar according to the nature of the coking process by which they are produced. D Thus, coal-tar coming from the gas industry contains about seven per cent. by weight of tar acids, of which only one-tenth, or 0.7 per cent., is phenol, while coal-tar obtained in making blast furnace coke for the steel industry contains only 1½ per cent. of tar acids, of which one-third or 0.5 per cent. is phenol. Conversely, gas industry coal-tar contains only a negligible quantity of naphthalene, while coking industry coal-tars contain about five per cent. The E value of the tar acids is only about nine per cent. of the total value of the products of distillation of coal tar produced in making blast furnace coke, and the value of the phenol itself is only five per cent.; whereas the value of the tar acids in coal-tar produced at gas works is about thirty per cent. of the total value of the products of distillation, of which phenol accounts for a little more than seven per cent. Price movements in the various products of tar distillation and refining, F particularly in tar acids and naphthalene, may thus have very different effects on the profits of tar distillation according to whether the tar is produced by the gas industry or by the blast furnace coke industry. Whether it is profitable to distil tar instead of selling it for burning if a market can be found depends on the total value of all the products of tar distillation and not merely on one of those products. G

The chemical characteristics of all the tar acids are to some extent similar, and in some industrial processes some of the others can be used as a substitute for phenol. The characteristics of orthocresol, however, are different from those of the other tar acids. Its main use is for selective weed-killers and the supply of this product at present exceeds the home demand. The meta- and para-cresol H mixtures can in some processes in the plastic industry be used as a substitute for, or mixed with, phenol, but have other uses of their own for which phenol is not suitable. The same applies to the xylenols which are at present in short supply. Even in those processes where substitution of one tar acid for another is chemically possible, however, there would be a natural reluctance on the part of the user to make alterations in his manufacturing process necessitated by the I substitution unless there was a substantial economic incentive to do so. In addition to the possibility of substitution in manufacturing processes of the tar acids inter se, the plastic industry, particularly in the manufacture of synthetic resins, offers some possibilities of substitution of entirely different products such as urea resins, which are not made from coal-tar, for phenol resins, and phenol plasticisers for phthallic anhydride plasticisers, which are made from naphthalene, a product of coal-tar; but there would be a similar reluctance on the part of the manufacturer to make consequential changes in his manufacturing processes.

The Association can be said to have begun in the year 1927. In that year, the three main British phenol-producing companies received from a group of German and other continental phenol-producing companies an invitation to discuss the market situation, as over-production was feared. Meetings ensued, and on Nov. 7, 1927, an agreement was made between the three British companies, and on Jan. 25, 1928, an agreement was made between the British group comprising the three companies and the German group. These agreements provided for the fixing of minimum prices for phenol, and, up to about September, 1939, prices were fixed from time to time and were observed by the companies in the British group and by the companies in the German group. There were three other arrangements initiated in 1927 or 1928. The agreement of Nov. 7, 1927, established a quota system for the British companies inter se, and this seems to have continued with modifications up to about September, 1939. Secondly, the agreement of Jan. 25, 1928, established a quota system as between the British group and the German group, and it was operated for some years but then lapsed owing to exchange and other difficulties. The third arrangement arose in 1927 or 1928 in this way: a German company, which was a large consumer of phenol, was proposing to start production of synthetic phenol; the producers of natural phenol, both German and British, wished to prevent this; accordingly, an arrangement was made whereby the German consumer company, in consideration of its refraining from production of synthetic phenol, would receive supplies on preferential terms from the producers of natural phenol, both German and British. This arrangement was in operation up to about 1933. In 1935 a somewhat similar situation arose in the United Kingdom; a company which consumed phenol and itself produced some natural phenol proposed to commence production of synthetic phenol. The other British producers of natural phenol wished to restrict this; accordingly, an arrangement was made, of which the effect, summarised very shortly, was that for each prospective six-monthly period it would be decided in advance either (i) that the producers of natural phenol could supply all the requirements of the consumer company and would do so on preferential terms, or (ii) that the producers of natural phenol could not supply all such requirements and, therefore, the consumer company should produce synthetic phenol. This arrangement operated until July, 1939, with the result that during some six-monthly periods the synthetic plant was closed and during others it was operating. The minimum price for phenol as fixed by the Association in conjunction with the German group in the period 1927 to 1939 was changed from time to time, the lowest figure being 5d. a lb. in 1931 and the highest 8⅛d. per lb. in 1933. From Jan. 1 to Sept. 30 1939, the price was 6⅝d. per lb.

In the meantime the membership of the Association (then called " English Phenol Convention ") had increased, so that by June, 1939, eight companies were members. The price was raised from 6⅝d. per lb. to 7⅝d. per lb. on Oct. 1, 1939, and in January, 1940, to 8⅛d., and in July, 1940, to 9¼d. The Chairman of the Association, Mr. Lowe, when giving evidence was asked what led to the increases up to 9¼d., and he said it would be the supply and demand situation at that time, and, on being asked whether that had always been the guiding influence on the Association in fixing prices, he said it had been one of the factors which was taken into consideration.

In the war period, there was a shortage of phenol, and all the producers, including the one producer of synthetic phenol, produced up to the full capacity of their plants. From about 1940 onwards, the supplies of tar acids and the distribution of phenol were regulated by the Coal Tar Controller. The price was not controlled under government order, but arrangements were made by which the two producers of phenol who were not yet members of the Association should become members, and the Association's price should be a fixed (not merely a minimum) price to be approved by the controller and not afterwards to be altered without his consent. Under these arrangements, the price of 9¼d. was approved and remained in force for eighteen months until Jan. 1, 1942, when it was raised to

9½d. It remained at 9½d. for five years. In 1946 the Association applied to the controller for his approval to be given for an increase in the price, and, at his request, figures showing the increased cost of production were collected and presented. The figures, however, showed only the increases in particular items of costs, such as steam, wages, carriage, etc., in 1946 as compared with 1941. The actual cost of producing phenol at any time was not ascertained. The price was raised to 10½d. per lb. on Jan. 1, 1947, and it remained at that figure until the end of 1949, when the control was abolished. In that year, 1949, there was a proposal to reintroduce quotas, but it was not adopted. After discussions in the early part of 1950, the price was raised to 11½d. as from July 1, 1950. Later in the year 1950, the price was raised again to 1s. 1d., as from Jan. 1, 1951. Then, at a meeting on May 9, 1951, the price was raised again to 1s. 6d. a lb. as from July 1, 1951. Thus in a period of just over a year the price was raised from 10½d. to 1s. 6d. a lb., an increase of over seventy per cent. The price remained at 1s. 6d. a lb. for two years up to July 1, 1953, when it was reduced to 1s. 4d. a lb. Numerous questions were put to the Association's witnesses about the policy of price-fixing in the period 1950 to 1953. There was a changing market situation; in the early part of the period there was a scarcity of phenol, especially in the year 1951 when the world price was very high and imported phenol fetched as much as 5s. a lb. in the United Kingdom; then supplies in the United Kingdom increased, largely by reason of new synthetic production, and by about April or at latest June, 1952, it was realised in the trade that the scarcity was ending and a surplus was to be anticipated. It is clear from the evidence that the price fixing was not based on costs of production. The chairman said:

> " I should make it quite clear that, although the members of the Association undoubtedly have in mind the variation in their costings of refining tar acids . . . the fixing of the price of phenol is not based on any costing data."

He was then asked whether the price was based on what the traffic would bear or on some other basis, and he said:

> " It is based on that. We acknowledge that we must give a fair return to the producer of our raw material. We have in mind, and must have in mind, the domestic prices in the main producing countries, and there I mention Germany and America."

It should be explained that the chairman's words " a fair return to the producer of our raw material " impliedly referred to the industry's numerous co-operation schemes, under which for supplies of raw material—tar to the distilleries or crude tar acids to the refineries—the suppliers receive a share of the net proceeds realised on the disposal of the refined products. At a later stage, the chairman was asked, " Would it be fair to say that your system was opportunism tempered by a collective sense of caution? " and his answer was, " That puts it very nicely ". Mr. Vickers, who has been a prominent member of the Association for many years, and was called as the first witness at the hearing, had been recorded in the minutes of the meeting of May 9, 1951, as making

> " a point that the tar distillers were in effect the custodians of the nationalised industries which produced the crude tar, and as such they had a responsibility to the nationalised bodies to give them a reasonable return for the crude tar."

In the course of his evidence, Mr. Vickers was asked what were the considerations which the Association had applied in trying to fix prices, and his answer was:

> " The main consideration is, first of all, the state of the world market, and bearing in mind the fact that we cannot put our customers into a situation whereby they cannot compete with their like industries and so on. That has been our first major consideration. Having taken into account that, our

next consideration has been the fact that we are obligated under our schemes for distilling tar to do the best we can for our tar producers. Within the bounds of the first consideration, we adjust the price of phenol accordingly."

Mr. Bailey, secretary of the Association and a chartered accountant, said that his impression of the discussions at meetings held to fix prices was that members had in mind their own increases of costs since the price was last fixed, the demand for the product, whether it would be wise to fix the price at a certain figure in order to encourage a new use, and many other factors. He agreed, when asked by counsel for the Registrar, that the real factor was the question of trying to gauge what price the trade would stand.

Another matter to be considered in respect of the period 1950 to 1953 is whether the prices fixed by the Association from time to time were reasonable or unreasonable. If for this purpose the costs of production have to be taken into account, the evidence is defective because there were not at any time any adequate costing data. If the costs of production are left out of account, regard must be had to the market situation. The sharp increase of the price from 1s. 1d. to 1s. 6d. by the decision at the meeting of May 9, 1951, though it was agreed unanimously, was afterwards felt by some members to have been perhaps immoderate, and a second meeting was held at which different opinions were expressed and the decision was confirmed only by a majority vote with some members dissenting. Whether or not there was lack of moderation, we find there was lack of flexibility in the price-fixing. There was some indication in the evidence of the rise in price being too long delayed, because phenol and its raw material (tar acids) were being exported to obtain the high world price and there was some deficiency in the supplies of phenol for the home consumer. When the price was raised to 1s. 6d. as from July 1, 1951, by a decision at the meeting in May, possibly that price was for the time being not excessive in relation to the prevailing scarcity of phenol and the high world price. But then the price was artificially held at 1s. 6d. from July 1, 1951, to July 1, 1953, although, in the meantime, from quite early in 1952, the market situation was changing from a scarcity to a surplus of phenol. This ought to have brought about a reduction in the price. The home consumer then had the more usual complaint of the price being too high. There were vigorous complaints by consumers that, having bought their phenol at the high United Kingdom price, they could not compete in export markets with foreign makers of plastics who had bought their phenol at the lower foreign prices.

As from July 1, 1953, the price was reduced to 1s. 4d. a lb. and has remained at this figure ever since. We do not know whether this price at that time was an economic one, but, if so, the Association can claim credit for not having raised the price of phenol in the long period of 6½ years, when prices of many other materials and rates of wages have been raised. On the other hand, there were from time to time complaints from consumers that the home trade price was higher than the export price. Also it is admitted that, at the present time, the Association's price of 1s. 4d. is much higher than the free market price would be if there were no price restriction. That is a further illustration of the inflexibility of the fixed price in the sense that it does not respond at all readily to changes in market conditions. In another sense, there are elements of inflexibility in the terms and conditions of sale. For instance, there is the uniform delivered price, which is no doubt administratively convenient for a fixed price system, but does mean that a buyer whose premises are within one mile of the seller's works must pay the same price for deliveries as a buyer whose premises are two hundred miles away and that no price concession can be given to a buyer who is willing to fetch the goods in his own vehicles. Moreover, since the abolition in 1955 of a "Large Consumers' Schedule" no price concession can be made for a long-term or large-scale contract.

Some of the main factors in the market situation can be shown in a table. The figures are in tons.

Phenol, Natural and Synthetic

Year	U.K. Production	Imports	Home Trade Deliveries from U.K. Producers	Exports
1949	13,000	918	11,393	
1950	16,601	1,485	15,786	760
1951	19,615	2,223	19,683	180
1952	21,776	2,720	18,189	1,900
1953	23,374	55	16,401	7,800
1954	27,565	681	25,221	2,600
1955	29,341	5	26,246	3,100
1956	34,732	—	28,487	5,111
1957	36,733	—	29,927	7,454
1958	40,879	—	31,116	8,757
1959	45,591	—	36,550	10,373

The estimated production in 1960 is 54,000 tons, the increase being due to the opening of a large new plant for the production of synthetic phenol. The figures in this table are not reliable for measuring fluctuations in trade, because the movements of stocks (whether of pure phenol or of intermediates containing forty per cent., sixty per cent. or eighty per cent. of phenol) are not shown and may have been important. Nevertheless, the main trends are unmistakable. First, there is the rapidly and consistently rising production; the production in 1960 is expected to be more than four times the production in 1949. Secondly, imports were an important supplement to the home production when phenol was scarce in 1951 and early 1952, but have since died away. Thirdly, home trade deliveries from United Kingdom producers have risen remarkably, though not quite so much as the production. Lastly, exports have become a large and increasing outlet for the industry's output.

Figures have been given of the domestic prices in the U.S.A. and West Germany, but they cannot readily be used for purposes of comparison with the Association's price because adjustments may be required for differences in the terms and conditions of sale or in the quantities supplied. For instance, a price " delivered " may have to be compared with a price " ex works ", and it is necessary to know whether a foreign price or price range is for a large quantity or a small quantity or a range of quantities. It seems clear that, from late 1952 onwards, American and West German domestic prices have been lower than the Association's price, but we cannot say how much lower. It also appears that American and West German prices have been lower in 1959 and 1960 than they were up to the middle of 1958, whereas the Association's price has remained fixed. Again, export prices received by Association members are not directly comparable with the Association's price, as they are shown in appendices to the agreed statement of facts at " f.o.b. equivalent in free packages ". The weighted average prices per lb. are given as 14.269d. in 1954, 13.218d. in 1955, 13.821d. in 1956, 14.522d. in 1957, 13.680d. in 1958 and 12.618d. in the first nine months of 1959. The Association's price, which is the United Kingdom domestic price, is 16d. Owing to the difficulties of comparison, we cannot express a firm opinion as to the position in earlier years, but it seems clear that, at any rate after the fall in the average export price in 1958-59, the Association price has been substantially above the world price.

Large purchases of synthetic phenol have been made and are being made from producers outside the Association at prices below the Association price. Such purchases in very large quantities by an oil company's chemical subsidiary were made in the years 1956-59 from one producer outside the Association, and are now being made from another. The Association's chairman in his evidence said that he knew of three other cases of such purchases being made, involving according to his guess about 2,000 tons in a year, and that in two of the cases the price was at a five per cent. discount from the Association price; he did not know what the price was in the third case. Some of the customers concerned were called as witnesses; they were understandably reticent as to the actual prices which they were paying, but their evidence tended to confirm what the Association's chairman had said.

The prices of the related products are fixed by associations, which have been described as off-shoots of the Tar Distillers' Association. The prices are for pure ortho-cresol 1s. 2d. a lb., for high ortho-cresol mixture 8½d. to 9½d. a lb., for meta-para-cresol 10½d. to 1s. 2d. a lb., for cresylic acid 7d. to 8d. a lb., for xylenols 6d. to 8½d. a lb., and for high boiling point tar acids 5d. to 5½d. a lb. There is no synthetic production of the related products except a very small amount of pure para-cresol. Ortho-cresol has special uses of its own, and its price is independent of the price of phenol except in so far as the customers might expect some reduction in the price of ortho-cresol to be associated with or to follow a reduction in the price of phenol and their expectations might have some influence. There is a surplus rather than a shortage of ortho-cresol. Meta-cresol is partly used as a substitute for phenol, where it is suitable, and also has some special uses of its own. The supply and demand for meta-cresol are in balance. Cresylic acid, which is a mixture of the related products and may have some phenol content, is used in the plastics industry, and can be exported as "American duty-free" to the U.S.A., where there is always a market for it. Xylenols are cheap materials, the use of which in the plasticiser industry has been developing; they are in good demand and a shortage can be foreseen. There was not much evidence as to high boiling point tar acids, and no special uses for them were mentioned.

Several of the customers who gave evidence expressed a preference for a free market for phenol on the ground that with their substantial requirements they would be able to negotiate more favourable prices. One buyer spoke in favour of a stable price, but from further explanation it appeared that he had in mind, as an example of instability, a commodity the price of which fluctuated between £50 and £150 a ton, and that, if the price of phenol were free from restriction and fluctuated between 1s. 1d. and 1s. 3d. a lb., he would regard that as a stable price.

Although the costs of production had never been ascertained for the purpose of fixing the price, determined efforts had been made by the parties' respective accountants, assisted by the chairman of the Association, to obtain some figures of costs for the purposes of this case. The attempt to obtain costs of production for natural phenol met great difficulties. No producer had costs relating solely to natural phenol, because that is only one of several products arising from the refining of crude tar acids. Costs have to be apportioned between the products. Moreover there was a special difficulty in attributing a cost to the crude tar acids, which are the raw material concerned, in that no member pays or receives a real market price for them. Although there are several different arrangements, under each of them the supplier of the tar or crude tar acids receives in one way or another a share of what is realised by the disposal of the refined products. To obtain a notional cost for the crude tar acids, use was made of a price formula by means of which the price of tar acids purchased by some of the members is calculated. This formula establishes a price for the raw material by reference to the realised prices of refined products, and it includes an element for the phenol content as well as elements for the cresol "A" and cresol "B" contents. The element included in the formula for the phenol content was taken, for the purposes of the costing in the present case, to represent the cost of crude tar acids attributable to the production of phenol. That may well have been the best that could be done in the circumstances, but the results were inevitably artificial. The members were requested to furnish returns of their costs of production and receipts in respect of natural phenol, and instructions were given as to the use of the price formula for determining the raw material cost and as to the apportionment of costs. Members duly furnished returns, and from them a summary was made by the accountants for the information of the court. The returns, however, had not been checked, and so it was not known what degree of uniformity had been achieved in the interpretation and application of the instructions. It was clear from the evidence of the accountants and other witnesses that the costing figures so obtained for the production of natural phenol were not a reliable foundation for estimating the profits earned. The costs were notional, and, consequently, the apparent profits must be notional. The figures might be useful for comparisons between members, but not for any other purpose. Indeed, counsel for the Association contended that the figures were valueless. At a later stage of the hearing, the Association produced a revised summary showing costs and receipts for the whole process of extracting products from crude tar acids. That avoided some of the difficulties of apportionment, but there was still no market price for the crude tar acids and the formula still had to be used. The figures appear to show a satisfactory, or even a high, rate of profit on turnover for the leaders of the industry, but, having regard to the difficulties that have been mentioned, we consider that no firm conclusion can be reached as to the degree of profitability of the production of natural phenol, and we cannot assess the extent of the return on capital employed.

The returns and the summary relating to the costs and receipts in respect of the production of phenol included figures for the production of synthetic phenol by one of the member companies. In contrast to the generally shared misgivings about the figures for natural phenol, it was contended on behalf of the Association that the figures for this company's production of synthetic phenol were reliable, and were, indeed, the only figures showing real costs of production. Certainly these figures were inherently more realistic, as the actual cost of the raw materials used could be given, and there was a separate plant producing only phenol and one by-product, so that no elaborate or difficult apportionment would be required. There was, however, not enough information to enable firm conclusions to be reached with regard to the costs and profits of this company producing synthetic phenol. No representative of this company gave evidence, and we had no evidence whether the year 1957, for which the figures were given, was a normal year in respect of production and costs, or whether it could be adopted as indicative of present conditions in synthetic production, or as to the proportion of working capacity employed in that year. Moreover, the figures were prepared in accordance with the special instructions given for the purposes of this case with a view to comparison with the figures for natural phenol production, and most probably differed from the company's normal costings.

In our view, there are four main features of the Association's price-fixing scheme: (i) The fixed price is substantially above the level at which the price would tend to settle, or round which it would tend to fluctuate, if it were freed from restrictions and left to be determined by the interplay of supply and demand in competitive conditions. (ii) The price fixed by the Association from time to time is not and never has been based on or related to or limited by any figures of costs of production, and the fixing of the price is left entirely to the unfettered discretion and decision of the members of the Association without regard to any formula. (iii) The policy of the Association in their price-fixing has been and still is to " charge what the traffic will bear ". As sellers they have to pay some regard to the interests of their customers, because they would spoil their own market if their prices were so high as to damage the customers' businesses. Their dominant object, however, is to obtain a good return for themselves and for their suppliers associated with them in co-operative schemes. This is a producers' price scheme, operated with some degree of caution but predominantly in the interests of the producers. (iv) There is the usual rigidity of a price-fixing scheme. The customer cannot negotiate for any preferential terms or concessions to assist him in his export trade, or in recognition of the proximity of his premises to the sellers' works, or to reward him for fetching the goods in his own vehicles, or even in consideration of a long-term or large-scale purchase contract. The price with its concomitant terms and conditions is as fixed by the Association, and the customer must agree to pay it or do without the goods. Moreover, the fixed price tends to remain unchanged at times when the price in a free market would be changing in response to changes in the relation between supply and demand. Rigidity is quite usual and, perhaps, unavoidable in a price-fixing scheme, but it must nevertheless be reckoned as one of the prominent features of this scheme.

Prima facie, all those four main features of the scheme are not benefits or advantages but detriments to the public as purchasers, consumers or users of any goods (including phenol and goods partly made from phenol and any other relevant goods) and the removal of the restrictions, by which the scheme having those features would be brought to an end, would not deny to that public any benefit or advantage but would relieve them of detriments. Thus the Association in the present case, in addition to bearing the ordinary burden of proof which rests on respondents under s. 21 of the Act, start with the handicap imposed by the obvious and prominent features of the scheme. In order to bring the scheme within para. (b) of sub-s. (1) of s. 21 of the Act (which is the first step and must be accomplished before the balancing provision at the end of the subsection is reached), they must present and prove some special aspects or features of the scheme or of its results and effects, by virtue of which it could be said that the removal of the restrictions inherent in the fixed price scheme would deny specific and substantial benefits or advantages to the public as purchasers, consumers or users of any goods.

The Association have responded to the challenge by presenting an elaborate and carefully prepared case in support of a number of contentions. The first of these contentions, as outlined by counsel in his opening speech and developed in the evidence, is by far the most important and received the most attention throughout the hearing and needs to be considered in some detail. For convenience, the argument for this contention will be divided into separate steps, so that each step may be considered in turn. (a) It is alleged that there is now for the time being an excess of supply over demand, and the probability is that this excess will increase in the near future and persist for a period of about five years, while demand is gradually overtaking supply, but after that there will be a shortage of supply in relation to demand. (b) It is alleged that the removal of the fixed price restrictions would cause (i) a fall in the price of phenol of about twenty-five per cent. from 1s. 4d. a lb. to about 1s. a lb., and (ii) a fall of about the same magnitude, about twenty-five per cent., in the price of each of the related products. (c) It is alleged that those falls in the prices of phenol and the related products would so reduce the revenue accruing to the coal-tar producers from the distillation of tar and the refining of the tar acids that they would be able to obtain greater financial advantages by using the tar as fuel or selling it for use as fuel; and, consequently, within three or four years a large proportion, estimated at fifty per cent., of the tar would be diverted from the distilleries to the more profitable use or sale of it as fuel (shortly stated, from distillation to burning); and the result would be that some of the distilleries and refineries would have to be closed down; and it would not be feasible to reopen them on a subsequent rise in the prices of phenol and the related products. (d) It is alleged that, in consequence of such diversion of the tar and closing down of distilleries and refineries, the products of tar distillation and tar acid refining, for which there are no alternative sources or none so cheap, would to a large extent be permanently lost; and so there would be denied to the public as purchasers, consumers or users the benefit of having those products and goods made from those products.

These allegations will now be considered in the same order. (a) It may well be that there is at present an excess of supply over the demand for phenol in the home market at present prices, and that such excess recently has been, and, perhaps, for a time will continue to be, increased by the development of the production of synthetic phenol by the Cumene process which will more than offset some fall in the production of natural phenol. In our view, however, it is wrong to leave out of account, in this connexion, the fixed price; lower prices can generate new uses and new demand. Equally, it is wrong to leave out of account the export market, which is an important outlet for the products of the British phenol industry. No evidence or no sufficient evidence has been given of any world-wide over-supply of phenol, nor of any difficulty in disposing of British-made phenol in the export market at the prices prevailing abroad. There has been a remarkable expansion both in the deliveries to the home trade and in exports; deliveries to the home trade rose steadily from 25,221 tons in 1954 to 31,116 tons in 1958, and then jumped to 36,550 tons in 1959; exports rose steadily from 2,600 tons in 1954 to 10,373 tons in 1959; at least one company was running down its stocks in 1958 and 1959. There is no evidence of excess of supply over total demand, when the demand for exports as well as the home demand is taken into account. Even if the export demand is excluded, the rapid expansion of the British plastics industry, in particular, precludes any reliable estimate of the period which must elapse before the home trade demand overtakes, or reaches the amount of, the present supply. Moreover, it cannot be assumed that the supply will remain stationary throughout that period; it may be expanded by an enlargement of the synthetic production in reasonable anticipation of the still further demand; if so, the anticipated shortage of supply in relation to demand some years hence will not occur.

(b) (i) It is common ground between the parties, and accepted by the court, that, after the supposed removal of the Association's price restrictions, there will be a substantial fall in the price of phenol. The extent of the expected fall of the price, and the extent to which this should be attributed to the supposed removal of the restrictions, are not agreed and cannot be determined with certainty, but there are some points which seem fairly clear. In view of the market situation, which has been described above, we think that, if the price restriction scheme remained in force, the Association would not be able to hold the price indefinitely at 1s. 4d. a lb. and would have to make some reduction, though not necessarily a large one. Accordingly, that amount of reduction, as it would have occurred in any case, is not attributable to the supposed removal of the restrictions. Next, we think that the lower limit—the " floor " as it is sometimes called—for the new home trade price level is likely to be somewhat higher than the level of export prices, because on the one hand the home trade price has tariff protection and on the other hand the export price f.o.b. at the British port has to be low enough to compete with the foreign domestic price after bearing the cost of freight, insurance, additional land transport, agents' charges and, perhaps, an import duty. Thirdly, the home trade price is likely to be influenced to a considerable extent by important factors on which there is hardly any evidence before the court, namely, the costs of production and price policies of the large producers of synthetic phenol who are outside the Association. It seems unlikely that the fall in the price of phenol, at any rate in so far as it would be caused by the removal of the price restrictions, would be as much as 4d. a lb., but we cannot make any definite forecast on this point.

(b) (ii) Be it supposed, however, that the removal of the restrictions on the price of phenol would cause it to fall by twenty-five per cent. Would it also cause a twenty-five per cent. fall in the prices of the related products? In our view, there is only a speculative possibility, and not a probability, that this would

A happen. It is possible that the association or associations controlling the prices would simply make an all-round reduction of twenty-five per cent. It is more likely, however, that, in relation to each particular product, they would have regard to the market factors affecting that product. Reference has already been made to the relevant market factors, including the scarcity and low price range of xylenols, the special export demand for cresylic acid under the guise of B "American duty free", the special uses of ortho-cresol, some use of meta-cresol otherwise than as a substitute for phenol, the absence of any substantial synthetic production of any of these related products, and the prospect of some diminution of the supply. It cannot be found from the evidence that removal of restrictions on the price of phenol would bring about an all-round or average reduction of, or in the region of, twenty-five per cent. in the prices of the related products.

C (c) Consideration of the next step in the argument requires assumptions to be made (although, in our view, they are improbable) that removal of the Association's restrictions on the price of phenol would cause a twenty-five per cent. fall in the price of phenol and an all-round or average twenty-five per cent. fall in the prices of the related products. Would these assumed price falls cause the tar producers to divert a large proportion of the tar from distillation to burning? D There are important differences between the two main classes of tar producers, namely, the steel companies operating coke ovens in or in connexion with their steel works and the Gas Boards operating their gas works. The steel companies are for general reasons more likely to make the diversion, because tar is a good fuel for giving radiant heat in open hearth furnaces and in many cases the coke ovens are situated near the furnaces, and some of the steel companies are already E burning tar. These companies, eight in number, already burn nearly the whole of their crude tar production, and are responsible for nearly the whole of the amount of the crude tar now burnt. On the other hand, phenol and its related products form only a small proportion of the products of coke oven tar, so that the supposed fall in their prices would have only a small effect on the revenue resulting from the distillation of coke oven tar. Moreover, any fall in the revenue from phenol F and its related products would be offset, to some extent at any rate, by improved revenue from naphthalene, which is an important product of coke oven tar, is scarce throughout the world, is in general demand and has a rising price trend. In the absence of direct evidence on the point, it cannot be found that the supposed fall in the prices of phenol and its related products would have any significant effect on the policies of the steel companies as to the use or disposal of G their coke oven tar. No witness was called from any of the steel companies to give evidence on this point. The position of the Gas Boards is different. The carbonisation process in their continuous vertical retorts produces tar containing a comparatively large proportion of phenol and its related products and a comparatively small proportion of naphthalene. The revenue derived from the tar is in one way or another directly dependent on the revenue realised from the H products obtained by distilling the tar and refining the tar acids. At least one Gas Board carries on its own distilling and refining operations for a proportion of its tar; others have long term co-operative schemes, under which the preponderant share of the net realisation comes to them; there are cases in which the tar acids are sold to refineries at a price ascertained by the use of a formula based on realisation. The revenues of the Gas Boards from this source would be reduced I by the supposed falls in the prices of phenol and its related products. Would they be induced to divert their tar from distillation to burning? It might not be easy to find a market. So far, the sales of tar as fuel have been on a very small scale, and the market for it on a large scale is untested. There were conflicting expert opinions as to the suitability of tar (not dehydrated) for use as fuel, and as to the price which tar as fuel would be likely to fetch now or in the future in competition with heavy fuel oil. It is uncertain whether the return from tar as fuel would be greater than the return from tar as a raw material for production of chemicals. If it were, the distilling and refining companies might be willing A to accept a reduced share of the realisation and thereby increase to some extent the returns to the Gas Boards. The Gas Boards have a considerable stake or vested interest in the tar distilleries and tar acid refineries, partly by direct ownership, partly through the long-term co-operative schemes and partly by shareholdings. So long as the distilleries and refineries remain in existence and in operation, the Gas Boards have a sure outlet for their tar. But suppose that a B large part of the tar were diverted to the fuel market, and, consequently, some of the distilleries and refineries were closed down; then the Gas Boards would have to depend on the fuel market for disposal of much of their tar and would be in competition with the suppliers of oil and coal and any other fuel that may be developed. A cautious attitude on the part of the Gas Boards would not be surprising. We have the evidence of Mr. Dyde, which is exactly on the point. C He estimated the loss of revenue to his Gas Board from the supposed fall in the prices of phenol and the related products, and he said that this loss of revenue would not be sufficient to induce his Gas Board to divert their tar from distillation to burning. There was no evidence to show how any other Gas Board would be affected. We accept Mr. Dyde's evidence, and, in our view, his evidence, taken in conjunction with the other matters which have been mentioned, makes it D impossible for the Association to establish the third step in their argument, even if they had successfully accomplished the first two steps.

(d) Consideration of the fourth step would have raised complex and far-reaching questions, on which it is not now necessary to express opinions.

The Association have a second main contention which was stated by counsel in his opening speech for the Association in these terms: E

> " Secondly we say that our system of price control when demand exceeds supply operates to keep prices down, and that the result of the stability of price at that lower level is for the benefit of the public. We say that, if as a result of our arrangement being determined the production of natural phenol is reduced, sooner or later the increasing demand for phenol will overtake the diminished supply, and the price of phenol, uncontrolled, is likely to F be higher than would otherwise be the case."

To a large extent the points involved in this contention have already been dealt with. The present effect of the Association's price-fixing is admittedly to keep the price of phenol at an artificially high level—higher than the price would be in free market conditions. It is not clear that the Association's price-fixing has G normally had a different effect in the past, and there is no guarantee that it would normally have a different effect in the future. In *Re Scottish Assocn. of Master Bakers' Agreement* (1), this court said:

> " It is not stabilisation of price by itself alone which is a benefit or advantage; it can only be stabilisation at the right level; it is difficult to envisage circumstances in which stabilisation at an excessive price level could be held H to confer benefit on the consumer. We re-affirm the view already expressed by this court in *Re Yarn Spinners' Agreement* (2) that, as a general rule, price stabilisation as an alternative to a free market is not a benefit to the consuming public. Stabilisation does not appear to us to be necessarily a virtue."

In our view, as stated above, the rigidity of the fixed price and its ancillary terms and conditions is a disadvantage to the purchasers. The estimate of an increasing I demand overtaking the diminished supply and causing a scarcity is not accepted, because the synthetic production of phenol can be expanded to meet or anticipate further increase in the demand.

The Association have a third main contention which was stated in these terms:

> " Thirdly we say that our system of price control has ensured the increase

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(1) [1959] 3 All E.R. 98 at p. 109; L.R. 1 R.P. 347 at p. 376.
(2) [1959] 1 All E.R. 299 at p. 317; L.R. 1 R.P. 118 at p. 189.

A of the supply of phenol to meet an erratically increasing demand, and that the continuance of our system gives the best security that the future supply of phenol will be in line with the future demand."

In our view, that is claiming too much for the effect of the price-fixing scheme. The effective reason for the increase in supply has been the rapid and on the whole steady increase in the demand for phenol, especially from the growing plastics B industry. Two of the large synthetic producers are outside the Association and making at any rate some sales below the fixed price. Their decisions as to expanding their production of synthetic phenol are likely to be governed by their forecasts of the future demand rather than by the continuance or cessation of the Association's price-fixing scheme.

Other contentions were set out in the Association's Statement of Case and were C referred to and relied on in counsel's opening speech. These have been taken into account.

We have come to the conclusion that the Association have failed to prove their case under s. 21 (1) (b) of the Act. Accordingly, there will be a declaration under s. 20 that the restrictions are contrary to the public interest. The parties will no doubt wish to discuss and if possible to agree the exact form of the declaration D and any further order that may be required, and there is liberty to apply.

Declaration accordingly.

Solicitors: *March, Pearson & Green*, Manchester (for the Phenol Producers' Association); *Treasury Solicitor.*

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

E

MASCHERPA *v.* DIRECK, LTD.

[COURT OF APPEAL (Hodson, Willmer and Devlin, L.JJ.), March 18, 21, 1960.]

F *Discovery—Forfeiture—Landlord and tenant—Forfeiture of lease for breach of covenant—Tenant's counterclaim for relief against forfeiture—Reply by landlord alleging financial unsoundness of tenant—Matters arising other than forfeiture issue—Discovery limited to such matters.*

A landlord brought an action against his tenant, a limited company, for forfeiture of the tenant's lease for failure to comply with the repairing cove- G nants therein. The tenant having counterclaimed for relief from forfeiture*, the landlord alleged in reply that the tenant was not financially sound and so was unable to comply with his obligations under the lease. On the landlord's application the tenant was ordered to give discovery of documents excluding those relating to the issue of forfeiture. On appeal,

Held: on a claim for relief against forfeiture of a lease many other H matters might arise than the issue on which forfeiture depended, such other matters in the present case (viz., the financial soundness of the tenant) could be and had been kept separate from the issue on which forfeiture depended, and the order for discovery limited to these had been rightly made.

Earl of Mexborough v. *Whitwood Urban District Council* ([1897] 2 Q.B. 111) and *Colne Valley Water Co.* v. *Watford & St. Albans Gas Co.* ([1948] I 1 All E.R. 104) distinguished; dicta of LORD ESHER, M.R. ([1897] 2 Q.B. at p. 117) and of TUCKER, L.J. ([1948] 1 All E.R. at p. 107) applied.

Appeal dismissed.

[As to proceedings in which discovery will not be granted, see 12 HALSBURY'S LAWS (3rd Edn.) 4, para. 4; and for cases on the subject, see 18 DIGEST (Repl.) 18, 19, *128-133*.]

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* Under the Law of Property Act, 1925, s. 146, the relevant terms of which are set out at p. 147, letter D, post.

Cases referred to:

Colne Valley Water Co v. *Watford & St. Albans Gas Co.*, [1948] 1 All E.R. 104; [1948] 1 K.B. 500; [1948] L.J.R. 385; 112 J.P. 113; 18 Digest (Repl.) 15, *98*.

Ind Coope & Co. v. *Emmerson*, (1887), 12 App. Cas. 300; 56 L.J.Ch. 989; 56 L.T. 778; 18 Digest (Repl.) 68, *528*.

Mexborough (Earl) v. *Whitwood Urban District Council*, [1897] 2 Q.B. 111; 66 L.J.Q.B. 637; 76 L.T. 765; 18 Digest (Repl.) 18, *130*.

Orme v. *Crockford*, (1824), 13 Price, 376; M'Cle. 185; 147 E.R. 1022; 18 Digest (Repl.) 15, *95*.

Seddon v. *Commercial Salt Co., Ltd.*, [1924] All E.R. Rep. 626; [1925] Ch. 187; 94 L.J.Ch. 225; 132 L.T. 437; 18 Digest (Repl.) 18, *132*.

Interlocutory Appeal.

The landlord of premises known as 159, Hornsey Road, Islington, London, demised by a lease dated Sept. 2, 1871, for a term of ninety years from Dec. 25, 1870, brought an action against the tenant, Direck, Ltd., of the premises claiming possession, damages for breaches of repairing and decorating covenants, and mesne profits. The claim for possession was based on a proviso for re-entry on breach of covenant contained in the lease. By counterclaim delivered on July 17, 1959, the tenant denied the breaches of covenants and counterclaimed that if, contrary to that denial, it should be found that the tenant had committed breach of covenant to repair, relief from forfeiture should be granted under s. 146 of the Law of Property Act, 1925, on such terms as the court should think fit. By defence to counterclaim delivered on Oct. 14, 1959, the landlord denied that the tenant was entitled to relief against forfeiture and alleged the following, among other, circumstances in support of that denial—(a) that the premises had been for a considerable time (as to how long the landlord was unable to particularise prior to discovery) unoccupied, and that during such time no adequate provision had been made for their care and management; (b) that at all material times the tenant had failed to set aside any sufficient monetary reserve to enable it to comply with the covenants and conditions of the lease; and (c) that the present financial structure of the tenant and its capital and trading prospects for the future were not such as to constitute the tenant a satisfactory lessee to whom relief should be granted. By order dated Dec. 14, 1959, the whole of the action was transferred to an official referee. By order dated Jan. 12, 1960, the following, among other matters, were ordered—that the landlord should file within ten days an affidavit of documents and that the tenant should file within ten days an affidavit of documents, excluding in the case of the tenant " those documents relating to the issue of forfeiture "; it was further ordered that there should be inspection of the documents within seven days of the filing of documents. The landlord's affidavit of documents was duly sworn and filed. By order dated Feb. 23, 1960, made on the application of the landlord, it was ordered that, unless the tenant paid into court £250 and filed an affidavit of documents, both within seven days, the tenant's defence and counterclaim should be struck out and the tenant should be placed in the same position as if it had not defended, and that the landlord should be at liberty to sign judgment for damages to be assessed and his costs of this action including the costs of this application to be taxed, the tenant having failed to comply with the order of Jan. 12, 1960, for discovery of documents. There had been no appeal against the order of Jan. 12, 1960, at the time when the order of Feb. 23, 1960, was made. Subsequently the landlord consented to an appeal and time was extended. The tenant accordingly appealed against both orders of the official referee dated Jan. 12 and Feb. 23, 1960.

D. Weitzman, Q.C., and *P. Weitzman* for the defendant, the tenant.

N. C. Tapp for the plaintiff, the landlord.

HODSON, L.J., stated the nature of the appeals and of the orders of Jan. 12, 1960 and Feb. 23, 1960, and continued: The action is an action for the possession

A of land, based on a forfeiture, the plaintiff landlord's case being that the defendant tenant has failed to comply with the tenant's covenant to repair. The tenant takes the point that no order for discovery can be made. So far as the first order is concerned the tenant was out of time on appealing. The tenant obtained the consent of the landlord to this appeal according to a direction given by this court (1) and time was thereby extended. This has a curious effect in this case, B because, there having been no appeal from the order of Jan. 12, 1960, the order of Feb. 23, 1960, was consequential on non-compliance with the first order: on the face of it the official referee was not wrong in law, and no appeal therefore lies to the court from the second order. However, the question whether there can be an appeal from that order is merely of academic importance because it depends in any event on the first order, and in my judgment the first order was right as to C discovery, and the tenant is wrong in seeking to say that no order for discovery at all should be made.

It should be stated that the tenant has asked for relief against forfeiture by way of counterclaim in this action, relying on the provisions which are now contained in s. 146 (2) of the Law of Property Act, 1925:

D
> " Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms . . . as the court . . . thinks fit."

E
It is clear from the language of that section that many other issues may be raised on the tenant's claim for relief against forfeiture apart altogether from the issue or issues on which the forfeiture itself depends. To complete the matter, I should say that that right to claim relief against forfeiture was first introduced by the Conveyancing Act, 1881 (2). Before that Act came into force the position F appears to have been that, except in the case of non-payment of rent and certain other rare cases, no relief against forfeiture could be given.

The contention of the tenant is that this is a case where the only matter in issue is forfeiture: if that is not precisely correct, the tenant argues that, since the tenant is claiming relief against forfeiture, its claim for relief is so closely allied to the landlord's claim for possession based on forfeiture that the protection which the law gives it on the forfeiture matter should cover the tenant G as to the counterclaim. The tenant relies on what was said by this court in *Earl of Mexborough* v. *Whitwood Urban District Council* (3). I draw attention to the date of that case because it was after 1881, when the Conveyancing Act came into force; indeed counsel on behalf of the tenant has relied on that matter as showing the attitude of the court towards discovery notwithstanding the H enlarged right to relief which the statute has given. In that case, the headnote is:

> " In an action to enforce a forfeiture of a lease for breach of covenant the court will not grant discovery of documents or leave to administer interrogatories for the purpose of establishing the forfeiture."

No other issue was raised in the action but the question whether or not there had been a forfeiture for breach of covenant; and there was no claim for relief I against forfeiture. The rule was stated by LORD ESHER, M.R., in this way (4):

> ". . . there are two rules of law which have always existed as part of the common law of England, and have been recognised as such by all courts whether of law or equity, and the rights conferred by them have never been taken away by any statute. The first is that, where a common informer sues for a penalty, the courts will not assist him by their procedure in any way:

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(1) [1958] 2 All E.R. 493.
(2) By s. 14.
(3) [1897] 2 Q.B. 111.
(4) [1897] 2 Q.B. at pp. 114, 115.

> and I think a similar rule has been laid down, and acted upon from the earliest times, in respect of actions brought to enforce a forfeiture of an estate in land. These are no doubt rules of procedure, but they are much more than that: they are rules made for the protection of people in respect of their property, and against common informers."

Lord Esher, M.R., quotes (5) from a judgment of Alexander, C.B., in *Orme* v. *Crockford* (6):

> " 'We must not lose sight of the fact that it is a most important right of which this bill seeks to deprive the defendant, no less than that of protecting himself by refusing to answer from the consequences of answering questions which might tend to charge him with a crime or subject him to penalties, or forfeiture of estate contrary to the humane policy of the law '."

Lord Esher, M.R., said (7):

> "I do not think the House of Lords (8) meant to decide that the Judicature Act had done away with these two fundamental rules of law for the protection of people in respect of their title to property and against common informers. There appears to me to be ample authority for saying that an action for forfeiture stands for the present purpose on the same footing as an action for penalties. I think the proper enunciation of the law on the subject is that, where in any action an issue is raised solely for the purpose of obtaining judgment for a forfeiture of land, the court will not with regard to that issue make any order either for the discovery of documents or for the administration of interrogatories. There may be an action where that is one of the issues and there are other independent issues, and the court may with regard to those other issues make an order for discovery of documents and interrogatories, but on the issue relating to forfeiture I think the court will not make such an order. When, as in the present case, the sole issue raised is whether there has been a forfeiture, I think no order can be made in favour of the plaintiff either for discovery of documents or for the administration of interrogatories."

I have read enough to show that the way in which Lord Esher, M.R., and indeed the other members of the court, approached the matter was that they were desirous of laying down the continued existence of the rule which protected people in respect of their title to property; and it was emphasised in the last sentence which I read that the only issue raised was whether there had been a forfeiture.

That case has been followed recently in two cases, the first of them being *Seddon* v. *Commercial Salt Co., Ltd.* (9) and I need read only one sentence from Warrington, L.J.'s judgment (10):

> "There is a very well-known rule that where in any action an issue is raised solely for the purpose of obtaining judgment for the forfeiture of land the court will not with regard to that issue make any order either for the discovery of documents or for the administration of interrogatories."

The only other case which I need mention to which we have been referred is *Colne Valley Water Co.* v. *Watford & St. Albans Gas Co.* (11), which was also a decision of the Court of Appeal. That was an action for penalties; there was also a claim for damages and an injunction; and the question which is connected with this question was whether in such an action discovery could be obtained without

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(5) [1897] 2 Q.B. at p. 116.

(6) (1824), 13 Price, 376.

(7) [1897] 2 Q.B. at p. 117.

(8) The decision referred to was *Ind Coope & Co.* v. *Emmerson*, (1887), 12 App. Cas. 300.

(9) [1924] All E.R. Rep. 626; [1925] Ch. 187.

(10) [1924] All E.R. Rep. at p. 628; [1925] Ch. at p. 194.

(11) [1948] 1 All E.R. 104; [1948] 1 K.B. 500.

A infringing the rule which I have stated. On the facts of that case Tucker, L.J., put the matter in this way (12):

> "That part of the claim being a claim for penalties, it becomes necessary to consider whether in this particular case in the exercise of his discretion the judge should, or could, have made an order for discovery limited to those issues in the action which are not concerned with the claim for penalties. B I agree that in this action it would be impossible to frame an order so limited, and, therefore, I think that this was not a case where the judge could be called on to exercise the discretion which he otherwise would have had in circumstances similar to the present."

Lord Goddard, C.J., had said (13):

> C "It is clear, although three different remedies are sought, that there is only one real issue, and that issue is whether or not the defendants have fouled the water supply of the plaintiffs."

In this case there is more than one issue, and for that reason the order of the official referee was right. The pleadings on the question whether relief should be granted contain a number of matters (14) quite apart from the question raised as D to the want of repair of the premises, the contention of the landlord being (broadly speaking) that the tenant is not financially sound and able to shoulder the obligations of the lease; and it is in respect of that aspect of the matter that discovery is primarily sought by the landlord. I think that the official referee has by the form of his order enabled the two matters to be kept separate. It is conceded by the landlord, so far as his claim to mesne profits is concerned, that that E may be subject to the same objection as the claim for damages was in *Colne Valley Water Co.* v. *Watford & St. Albans Gas Co.* (15), and he does not seek discovery on that. So far, however, as the other matters are concerned, the question of the breach of covenant to repair can be kept quite separate from the matters arising from the counterclaim of the tenant.

In my judgment, the first order of the official referee (the order of Jan. 12, F 1960) was good in law; the tenant's objection to that order fails; and the appeal should be dismissed.

WILLMER, L.J.: I agree so fully with what my Lord has said that I should be merely wasting time if I were to repeat the reasons for dismissing the appeal.

G **DEVLIN, L.J.:** I also agree.

Appeal dismissed. Order for delivery of tenant's affidavit of documents within seven days.

Solicitors: *Gale & Phelps*, London, N.16 (for the defendant, the tenant); *Gordon, Dadds & Co.* (for the plaintiff, the landlord).

[*Reported by* Henry Summerfield, Esq., *Barrister-at-Law.*]

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(12) [1948] 1 All E.R. at p. 107; [1948] 1 K.B. at p. 507.
(13) [1948] 1 All E.R. at p. 106; [1948] 1 K.B. at p. 505.
(14) See p. 146, letters E and F, ante.
(15) [1948] 1 All E.R. 104; [1948] 1 K.B. 500.

Re KENSINGTON NORTH PARLIAMENTARY ELECTION.

[ELECTION COURT (Streatfeild and Slade, JJ.), April 4, 5, 6, 1960.]

Elections—Parliamentary—Validity of election—Petition alleging breaches of Parliamentary Elections Rules—Whether election conducted substantially in accordance with law—Onus of proof—Representation of the People Act, 1949 (12, 13 *&* 14 *Geo.* 6 *c.* 68), *s.* 16 (3).

In determining under s. 16 (3)* of the Representation of the People Act, 1949, whether a Parliamentary election was so conducted as to be substantially in accordance with the law as to elections and whether an act or omission affected its result, the burden of proof is not on the respondent to the election petition, but the election court decides the questions on the evidence as a whole (see p. 153, post).

Islington, West Division, Case ((1901), 5 O'M. & H. at p. 130) distinguished.

[As to irregularities at and the validity of elections, see 14 HALSBURY'S LAWS (3rd Edn.) 149, para. 261.

For the Representation of the People Act, 1949, s. 16 (3), see 8 HALSBURY'S STATUTES (2nd Edn.) 594; and for the Parliamentary Elections Rules, r. 32, r. 38, r. 44 and r. 45, see ibid., 768, 774 and 780.]

Case referred to:

Islington, West Division, Case, Medhurst v. *Lough & Gasquet,* (1901), 5 O'M. & H. 120; 20 Digest 115, *916*.

Petition.

This was a parliamentary election petition presented by Sir Oswald Mosley, Baronet, who was a candidate at the general election for the North Division of Kensington held on Oct. 8, 1959. The successful candidate was George Henry Roland Rogers, who was the first respondent to the petition. The second respondent was the returning officer, Arthur Newton McHaffie. The petition was dated Oct. 28, 1959.

In para. 3 of the petition the petitioner stated that in the holding of the election divers illegal practices and breaches of the statutory rules† governing the conduct of the election were committed by the returning officer and/or his servants or agents in that:

> "(i) when numerous persons who were qualified to vote in the said election did in fact vote therein, no marks were placed against the numbers allotted to the said persons in the register of electors to denote that ballot papers had been received by them.
>
> "(ii) no proper arrangements were made for the transporting of the ballot boxes and packages from the polling stations to the place appointed for the count.
>
> "(iii) the returning officer failed to make any or any proper arrangements for ensuring that the ballot boxes were opened and/or the votes were counted in the presence of the counting agents and/or the election agents entitled to be present thereat.
>
> "(iv) the ballot boxes were opened and/or the returning officer proceeded to count the votes in the absence of counting agents and/or election agents entitled to be present thereat.
>
> "(v) persons other than those specified in r. 45 (2) of the Parliamentary Elections Rules contained in Sch. 2 to the Representation of the People Act, 1949, attended the counting of the votes.
>
> "(vi) persons other than those who had taken the requisite declaration of secrecy in respect of the said election attended the counting of the votes."

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* The terms of the subsection are printed at p. 152, letter G, post.

† The Parliamentary Elections Rules, in Sch. 2 to the Representation of the People Act, 1949. The relevant rules are r. 38 (voting procedure), r. 44 (procedure on close of poll), r. 45 and r. 46 (counting of votes), and r. 32 (declaration of secrecy).

The petitioner prayed that (a) there might be a scrutiny of the votes recorded as having been cast in the election, and (b) that it might be determined that the first respondent was not duly elected and that his election and return were void.

On Apr. 4, 1960, the petition came on for trial before the election court (STREATFEILD and SLADE, JJ.). In his presentation of the case, the petitioner, who appeared in person, referred to a canvass which had been made by his supporters in four of the sixteen polling districts, to inquire whether or not certain electors had actually voted although no marks were placed against their numbers in the register of electors. On the question of procedure, STREATFEILD, J., said that, as the election court was not bound by the ordinary rules regarding hearsay evidence*, it was open to the petitioner to give the result of the canvass, for what it was worth, although it was based on hearsay evidence.

At the continued hearing on Apr. 5, after the petitioner had concluded his case, counsel for the returning officer submitted that there was no case to answer under para. 3 (ii), (iii) and (iv) of the petition. The submission was upheld by the court. The petitioner, while accepting the ruling of the court in regard to para. 3 (ii), invited the court to include with its certificate to the Speaker a recommendation with regard to the future escorting of ballot boxes from the place of the poll to the place of count.

In regard to para. 3 (v) and (vi) of the petition, the count for the North Kensington Division and that for the South Kensington Division took place at the same time in the Kensington town hall, and it was admitted by counsel for the respondents that two persons connected with the South Kensington election (the labour candidate and a counting agent) were present at some time during the count for the North Kensington Division, although their names were not included in the list of persons who had been given permission to attend under r. 45 (2)† of the Parliamentary Elections Rules.

The petitioner appeared in person.

J. A. Grieves, Q.C., and *Henry Summerfield* for the first respondent, the successful candidate.

E. H. Blain and *Miss Sheila Cameron* for the second respondent, the returning officer.

J. R. Cumming-Bruce for the Director of Public Prosecutions.

STREATFEILD, J.: This is an election petition brought by Sir Oswald Mosley, Baronet, who was one of the candidates at the general election for the North Kensington Division. This resulted in the return to Parliament of Mr. Rogers (the first respondent), who received 14,925 votes. Mr. Bulbrook came second with 14,048 votes; Mr. Hydleman came third with 3,118 votes, and Sir Oswald Mosley next with 2,821 votes. In this petition the petitioner alleges a number of illegal practices and breaches of the statutory rules (1) governing the conduct of the election, alleged to have been committed by the returning officer, who is the second respondent to the petition. We have already ruled that there is no case to answer in regard to the matters stated in para. 3 (ii), (iii) and (iv) of the petition, although I shall have a word to say presently with regard to para. 3 (ii).

The first item of complaint, under para. 3 (i) of the petition, is that there was a breach of r. 38 of the Parliamentary Elections Rules, in that numerous persons who were qualified to vote in the election did in fact vote therein, but no marks were placed against their numbers in the register of electors to denote that ballot papers had been received by them (2). It is laid down in the rules that a person tendering himself as a voter must identify himself. He is checked from the register of voters; he is given a ballot paper and the counterfoil is marked with his number on the back (3) in case thereafter it is necessary to have a scrutiny of the vote. He has, or should have, his name ticked off or otherwise struck out in the voting register (4) in order to indicate that he has received a ballot paper, otherwise of course there would be danger that someone might come a second time and might get another ballot paper, perhaps from another clerk at the polling station, and so record his vote twice. The object of the rule is to prevent that danger.

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* Under s. 137 (2) of the Representation of the People Act, 1949, subject to the provisions of the Act and rules made under it, the practice and rules on which committees of the House of Commons used to act in dealing with election petitions are to be observed by the election court. See the Parliamentary Election Petitions Rules dated Nov. 21, 1868, as amended by Additional Rules dated Dec. 19, 1868, Mar. 25, 1869, and Jan. 27, 1875; these rules were revoked by r. 22 of the Election Petition Rules, 1960 (S.I. 1960 No. 543), which came into operation on Apr. 1, 1960, but do not affect petitions presented before that date (r. 23).

† Rule 45 (2) reads: " No person other than—(a) the returning officer and his clerks; (b) the candidates and their wives or husbands; (c) the election agents; (d) the counting agents; may be present at the counting of the votes, unless permitted by the returning officer to attend."

(1) The Parliamentary Elections Rules, see footnote† on p. 150, ante.

We were told that a number of persons had been interviewed (5) from various polling stations and that some 111 of them had indicated that they had voted; and that there were no marks against their names in the relevant register of electors. We were told that some twenty of such persons were to be called as witnesses. In fact, ten of them were called and it transpired that five out of the ten had not voted at all—a very good reason for no marks being put against their names. Of the remaining five who did vote, it is, I think, clear from examining the register of voters, that one of them did in fact have his name struck out, together with that of his wife. The clerk had obviously struck them both out together, and the mark rather tailed off when it came to this particular voter; but I think that his name was struck off. In regard to another of the five, the matter was more doubtful, because the name was struck off but the word " stet " was written opposite. There was no mark against the names of the other three, and they did vote. All of those five witnesses who said that they did vote voted only once. There is not a shred of evidence that any of them took advantage of the fact, if, indeed, they knew of the fact, that their names had not been ticked off. It was a breach of r. 38 (1) (d) of the Parliamentary Elections Rules that, when the ballot papers were delivered to these three witnesses—and possibly to four of them—who in fact recorded their votes, no mark was made against their names in the register of electors. The court has to determine what is the result of that breach.

The section which particularly concerns the court is s. 16 of the Representation of the People Act, 1949. By s. 16 (3):

> " No parliamentary election shall be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connexion with the election or otherwise of the parliamentary elections rules if it appears to the tribunal having cognizance of the question that the election was so conducted as to be substantially in accordance with the law as to elections, and that the act or omission did not affect its result."

It seems to me that the election was conducted substantially in accordance with the law, and that the act or omission did not affect the true result. The question of the burden of proof does not, on the strict wording of s. 16, really arise. If it did arise, it seems that, under the wording of the corresponding section of the Ballot Act, 1872, (6) the burden rested on the respondent: see *Islington, West Division, Case, Medhurst* v. *Lough & Gasquet* (7). I think that with the changed wording under s. 16 (3) of the Act of 1949 it is for the court to make up its mind on the evidence as a whole whether there was a substantial compliance with the law as to elections or whether the act or omission affected the result.

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(2) Rule 38 (1) reads: "A ballot paper shall be delivered to a voter who applies therefor, and immediately before delivery—(a) the ballot paper shall be stamped with the official mark . . . (b) the number, name and description of the elector as stated in the copy of the register of electors shall be called out; (c) the number of the elector shall be marked on the counterfoil; (d) a mark shall be placed in the register of electors against the number of the elector to denote that a ballot paper has been received but without showing the particular ballot paper which has been received . . ."

(3) See r. 38 (1) (c).

(4) See r. 38 (1) (d).

(5) The petitioner stated that 739 electors who were shown in the register of electors as not having voted were interviewed.

Even if the burden rested on the respondent, I have come to the conclusion that the evidence is all one way. Here, out of a total voting electorate of 34,912 persons who recorded their votes, three or, possibly four, are shown by the evidence to have voted without having a mark placed against their names in the register, and each of them voted only once. Even if one was to assume in favour of the petitioner that some proportion of the remainder of 111 persons, whom we have not seen, were in somewhat similar case, there does not seem to be a shred of evidence that there was any substantial non-compliance with the provision requiring a mark to be placed against voters' names in the register; and when the only evidence before the court is that, of the only three, or possibly four, people who are affected in that they recorded their votes without having a mark placed against their names, each voted only once, one cannot possibly come to the conclusion that, although there was a breach of the statutory rules, the breach can have had any effect whatever on the result of the election. Even if all the 111 were similarly affected, it could not possibly have affected the result of this election; therefore, although there was a breach in regard to the matter set out in para. 3 (i) of the petition in the omission to place a mark against certain names in the register, I should be prepared to say that there was a substantial compliance with the law in this respect governing elections and that the omission to place a mark against the names did not affect the result.

[HIS LORDSHIP then referred to the Parliamentary Elections Rules, r. 44, dealing with " Procedure on close of poll ", and, after pointing out that there was no provision in the Act of 1949 for a constable to accompany ballot boxes from the polling stations to the place of counting and that there was no evidence in the present case that the ballot boxes had been tampered with in any way, said that, in the circumstances, the court would not make any recommendation to Parliament with regard to the future escorting of ballot boxes. With regard to the allegations in para. 3 (v) and (vi) of the petition, HIS LORDSHIP said that, assuming (without full argument on the point) that the presence, at the count for the North Kensington Division, of the labour candidate and a counting agent for the South Kensington Division constituted a breach of r. 45 (2) of the Parliamentary Elections Rules, in that these two persons had not been given permission to attend the count for the North Kensington Division, and of r. 32, in that they had not made a declaration of secrecy qua the North Kensington election, nevertheless the rules relating to the count were substantially observed, the presence of these two persons at the count did not affect the result of the election, and the election was so conducted as to be substantially in accordance with the law as to elections, within s. 16 (3) of the Act, and that, therefore, the petition should be dismissed.]

SLADE, J.: I agree.

STREATFEILD, J.: The court will order that the petition should stand dismissed and in due course we will report. Under s. 124 (1) of the Act of 1949:

> "At the conclusion of the trial of a parliamentary election petition the election court shall determine whether the member whose election or return is complained of, or any and what other person, was duly returned or elected or

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(6) Section 13 of the Ballot Act, 1872. The Act was repealed by the Representation of the People Act, 1949, s. 175 and Sch. 9.

(7) (1901), 5 O'M. & H. at p. 130, per KENNEDY, J., delivering the judgment of the election court.

> whether the election was void, and shall forthwith certify in writing the determination to the Speaker . . ."

It follows from that that this court itself determines that the first respondent was duly returned and that there is no other person who should have been returned, and it will be certified to the Speaker accordingly.

[After argument as to costs, the court held that the first respondent and the second respondent should be awarded their costs, but, while acknowledging the assistance of counsel for the Director of Public Prosecutions as amicus curiae, made no order as to his costs.]

Petition dismissed.

Agents: *Amphlett & Co.* (for the first respondent); *Town clerk*, Kensington (for the second respondent); *Director of Public Prosecutions.*

[*Reported by* KEVIN WINSTAIN, ESQ., *Barrister-at-Law.*]

NOTE.

COLLINS *v.* COLLINS.

[GLOUCESTER ASSIZES (Mr. Commissioner Gallop, Q.C.), December 21, 22, 23, 1959.]

Divorce—Costs—Party named—Wife's petition alleging husband's improper association with named woman—Copy of petition served on named woman—Appearance entered by named woman, and answer filed denying charges——No application for leave to intervene in suit—Charges against named woman dismissed—Whether order for payment of costs of party named can be made in absence of order giving leave to intervene.

[As to the right to become a party to a divorce suit by intervention, see 12 HALSBURY'S LAWS (3rd Edn.) 329, para. 674, and SUPPLEMENT.

For the Matrimonial Causes Act, 1950, s. 31, see 29 HALSBURY'S STATUTES (2nd Edn.) 416.]

Cases referred to:

D. v. *D.*, [1952] 2 All E.R. 854; 3rd Digest Supp.

Green v. *Green & Partridge*, [1958] 3 All E.R. 242; [1958] 1 W.L.R. 1104; 3rd Digest Supp.

Petition.

In this case the wife petitioned for divorce on the ground of the husband's cruelty. The petition alleged, among other things, an improper association by the husband with a Mrs. Davies. The husband, by his answer, denied the charges of cruelty and, expressly denied that there was any association of any kind with Mrs. Davies. A copy of the petition and notice of proceedings were served on Mrs. Davies, together with a memorandum of appearance which was completed on her behalf by her solicitors and in which it was stated that she intended to deny the charges of "association" made against her. She also filed an answer denying that she had associated with the husband in any way and prayed to be dismissed from the suit with costs. She did not apply for leave to intervene in the suit under s. 31 of the Matrimonial Causes Act, 1950. The registrar granted his certificate and the cause proceeded to trial, Mrs. Davies being described in the Cause List and during the hearing as an intervener. The wife was granted a decree nisi, but the charges against Mrs. Davies were dismissed. The report is confined to the question of Mrs. Davies' costs.

C. G. Heron for the wife.

G. Green for the husband and Mrs. Davies.

A **MR. COMMISSIONER GALLOP, Q.C.:** I now deal, as counsel have requested, with the matter of Mrs. Irene Davies's costs. She ought not to be involved in any expense. The wife, although a legally assisted person has no responsibilities and earns about £8 a week, and I should be disposed to order her to pay all the costs of Mrs. Davies, but the position is difficult.

I am told that the solicitors in this suit have been uncertain how to apply B the decision in *Green* v. *Green & Partridge* (1) and, indeed, I have been told the same thing in other assize courts. That was a case in which KARMINSKI, J., had to consider charges against a husband of improper, but not adulterous, association with a number of women who were named by the wife, which association was alleged to constitute revival of the husband's condoned adultery. KARMINSKI, J., said (2):

C

> "First she relies on an association with a number of other women; they are five in succession starting in 1948 or thereabouts. I do not propose to give the names of these women in the course of my judgment and for this reason. In this case, unfortunately, no effort has been made to serve on these women notice of these charges; had that been done they might have applied D for and have obtained leave to intervene. It is right to say that one or two of them certainly seem to have disappeared, but I myself deplore the introduction of people in charges of this kind (admittedly short of adultery, but discreditable) without some effort to find them."

Then the learned judge added (2):

E

> "I want to make it as clear as I can, that if I thought that the justice of the case had required it, I should have adjourned this matter for the service on the women who have been named in the answer, with possibly certain consequences as to costs against the person alleging but not serving notice of these charges. For that reason I propose to refer to these women, when necessary, by their Christian names."

F The costs thrown away on such an adjournment could well be heavy, and I should think that a litigant in that position might attribute the fault to the solicitor who omitted to serve or give notice if it is in law required. The second supplement to RAYDEN ON DIVORCE (7th Edn.), after referring to *Green's* case (1), says, and says accurately (3):

G

> "It is to be noted that the rules do not *require* such service to be effected [the word "require" is in italics]; but if no attempt is made, there is the risk that the trial judge may adjourn the case for this to be done."

I have not succeeded in reconciling the observations of KARMINSKI, J., with the decision of the Court of Appeal in *D.* v. *D.* (4). That was a case where the husband petitioned for divorce on the ground of cruelty, alleging unnatural H practices by the wife with another woman. The woman named applied for leave to intervene and file an answer in the suit under s. 31 of the Matrimonial Causes Act, 1950, which provides that:

> "In every case in which any person is charged with adultery with any party to a suit [which does not apply] or in which the court may consider, in the interest of any person not already a party to the suit, that that person I should be made a party to the suit, the court may, if it thinks fit, allow that person to intervene upon such terms, if any, as the court thinks just."

BARNARD, J., reversing the decision of Mr. Registrar LONG, refused the application of the other woman for leave to intervene. The Court of Appeal, however, restored the decision of the learned registrar, but in granting leave to intervene clearly took the view that leave should be granted not as a matter of course but only, as a rule, in exceptional circumstances. SINGLETON, L.J., said (5):

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(1) [1958] 3 All E.R. 242. (2) [1958] 3 All E.R. at p. 243.

(3) In the noter-up to p. 317, para. 90, of RAYDEN ON DIVORCE (7th Edn.).

(4) [1952] 2 All E.R. 854.

> " BARNARD, J., we understand, took the view that it was not right to apply the terms of [s. 31 of the Act of 1950] to a case in which the allegation on the file was one of cruelty. I agree with him to the extent that I think it *is very seldom that such a position can arise in a cruelty case*, and, in any event, I feel that the powers given by the section should be *applied sparingly*, but in the present circumstances there is an allegation on the file of cruelty of a most unusual kind."

Even if it is possible to attach a sufficiently determinate meaning to the expression " improper association " I must say, with the greatest respect, that I do not altogether see the value of an automatic obligation to serve notice if the outcome is to be that leave to intervene will only be granted sparingly. In the absence of anything in the Matrimonial Causes Act, or the Matrimonial Causes Rules calling for such notice, I ought, as I believe, to guide myself by the principle of *D.* v. *D.* (6) and to express the view that Mrs. Davies should not have been served, and in any case ought not to have appeared in the form in which she purported to do so.

No doubt it was after careful consideration that the husband's solicitors served Mrs. Davies with the document headed " Memorandum of Appearance. (Co-respondent, Party Cited or Person Named) ", but, as I have already mentioned, no application was made to the registrar for leave to intervene or any other direction, and whether I am right or wrong in thinking that she ought not to have been served, her only course would have been to apply under s. 31. It seems that the registrar was not consulted about it. My opinion therefore is that the procedure had been erroneous throughout. I feel that in view of the observations of KARMINSKI, J., in *Green* v. *Green & Partridge* (7) the wife's solicitor had no option but to create an opportunity for Mrs. Davies to intervene, and that she should have been advised that she had the right to apply for leave to intervene. This never having been done I cannot regard her as a party. I should have thought, therefore, that she does not really require to be dismissed from the suit, but I am told by the associate that she cannot be taken out of the suit without an order. I suppose, if that is so, that the best thing for me to do is to dismiss her from the suit. I do not see how I can order anyone to pay her costs.

Solicitors: *H. W. W. MacNaught*, Worcester (for the wife); *Thursfield & Adams*, Kidderminster (for the husband and Mrs. Davies).

[*Reported by* GWYNEDD LEWIS, *Barrister-at-Law.*]

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(5) [1952] 2 All E.R. at p. 855.

(6) [1952] 2 All E.R. 854.

(7) [1958] 3 All E.R. 242.

BURNETT & HALLAMSHIRE FUEL, LTD. *v.* SHEFFIELD TELEGRAPH & STAR, LTD.

[SHEFFIELD ASSIZES (Salmon, J.), March 1, 2, 1960.]

Libel—Privilege—Report—Judicial proceedings—Newspaper—Advocate's speech—Whether duty to verify advocate's statement.

The privilege which in an action for libel protects a fair and accurate newspaper report of judicial proceedings applies to statements made in advocates' speeches in the course of the proceedings and included in the report, notwithstanding that the statements have not been verified by the newspaper and were not warranted by the facts.

Observations in *Flint* v. *Pike* ((1825), 4 B. & C. 473, see at pp. 479, 480) not followed.

[**Editorial Note.** To be protected, within the proposition stated above, a report must be fair as well as accurate. SALMON, J., gave instances of what might constitute an unfair report. These are at p. 158, letter G, post.

As to the privilege of reports of judicial proceedings, see 24 HALSBURY'S LAWS (3rd Edn.) 63, para. 109, and pp. 65, 66, paras. 111-116; and as to the absolute privilege of advocates and witnesses in the course of judicial proceedings, see ibid., p. 49, para. 89.]

Case referred to*:

Flint v. *Pike*, (1825), 4 B. & C. 473; 6 Dow. & Ry. K.B. 528; 3 L.J.O.S.K.B. 272; 107 E.R. 1136; 32 Digest 106, *1369*.

Action.

This was an action brought by coal merchants, Burnett & Hallamshire Fuel, Ltd., for libel by the publication in a newspaper of the defendants, Sheffield Telegraph & Star, Ltd., of a report of judicial proceedings on Oct. 22, 1958, viz., a prosecution of one Albert Darwent before a magistrates' court on a charge of theft of coal, in which report were published statements made, or alleged to have been made, by the advocate for the prosecution which statements, so it was alleged, were defamatory of the plaintiffs.

On Oct. 22, 1958, Albert Darwent pleaded guilty at the Sheffield magistrates' court to stealing a quantity of coal of the value of 6s. the property of the plaintiffs. He consented to be dealt with summarily. The solicitor who was prosecuting made a speech to the magistrates telling them what the case was about. Evidence was called of the accused's character which included previous convictions and he was fined £10. A reporter from the defendants' newspaper was present in court and took a shorthand note, though not a verbatim account of the proceedings. Within ten minutes of having made that note he wrote out a report which was edited by one or more sub-editors and finally the article or report found its way into the defendants' newspaper, " The Star ", on the same evening as the conviction. It read:

> " COAL FIRM ' CONNIVES AT DISHONESTY '—SOLICITOR.
>
> " A large firm of city coal merchants had ' connived at dishonesty ' by employees, said Mr. George Pitt, prosecuting in Sheffield today. They knew that employees were stealing but turned a blind eye to the thefts, Mr. Pitt said, adding that the firm were reluctant to bring prosecutions, and even when a policeman caught a man in the act of stealing coal, said they did not wish a case to be brought.
>
> " Albert Darwent, 36 year old lorry driver, of Ironside Road, Sheffield,

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* The following cases were referred to in argument: *Kimber* v. *Press Assocn.*, [1893] 1 Q.B. 65; 62 L.J.Q.B. 152; 67 L.T. 515; 57 J.P. 247; 32 Digest 136, *1666*; *Saunders* v. *Mills*, (1829), 6 Bing. 213; 3 Moo. & P. 520; 8 L.J.O.S.C.P. 24; 130 E.R. 1262; 32 Digest 138, *1696*.

> was fined £10 after pleading ‘ guilty ’ to stealing coal worth 6s. the property of Burnett & Hallamshire Fuel, Ltd.
>
> “ Previous Thefts.
>
> “ Mr. Pitt said that Darwent, who had three children, had previous convictions for stealing coal and had been sent to prison for six months last year for such an offence.
>
> “ Darwent, Mr. Pitt continued, was employed as a lorry driver, taking coal from an opencast site to Neepsend Power Station. A police constable who stopped Darwent’s lorry found two hundredweights of coal in bags in the cab. Darwent admitted that he had stolen it and intended taking it home. The constable had done a public service in uncovering this type of offence, Mr. Pitt added.”

The plaintiffs brought an action against the defendants for libel, alleging that by those words the defendants meant and were understood to mean that the plaintiffs connived at thefts by employees, including Darwent, which they knew to be taking place and tried to protect their employees when caught in the act and preferred to deliver short weight to their customers rather than do their duty by prosecuting such employees. By their defence, the defendants admitted that they printed and published the words set out previously but did not admit that they printed or published them of or concerning the plaintiffs. They denied that the words meant or were understood to mean or were capable of the alleged or any meaning defamatory of the plaintiffs. The defendants also claimed that the words were a fair and accurate report of proceedings publicly heard before the court on the hearing of the charge. It was conceded by counsel for the defendants that to say of the plaintiffs, or of anyone, that they had connived at dishonesty was defamatory.

Albert Darwent was in fact employed by a man who was a coal merchant and contractor and who was under sub-contract to carry coal for the plaintiffs and it was contended on behalf of the plaintiffs that, on the facts, it was not proved that Mr. Pitt was criticising the plaintiffs at all, that he might well have been criticising the sub-contractor and that the report could not therefore have been a fair and accurate one. The plaintiffs further contended that in law the privilege for a newspaper report of judicial proceedings did not apply in relation to an advocate’s statement unless the statement was warranted by the facts. The case was tried with a jury.

In the course of his summing-up, His Lordship (SALMON, J.) gave as an illustration of an unfair and inaccurate report the examples of counsel in opening having said something, on instructions, defamatory about one of the parties to a case and the evidence subsequently failing to support that statement, or where the judge or jury had ultimately found that there was nothing in the allegations made against a party. In such a case, if the report merely stated the opening speech, or the allegations, and left out the evidence or finding of the court, which gave an entirely different view of the matter, there would be no difficulty in concluding that the report was unfair and inaccurate. The case is reported only on the ruling of the court on the question whether a newspaper report of an advocate’s statements in a speech was privileged although the accuracy of the statements had not been verified by the newspaper.

Colin Duncan and *D. T. Lloyd* for the plaintiffs.
H. P. J. Milmo and *G. F. Leslie* for the defendants.

SALMON, J.: Members of the jury, I reminded you that a judge, a witness and an advocate are completely protected from what they say in court, but there is a corresponding rule of practice that no advocate ought to make a charge of dishonesty unless he is satisfied that there is material to support the charge. There is another rule of practice that an advocate does not attack the integrity of someone who is not before the court and therefore unable to defend himself.

A save in the most exceptional circumstances. In this case, however, you are not deciding whether Mr. Pitt was fair to the plaintiffs in what he said. What you have to decide is whether the report of those proceedings against Darwent on Oct. 22, 1958, was a fair and accurate report. Was the report of the judicial proceedings fair and accurate? That is the point for you to consider.

It has been submitted to you by counsel on behalf of the plaintiffs that there B is a rule of law that this defence of a fair and accurate report of judicial proceedings does not apply to a report of a counsel's address in court, or a solicitor's address in court, unless what the counsel or solicitor says is warranted by the facts, and in support of that contention counsel has cited a case to you called *Flint* v. *Pike* (1) which was decided in 1825. Members of the jury, I tell you—and you must take the law from me—that that case, in my judgment, decides nothing C of the kind. There are certain observations made by one of the judges (2) in that case which were not essential for the decision of the case and which do appear to support the argument on behalf of the plaintiffs; but I am bound to direct you that in my judgment that argument is wrong. You were also referred to a text-book, GATLEY ON LIBEL AND SLANDER (4th Edn.) at pp. 302, 303, and so far as the passage in GATLEY appears to support the argument, that, members of the D jury, is equally wrong.

What was said by the learned judge in 1825 does not correctly state the law of England today in 1960, and I profoundly doubt if it stated it correctly in 1825. There is no rule of law that a newspaper, before publishing a report of proceedings in court, is bound to verify whether what learned counsel or a solicitor has said is accurate or whether what a witness says is accurate. The function of a E newspaper is to give a fair and accurate account of what happens in court. The public is entitled to be in court and to listen, and the public is entitled to know what is going on in the court through their newspapers. That is a fundamental right of the public, and it depends to no little extent on what is called the freedom of the press. It is really the freedom of all of us. So you can consider the question whether this is a fair and accurate report untrammelled by any rule F of law. It is entirely a matter of fact for you to say—"Is that a fair and accurate report of those judicial proceedings?"

[HIS LORDSHIP referred to the fact that Darwent was an employee of a sub-contractor and concluded his summing-up. The jury, having retired to consider their verdict, found for the defendants.]

Verdict for the defendants.

Solicitors: *Kershaw, Tudor & Co.*, Sheffield (for the plaintiffs); *Neal, Scorah, Siddons & Co.*, Sheffield (for the defendants).

[*Reported by* G. M. SMAILES, ESQ., *Barrister-at-Law.*]

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(1) (1825), 4 B. & C. 473.
(2) See per BAYLEY, J. (1825), 4 B. & C. at pp. 479, 480.

TSAKIROGLOU & CO., LTD. *v.* NOBLEE & THORL G.m.b.H. ALBERT D. GAON & CO. *v.* SOCIÉTÉ INTERPROFESSIONELLE DES OLEAGINEUX FLUIDES ALIMENTAIRES.

[COURT OF APPEAL (Sellers, Ormerod and Harman, L.JJ.), February 16, 17, 18, 19, March 28, 1960.]

Sale of Goods—C.i.f. contract—Frustration—Performance possible by route which was not customary—Closing of Suez Canal.

Force Majeure—Sale of goods—Force majeure clause—C.i.f. contract for the sale of groundnuts—I.O.S.A. Form 38, *cl.* 8*—Closing of Suez Canal—Whether clause brought into operation.*

Arbitration—Case stated—Facts found in Special Case—Frustration—Sale of goods—Normal shipping route via Suez—Finding in Case that shipping by route via Cape of Good Hope would not render contract commercially or fundamentally different—Whether appeal tribunal can review finding.

By two contracts, dated respectively Oct. 12 and Oct. 31, 1956, sellers in Sudan agreed to sell specified quantities of Sudan groundnuts in shell, c.i.f. Nice and Marseilles respectively, shipment to be made from a Sudanese port under the first contract in October/November, 1956, and under the second contract in November, 1956. Both contracts incorporated the terms of Form 38 of the I.O.S.A. forms of contract, cl. 8 of which provided, among other things, that, in all cases of force majeure preventing shipment within the time fixed, the period for shipment should be extended for not more than two months and " after that, if the case of force majeure be still operating, the contract shall be cancelled ". Sufficient groundnuts were held to the sellers' order to fulfil both contracts. Following the invasion of Egypt by Israel, the Suez Canal was blocked to shipping on Nov. 2, 1956, and it remained blocked until April, 1957. The sellers reserved shipping space, but the reservations were cancelled. The sellers did not ship any groundnuts and their contention that the contract was frustrated was referred to arbitration. It was found that at the time of the first contract, Oct. 12, 1956, the parties contemplated shipment by the Suez Canal route; but there was no finding that the sellers or buyers were aware at the time of the second contract that that route was impracticable or what route they had then in contemplation. It was found that the alternative route during the closure of the Suez Canal was by the Cape of Good Hope which was then the shortest practicable route. It was also found that performance of the contract by shipping the goods on a vessel routed via the Cape of Good Hope was not commercially or fundamentally different from its being performed by shipping the goods on a vessel routed via the Suez Canal.

Held: the contracts were not frustrated for the following reasons—

(i) the contracts did not expressly stipulate for shipment via Suez, and there was no ground on which such a stipulation could be implied.

(ii) neither war nor force majeure prevented shipment of the contract goods and cl. 8 did not protect the sellers.

(iii) when the Suez route (i.e., the usual route at the dates of the contracts) became impracticable it was the sellers' duty to put the goods on a vessel destined for the required port by a reasonable and practicable route, and the questions for consideration were whether there existed an alternative route and, if so, whether performance by that route would render the sellers' obligations radically different from those undertaken by the contracts; and, on the facts, there was an alternative route (i.e., via the Cape of Good Hope) and shipping by that route would not render the contracts radically different.

Carapanayoti & Co., Ltd. v. *E. T. Green, Ltd.* ([1958] 3 All E.R. 115) overruled.

Re L. Sutro & Co. & Heilbut, Symons & Co. ([1917] 2 K.B. 348) distinguished.

Held, further, the finding that performance of the contract by shipping the goods via the Cape of Good Hope was not commercially different from its performance by shipping via Suez involved a question of law, viz., whether the contract had been frustrated, and was not merely a finding of fact; and it was, therefore, open to review.

Per SELLERS and ORMEROD, L.JJ. (approving the decision of McNAIR, J., in *Carapanayoti & Co., Ltd.* v. *E. T. Green, Ltd.*, [1958] 3 All E.R. 115, on this point): where a contract for the sale of goods provides that performance or a particular part of the performance is to be carried out in a customary manner, the performance must be carried out in a manner which is customary at the time when the performance is called for (see p. 163, letter G, and p. 167, letters H and I, post).

Decisions of DIPLOCK, J. ([1959] 1 All E.R. 45) (on different grounds) and ASHWORTH, J. ([1959] 2 All E.R. 693) affirmed.

[As to shipment of goods under a c.i.f. contract, see 29 HALSBURY'S LAWS (2nd Edn.) 214, para. 286.

As to the frustration of a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 185, para. 320; and for cases on the subject, see 12 DIGEST (Repl.) 459, 460, *3425-3429*.]

Cases referred to:

Bank Line, Ltd. v. *Capel (A.) & Co.*, [1919] A.C. 435; 88 L.J.K.B. 211; 120 L.T. 129; 14 Asp. M.L.C. 370; 12 Digest (Repl.) 443, *3365*.

Carapanayoti & Co., Ltd. v. *E. T. Green, Ltd.*, [1958] 3 All E.R. 115; [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390; 3rd Digest Supp.

Davis Contractors, Ltd. v. *Fareham U.D.C.*, [1956] 2 All E.R. 145; [1956] A.C. 696; [1956] 3 W.L.R. 37; 3rd Digest Supp.

Evans, Sons & Co. v. *Cunard Steamship Co., Ltd.*, (1902), 18 T.L.R. 374; 41 Digest 486, *3175*.

Jackson v. *Union Marine Insurance Co., Ltd.*, (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 2 Asp. M.L.C. 435; 12 Digest (Repl.) 438, *3339*.

Reardon Smith Lines, Ltd. v. *Black Sea & Baltic General Insurance Co., Ltd., The Indian City*, [1939] 3 All E.R. 444; [1939] A.C. 562; 108 L.J.K.B. 692; 161 L.T. 79; Digest Supp.

Sutro (L.) & Co. & Heilbut, Symons & Co., Re, [1917] 2 K.B. 348; 86 L.J.K.B. 1226; 116 L.T. 545; 14 Asp. M.L.C. 34; 17 Digest (Repl.) 45, *543*.

Taylor v. *Caldwell*, (1863), 3 B. & S. 826; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 122 E.R. 309; 12 Digest (Repl.) 418, *3242*.

Appeals.

These were two appeals by sellers of groundnuts in matters raising identical questions for the decision of the court, and by consent they were heard together. In *Tsakiroglou & Co., Ltd.* v. *Noblee & Thorl G.m.b.H.*, the sellers appealed against an order of DIPLOCK, J., dated Dec. 9, 1958, and reported [1959] 1 All E.R. 45, and in *Albert D. Gaon & Co.* v. *Société Interprofessionelle des Oleagineux Fluides Alimentaires* the sellers appealed against an order of ASHWORTH, J., dated June 5, 1959, and reported [1959] 2 All E.R. 693. In both cases the order at first instance was made on a Case Stated by the Board of Appeal of the Incorporated Oil Seed Association under the Arbitration Act, 1950, s. 21 (1) (b). The facts in each case are set out in the judgment of SELLERS, L.J.

Eustace Roskill, Q.C., and *R. A. MacCrindle* for the sellers in both cases.

John Megaw, Q.C., and *J. F. Donaldson* for the buyers in the *Tsakiroglou & Co., Ltd.*, case.

Sir David Cairns, Q.C., and *S. O. Olson* for the buyers in the *Albert D. Gaon & Co.* case.

Cur. adv. vult.

Mar. 28. The following judgments were read.

SELLERS, L.J.: These two appeals were heard together by the consent of the parties as they both relate to contracts of sale of groundnuts in the shell for shipment cost, insurance, freight from Port Sudan, which were unperformed at the time of the blockage of the Suez Canal on Nov. 2, 1956, and the sellers, the appellants in these appeals, relying on that event as sufficient justification, failed to make shipment within the contract periods of the goods sold and claimed that they were no longer bound to do so. In respect of each contract the sellers had the groundnuts available for shipment and had arranged reservations of shipping space to the respective destinations via the Suez Canal. These reservations were cancelled by the shipowners and the sellers made no other arrangements in fulfilment of these contracts and they did not apparently attempt so to do. It was established in both the cases that shipment could have been made via the Cape of Good Hope although no doubt it would have involved a greater cost.

The main issue is whether the respective contracts required the sellers to ship the goods via the alternative route of the Cape when the anticipated route via the Suez Canal was closed. This has been decided in favour of the buyers in each case by the umpire, and by the Board of Appeal of the Incorporated Oil Seed Association and by DIPLOCK, J., in the *Tsakiroglou* case and ASHWORTH, J., in the *Gaon* case. In the former case DIPLOCK, J., felt that the matter was concluded by the findings of the appeal tribunal.

The parties in both cases contracted on the terms of the I.O.S.A. Contract No. 38 which is headed " Contract for West African groundnuts in the shell " taken and accepted to be modified or adapted to provide for shipment from Port Sudan on the Sudanese Coast. The shipment clause so adapted is to be read

> " shipment from Port Sudan as per bill or bills of lading dated or to be dated . . . by steamer or steamers (tankers excluded) direct or indirect with or without transhipment. For the purposes of this contract the words steamer or steamers are intended to include any full powered primarily engine driven vessel."

There is a clause requiring buyers to accept documents containing certain specified deviation clauses.

In the *Tsakiroglou* case the contract dated Oct. 4, 1956, was for shipment November/December, 1956, of 300 tons of Sudanese groundnuts in the shell at £50 per 1,000 kilos c.i.f. Hamburg. In the *Gaon* case there were two contracts. The first dated Oct. 12, 1956, was for shipment October/November, 1956, of 1,500 metric tons of Sudanese groundnuts in shell at £49 10s. per metric ton c.i.f. Nice. The second dated Oct. 31, 1956, was for shipment November, 1956, of 1,000 tons of similar groundnuts at £54 5s. per metric ton c.i.f. Marseilles. The diary of the events affecting the Suez Canal is set out in both Cases but it is sufficient to state here that the Suez Canal was effectively blocked on Nov. 2, 1956, and remained closed to shipping until Apr. 9, 1957.

There is no doubt that, when the contracts of Oct. 4 and Oct. 12, 1956, were entered into, the usual and normal route for the shipment of Sudanese groundnuts from Port Sudan to either Hamburg, Nice or Marseilles was via the Suez Canal. After the closing of the Canal the shortest and a practicable route to these ports was via the Cape of Good Hope. The sea route via Suez to Hamburg is approximately 4,386 miles, and via the Cape 11,137 miles, and to Nice and Marseilles the comparative distances are approximately 2,300 miles and 10,500 miles respectively. From Nov. 10, 1956, a 25 per cent. freight surcharge was placed on goods shipped on vessels proceeding via the Cape of Good Hope and this was increased to 100 per cent. on Dec. 13, 1956.

The effect of the blockage of the Suez Canal on shipowners was obvious, for the relatively short route through the Canal was denied them and for destinations such as we are considering in these cases a different and much more prolonged journey had to be substituted. But the question is what effect that had on the contract of sale between the parties here. The sellers contended that the contract in each case should be read as if it contained the provision " shipment from Port Sudan via the Suez Canal ". Further the sellers in the *Tsakiroglou* case had sought an extension of two months relying on cl. 6 of the contract alleging that they were prevented from making the shipment by war or force majeure. The buyers refused. Clause 6 is as follows (1):

> " In case of prohibition of import or export, blockade or war, epidemic or strike, and in all cases of force majeure preventing the shipment within the time fixed, or the delivery, the period allowed for shipment or delivery shall be extended by not exceeding two months. After that, if the case of force majeure be still operating, the contract shall be cancelled."

The comparable clause in the Gaon contract was cl. 8 and it was similarly relied on. These two questions can conveniently be considered together. It was submitted that, although the contract of sale did not state the route by which the goods were to travel, it was in the circumstances to be implied that they would be shipped by the Suez Canal, which was the usual and normal route and the route in the contemplation of the parties at the making of the contract. Shipment too, it was said, meant the intended shipment, the one for which they had contracted and made provision, and as that was not available by circumstances beyond their control the extension ought to have been granted. If the sellers had stipulated expressly for shipment via Suez in these contracts they would no doubt have been on strong ground in the events which arose, but they did not so stipulate, and I can see no adequate ground on which to imply into the contracts any such term or requirement. The sales were for future shipments and the circumstances at the time of shipment would be more important to the parties than at the time of the making of the contract. It is true that the cost of the freight was included in the price. This is a risk which falls on the seller under such a contract and, while he may have to pay more freight than he contemplates at the time of contracting, unless he has made a firm engagement of freight before he makes his sale, he may on the other hand find that he has to pay less.

In *Carapanayoti & Co., Ltd.* v. *E. T. Green, Ltd.* (2), which was the first of what counsel described as the " Suez " cases to come before the courts, McNAIR, J., held that, where a contract provides that the performance, or a particular part of the performance, is to be carried out in a customary manner, the performance must be carried out in a manner which is customary at the time when the performance is called for. I agree with the opinion of McNAIR, J., and the reasoning by which he supported it, that the obligation of the sellers is not confined to shipping by a route usual and normal at the time of the contract.

Counsel for the sellers relied on the judgments in *Re L. Sutro & Co. & Heilbut, Symons & Co.* (3), and especially the dissenting judgment of SCRUTTON, L.J., to support his argument on the term to be implied into the contract, but the point which arises here was not under consideration. In that case the sea route and the overland route were both in use at the time of the contract and at the time of its performance. I do not think that one can deduce any real support from the case for the argument. There has been unanimity among the judges who have considered this submission and I am in full agreement with their views in rejecting it.

Although there were hostilities in Egypt and in the region of the Suez Canal at the material times, there has been no finding of war, and I think that it is clear that neither war nor force majeure prevented shipment of the contract goods. Shipment means physically putting the goods on board a vessel, and, if there was a duty on the sellers to put the contractual goods on board a vessel for a voyage round the Cape to the contractual destination, there was nothing to prevent their doing so and cl. 6 does not protect them.

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(1) Clause 6 of the contract was cl. 8 of Form 38 of the I.O.S.A. forms of contract.
(2) [1958] 3 All E.R. 115; [1959] 1 Q.B. 131.
(3) [1917] 2 K.B. 348; 14 Asp. M.L.C. 34.

There is no finding that after the Suez route was closed and at any time for shipment under these contracts there was any normal route for shipping from Port Sudan to the ports concerned. The Cape route, the sellers said, was and remained an emergency route. The sellers therefore relied on the statement on p. 39 of Kennedy on C.I.F. Contracts (2nd Edn.), the last edition by Judge Kennedy:

> " In the absence of express terms in the contract the customary or usual route must be followed. An usual route need not be the invariable route. In one case a route followed in one-half of the recorded cases was held to be an usual or customary route ",

and it was said that as there was no usual or customary route the contract could not be performed by the sellers. The case referred to was *Evans, Sons & Co.* v. *Cunard Steamship Co., Ltd.* (4), on which in the argument before us both sides in their turn relied. It was a claim by a shipper against a shipowner who had carried his goods on a rather prolonged and devious journey, having taken them on board on an outward journey which continued to its end before turning round to come home and then going by way of Constantinople, as it was in those days. The case turns on the obligations which the shipowner had entered into with the plaintiff and its bearing, if any, on the present dispute seems indirect. Willes, J., said, however, in the course of his judgment (5):

> ". . . if that is the only voyage practicable, that must be the voyage in the business sense agreed upon."

The passage in Kennedy seems to assume that there would be a usual route but the trade may be new, or the usual route—if there was only one usual route—may become, as here, no longer available or may, I suppose, in changing circumstances fall into disuse. I would accept the buyers' submission that when the Suez route became unusable the sellers' duty was to put the goods on a vessel destined to the required port by a reasonable and practicable route, if there is such an alternative when the contract is properly regarded. If in a c.i.f. contract no route were expressly specified, or if no usual or normal route had impliedly been established as the route to be taken under the contract, as in the case of a new trade between two new ports, then clearly it would seem that the implication would be that the parties intended the goods to be sent by a reasonable and practicable route. But here there had undoubtedly been a usual route. The buyers contended that shipment via the Cape of Good Hope was the most practicable and the best route available at the respective times for shipment after Nov. 2, 1956, and that it has not been shown that the sellers could not have made shipments accordingly. At the most it would have cost them more freight. That I think is true. The question is whether such shipment would have been reasonable and practicable so as to bring it within the sellers' contractual obligation or whether, as the sellers contended, the contracts could not be performed as intended and therefore each contract was at an end on the ground, it was said, that it had been frustrated.

Ashworth, J., put the question in this way (6):

> " In my judgment, in considering whether a contract of this type has been frustrated by the disappearance of the usual or customary route, one has to decide (inter alia) whether an alternative route existed, and, if so, whether performance by that route would ' render it a thing radically different from that which was undertaken by the contract ', to quote the words of Lord Radcliffe in *Davis Contractors, Ltd.* v. *Fareham U.D.C.* (7)."

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(4) (1902), 18 T.L.R. 374.

(5) (1902), 18 T.L.R. at p. 375.

(6) [1959] 2 All E.R. at p. 698.

(7) [1956] 2 All E.R. 145 at p. 160; [1956] A.C. 696 at p. 729.

I think that that is the question which arises here. What are the differences, one may ask, from the point of view, not of a shipowner who is required to send his ship on a different and greatly longer route, but of the parties to a c.i.f. contract. The obligations of the parties to such a contract of sale in its ordinary form are well defined and are conveniently summarised by McNAIR, J., in *Green's* case (8). This form of contract no doubt developed commercially because it had advantages for both parties and it has long been used, often with adaptations and variations. Where a considerable journey by sea is involved, the contract and the goods are not, as it were, in suspense. The seller can, in various ways, raise money on the goods he has shipped almost at once and the buyer, once he has taken up and paid for the documents, can deal with the goods by transferring the documents before the goods have arrived at the port for delivery. These factors minimise the disadvantages of delay in receiving the goods on the buyer's side and delay in receiving payment on the seller's side whilst the goods are on the high seas. The bill of lading on which the goods are carried is no doubt a vital document in the transaction, in conjunction with an insurance policy to cover the risks of transit and an invoice to describe the goods shipped and their cost. But it is the importance of the route which the goods will take which is an issue in this case. It is conceded by the sellers that a mere increase of freight is a burden which would fall on them. Circumstances might arise in which freights might go up very substantially for the " usual and normal route " or they might go down. These variations normally affect the seller and not the buyer. They are his risk or advantage. Once the seller has shipped the goods and obtained the necessary documents and passed them to the buyer, he is no longer concerned with the sea voyage of the goods except to the extent, in some cases, of the final settlement of the balance of the payment for the goods when the delivered weights have been ascertained, which cannot be regarded as a substantial or fundamental matter in the contract.

The sellers' conduct, in these cases, in performance of the contracts would not have differed. They had the goods available. They had to put the goods on board a vessel at Port Sudan and get a bill of lading to the port of delivery in respect of each consignment on shipment within the contractual date and then take out an insurance cover and make out the invoice. The only difference would have been the journey of the vessel after she left Port Sudan and any extra cost involved in arranging the contracts of affreightment and insurance. From the buyer's point of view goods on a longer sea journey would be subjected to a longer period in the hold of a ship and possibly to the rigours of cold or heat, and the goods would not arrive as early as the buyer would have contemplated by the " usual route ". In the present cases the Equator would have been crossed twice, but this apparently would have had no ill effect on these goods, and the date of arrival might have been delayed some three or four weeks according to the speed of the vessel engaged.

Counsel for the sellers put his point graphically when he said that, if the sellers had shipped the contract goods via the Cape of Good Hope while the Suez Canal was an available route, it would have been a breach of contract. Why then is it not a totally different contract to ship by that route when Suez was closed? I think the answer is that the changed circumstances gave rise to a change in their performance of the contracts by the sellers, but it is not so fundamental a change that it can be said to be commercially different or of such a character that the parties at the time of the making of the contract, if they had considered the position, would have said with one voice that in those circumstances their bargain would be at an end. If by April, 1957, the route by the Cape of Good Hope had become a " usual route ", I cannot think that the sellers would have been in default in the absence of express stipulation in shipping via Suez when it opened again, although they might have got an advantage of a lower freight. It would not have been a fundamentally different contract of sale.

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(8) [1958] 3 All E.R. at p. 117; [1959] 1 Q.B. at p. 143.

I agree with the view of Ashworth, J., and regret that it is contrary to the view taken by a very experienced commercial judge, McNair, J., in very similar circumstances in *Green's* case (9). It is however the same opinion as that held by those engaged in or very familiar with the trade who have formed the respective arbitration tribunals in these cases, in one of which—the *Gaon* case—there was an express finding:

> " If after the closing of the Suez Canal the sellers had shipped the goods via the Cape of Good Hope the buyers could not have rejected the documents."

They might not, one may assume, have so found if the longer voyage would have caused the goods to deteriorate appreciably in quality or perhaps even in weight or if the delay would have been unduly prolonged.

As the view which I have taken of these appeals agrees with the finding in the *Tsakiroglou* case that

> " The performance of the contract by shipping the goods on a vessel routed via the Cape of Good Hope was not commercially or fundamentally different from its being performed by shipping the goods on a vessel routed via the Suez Canal ",

it is not necessary to decide whether Diplock, J., was bound to accept that finding in the Case as conclusive, as a " special verdict " of a jury, as the learned judge put it. It will not affect the result of this appeal. The pronouncement was made in the time-honoured but not very satisfactory form of a Special Case " so far as it is a question of fact we find and as far as it is a question of law we hold ". How far was it a question of fact? Very largely, no doubt. But it must in my opinion be the ultimate function of the court to say whether on the facts found and in all the circumstances there arises frustration of a contract or adventure. Ashworth, J., I think rightly, treated like findings in the *Gaon* case as mixed findings of law and fact. Counsel for the sellers argued forcefully that if it were otherwise a tribunal, by such a finding of fact, if so it is to be regarded, could state the parties out of court in a frustration case and there could be conflicting decisions on precisely similar contracts and facts. I apprehend that if the present decision of this court is right then a different decision of an arbitrator or umpire on similar facts in answer to the same question would be wrong in law. In *Jackson* v. *Union Marine Insurance Co., Ltd.* (10), on which Diplock, J., relied, although Brett, J., put as a third question to the jury (11):

> ". . . whether such time was so long as to put an end in a commercial sense to the commercial speculation entered upon by the shipowner and the charterers ",

that learned judge in a judgment with which Keating, J., agreed reviewed many authorities, including directions to and findings of juries, and as I understand it considered whether the jury's verdict could stand as a matter of law and held that it did. Bovill, C.J., took a contrary view. I agree with Diplock, J., that this finding of fact made by the appeal tribunal was of the utmost relevance in answering the ultimate question of law, and on the view of the law which Ashworth, J., applied (and with which I agree) it was conclusive because it was that issue of fact which answers the question of law in this particular case and there is evidence to support it and no misdirection.

It was argued for the buyers that the second Gaon contract dated Oct. 31, 1956, should in any event be decided in favour of the buyers, but I doubt if I should have treated that contract differently, if I had accepted generally the sellers' argument. It would seem that the situation at Suez had worsened considerably at that date in fact, but to what extent to the knowledge of the parties at the time of contracting does not seem sufficiently clear to justify a discrimination.

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(9) [1958] 3 All E.R. 115; [1959] 1 Q.B. 131.

(10) (1874), L.R. 10 C.P. 125; 2 Asp. M.L.C. 435.

(11) (1874), L.R. 10 C.P. at p. 126; 2 Asp. M.L.C. at p. 436.

I would dismiss both the appeals.

ORMEROD, L.J.: The contract in each of these cases was in the same form, and, with the exception of one of the findings in the Case Stated in what has been referred to as the "Tsak" case, there is no difference of substance in the considerations affecting them. By the consent of the parties the two appeals were heard together. It is convenient to deal with them together in this judgment apart from some mention of what has been called the "special finding" in the "Tsak" case.

None of the contracts contained any express provision as to the route to be followed. The sellers therefore based their argument to a very large extent on the submission that there must be implied a term that the customary or usual route must be followed. It was not disputed that, at the time the contracts were entered into, the customary or usual route was through the Suez Canal. Before the time of performance the Canal had been blocked by the Egyptian authorities, and shipping by that route was therefore impossible. There was no finding that, at the time when the contract would have been performed, any other customary or usual route had been established, although there was an alternative route available by the Cape by which goods could be shipped from Port Sudan to their respective destinations in Europe.

The sellers had in each case submitted to the learned judge at the trial that there should be implied a term that the goods would be shipped via Suez. In neither case had this submission found favour, and it was not pressed by the sellers in this court. It was, however, strongly submitted by counsel on behalf of the sellers that a term should be implied that the goods would be carried by the customary or usual route, that this route was via Suez, and, as it was not available at the time of performance, that the contracts were thereby frustrated. He submitted that the fact that an alternative route was available was immaterial. If the customary or usual route was not available at the time of performance the contract was thereby frustrated. The buyers did not dispute that a contract of this kind implied in the ordinary way a term that the goods would be taken by the customary or usual route. But it was submitted that this only applied if there was such a route available, and that if in the absence of such a route there was left a practicable or common-sense route the contract must be taken to imply that the carriage must be by that route. So far as the parties knew, the Canal was open for traffic at the time when the contracts were made, but the question arises whether that is the date to be considered.

In *Carapanayoti & Co., Ltd.* v. *E. T. Green, Ltd.* (12), the first of the cases arising out of the Suez crisis to come before the court, McNAIR, J., said (13):

> "In principle, it seems to me that where a contract expressly, or by necessary implication, provides that performance, or a particular part of the performance, is to be carried out in a customary manner, the performance must be carried out in a manner which is customary at the time when the performance is called for. This is particularly so in the case of forward contracts like many c.i.f. contracts which call for performance at some future date, when one bears in mind that in mercantile matters custom and usage are subject to rapid change—(see the speech of LORD WRIGHT in *Reardon Smith Lines, Ltd.* v. *Black Sea & Baltic General Insurance Co., Ltd., The Indian City* (14))."

I agree with this opinion as expressed by McNAIR, J., and it follows that these appeals must be considered in relation to the conditions existing at the date when the contracts were due for performance, and not when they were made.

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(12) [1958] 3 All E.R. 115; [1959] 1 Q.B. 131.
(13) [1958] 3 All E.R. at p. 119; [1959] 1 Q.B. at p. 145.
(14) [1939] 3 All E.R. 444; [1939] A.C. 562.

There would seem therefore to be two questions to be considered: (i) in view of the fact that no customary or usual route was available at the time of performance, were the contracts frustrated? If the answer to this question is " Yes " then of course it is the end of the matter. But if the answer be in the negative, then (ii) would shipment of the goods by the alternative route via the Cape be sufficient performance under the contracts? Ashworth, J., addressed himself to the proper question when he said (15):

> " In my judgment, in considering whether a contract of this type has been frustrated by the disappearance of the usual or customary route, one has to decide (inter alia) whether an alternative route existed, and, if so, whether performance by that route would ' render it a thing radically different from that which was undertaken by the contract ', to quote the words of Lord Radcliffe in *Davis Contractors, Ltd.* v. *Fareham U.D.C.* (16)."

In dealing with the first question, counsel for the sellers cited the well-known passage from Kennedy on C.I.F. Contracts (2nd Edn.), p. 39: "In the absence of express terms in the contract the customary or usual route must be followed ". Counsel agreed that this passage in Kennedy was the only authority for the proposition with the possible exception of the judgments in *Re L. Sutro & Co. & Heilbut, Symons & Co.* (17). This was a case of a c.i.f. contract made in 1916 for the sale of rubber to be shipped

> " by vessel or vessels (steam or motor) from the East to New York direct and/or indirect, with liberty to call and/or tranship at other ports."

The sellers made a declaration under the contract for the shipment of fifteen tons to Seattle, a port on the Pacific coast, whereby they would go to New York by train. It was held by this court, Scrutton, L.J., dissenting, that the proposed route was inconsistent with the terms of the contract, which was a contract for the carriage of goods by sea and not by land. In my judgment, this case does not help the sellers. It was dealing with a proposed route which was different in kind from anything contemplated by the buyers. The authority of the passage in Kennedy, however, has not been questioned by the buyers in these cases, nor indeed by the court.

Counsel for the sellers seeks, however, to go further and to say that, if the usual route cannot be followed for reasons for which the parties cannot be held responsible, then the contract must be at an end. This is tantamount to saying that it was a term of the contract that the goods should be shipped via Suez. It means that the parties must be taken to have said at the time they entered into the contract: " It is agreed that these goods shall be shipped by the customary or usual route provided that it is available at the time of performance. If it is not, the contract is at an end even though there is an alternative practicable route available ". That such would be the mind of the parties seems to me to be most unlikely, and I can find no reason for the implication urged by counsel. In my judgment, the proper implication is that the goods should be sent by the alternative route provided that performance by that route would not " render it a thing radically different from that which was undertaken by the contract ".

In *Green's* case (18) McNair, J., said (19):

> " I feel no doubt at all that the continued availability of the Suez route was a fundamental assumption at the time when the contract was made, that to impose on the sellers the obligation to ship by an emergency route via the Cape would be to impose on them a fundamentally different obligation, which neither party could, at the time when the contract was made, have

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(15) [1959] 2 All E.R. at p. 698.
(16) [1956] 2 All E.R. at p. 160; [1956] A.C. at p. 729.
(17) [1917] 2 K.B. 348; 14 Asp. M.L.C. 34.
(18) [1958] 3 All E.R. 115; [1959] 1 Q.B. 131.
(19) [1958] 3 All E.R. at p. 121; [1959] 1 Q.B. at p. 149.

> A dreamed that the sellers would be required to perform and that, if the parties to the contract had thought of the matter at the time, both, as reasonable men, would have accepted at once that, if the Canal was closed for an indefinite period at a time when the sellers were not in breach for failure to ship earlier, the contract would be off."

B Like my brethren and ASHWORTH, J., I differ with reluctance from the view of a learned judge with such great experience of this branch of the law, but I have come to the firm conclusion that the second question should be answered in the affirmative, and that shipment by the Cape route would not be performance radically different from that undertaken by the contract. It is true that the distance is much greater, and the expense would be increased, particularly if C shipment was delayed, as we were told that freights were increased as time went on, but these matters of themselves are not necessarily sufficient in my judgment to transform the nature of the undertaking in the manner submitted by counsel for the sellers. The views of the commercial men engaged in these arbitrations are helpful in considering this problem, and it is significant that they all take the view that shipment round the Cape would be a proper tender under D these contracts. I would dismiss both the appeals.

It remains to refer to what has been described as the " special finding " in the " Tsak " case. Paragraph (vi) of the findings of the Case Stated reads as follows:

> " The performance of the contract by shipping the goods on a vessel routed via the Cape of Good Hope was not commercially or fundamentally different from its being performed by shipping the goods on a vessel routed via the E Suez Canal."

This finding appears only in the Case Stated in the " Tsak " case, and DIPLOCK, J., came to the conclusion that it was a finding of fact with which he should not interfere. He based his conclusion largely on the decision in *Jackson* v. *Union Marine Insurance Co., Ltd.* (20). In that case the question at issue was whether F the time required to do the necessary repairs to a ship was so long as to put an end in any commercial sense to the adventure. It is to be noted that in *Jackson's* case (20) the issue was the single one of time, and the question the jury had to answer was really one of degree. That is not the case here. The arbitrator has found, presumably on all the facts before him, and on his own knowledge of the conditions of the trade, that shipment by the Cape would not be fundamentally G different from shipment through Suez.

This finding appears to be decisive of the question whether the contract has been frustrated and therefore to involve a question of law, or at the least to be a question of mixed fact and law, and I would have thought that the learned judge would have been entitled to come to a different conclusion had he thought fit. However, I have already come to the conclusion that this appeal should be H decided in the same way as the appeal from ASHWORTH, J., and it is unnecessary therefore to consider the matter further.

I would dismiss both the appeals.

HARMAN, L.J.: I take the *Gaon* case first. The sellers there take four points: (i) There should be read into the contracts by implication the words " via Suez ". (ii) There should be read into the contracts by implication the I words " by the usual and customary route ". (iii) The exception clause absolves the shippers from delivery. (iv) The closure of the Canal frustrated the commercial object of the adventure and operated as a solvent of the contracts.

As to (i). This was not pressed before us. It was rejected by ASHWORTH, J., and indeed by all the judges who have considered these Suez cases. I need say no more than that I can see no excuse for writing in words which do not appear and are not necessary either to the understanding or to the effectiveness of the contracts. They could only be inserted by invoking the doctrine of rectification which on the facts could not be supported.

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(20) (1874), L.R. 10 C.P. 125; 2 Asp. M.L.C. 435.

As to (ii). It was conceded in the court below and I think admitted before us that these words are to be read in ordinary circumstances into c.i.f. contracts. Where the parties differed was that the sellers argued that, where the usual and customary route proved to be unavailable at the time when performance of the contract became due, the contract was automatically at an end because the sellers' only obligation was to ship by the customary route and no other, while the buyers' case was that, where the usual and customary route was, for whatever reason, unavailable at the time of performance, that did not of itself absolve the sellers, who remained bound to ship the goods by any alternative route which was available so long as that route was not altogether outside what must be supposed to be the contemplation of the parties. For myself I feel some embarrassment at this argument. It assumes that there is some magic about shipping contracts and that the ordinary rules do not apply. I am unwilling to accept this. The contracts here by their express terms bound the sellers to sell the goods to the buyers and to deliver them by ship sailing within a fixed period to a European port, nothing being said about the port of departure, though the conditions annexed were appropriate to despatch from a West African port. It was, however, agreed that both parties would know that an East African port was intended and that Port Sudan was the only such port available for the export of these goods. The sellers' duty therefore was to ship the goods from Port Sudan to the named Mediterranean port by a ship leaving within the given period. Why it should be necessary to imply such words as " by the usual and customary route ", I do not see. No doubt, as the Case Stated finds, both parties assumed that the goods would be shipped via Suez, that being the obvious way in normal circumstances. No doubt also it was for the sellers to ship by the route most likely to effect their obligation within a reasonable time, and this would normally involve shipment by the customary route because shipment by some other route would not be reasonable and therefore would not be performance of the contract. It might be, of course, that it was essential for the buyer to receive the goods within a given time, which could only be done by sending them via Suez; moreover, the goods might be of a nature which would not stand a route twice crossing the Equator. Considerations of this sort would require express mention in the contracts unless indeed evidence were available to show that both parties knew of them. There is not a word of such evidence and in any event it would not lie in the sellers' mouth to allege as an excuse for not shipping the goods provisions which could only be inserted or implied in order to protect the buyer to whom the choice between the two routes was a matter of indifference. The argument of counsel for the sellers had the merit of simplicity, but in effect it is the same as argument No. (i) above. It goes like this. The route must be the usual and customary route; the only such route mentioned in the case is the Suez route; no one suggested that the Cape route had become the usual and customary route at any relevant time; therefore the only obligation on the sellers was to ship by Suez, and, that having become impossible, they are relieved of their bargain. This in effect is to write " via Suez " into the contract and it is therefore the same as argument (i) which I have already rejected.

As to (iii). The exceptions clauses in these contracts raise once more exactly the same point. They speak of force majeure preventing the shipment within the time fixed. Now if " shipment " means placing the goods on a ship bound for the right destination, as I think it must, and if by the contract the destination may only be reached through Suez, then shipment became impossible when the Canal closed because there was no ship destined for the Mediterranean ports via the Canal, and this would represent force majeure preventing the shipment. If, however, " via the Canal " is not to be written into the contracts, there is no prevention, because the evidence shows quite clearly that goods were being shipped during the contract period from Port Sudan to European destinations via the Cape, and that this route was available to the shippers who in fact freely availed themselves of it under other contracts.

As to (iv). Frustration is a doctrine only too often invoked by a party to a contract who finds performance difficult or unprofitable, but it is very rarely relied on with success. It is in fact a kind of last ditch, and, as LORD RADCLIFFE says in effect in his speech in the most recent case (*Davis Contractors, Ltd.* v. *Fareham U.D.C.* (21)), it is a conclusion which should be reached rarely and with reluctance. The doctrine used to be spoken of as that of " frustration of the adventure ", which seems to me to be more accurate than the modern expression " frustration of the contract ". I agree with the submission of counsel for the buyers (Sir David Cairns) that frustration is of two kinds; one brought about by the physical impossibility of performance as in *Taylor* v. *Caldwell* (22), where the commercial adventure was a performance in a building which did not exist when the time came for it, or in the coronation cases, where the object of the adventure was to provide a view of a coronation procession which did not proceed; or, secondly, where the adventure is frustrated by the mere passage of time as in *Jackson* v. *Union Marine Insurance Co., Ltd.* (23), or in *Bank Line, Ltd.* v. *A. Capel & Co.* (24). In both these latter cases the voyage which was the subject-matter of the adventure could eventually be undertaken, but at a distance of time so far removed from that contemplated by the contract that it was a different thing altogether.

I have always favoured the view that this doctrine when analysed proves to depend on the true construction of the contract. A man may only be released under this doctrine if he can truly say with the hero (25) " Non haec in foedera veni "— as we were reminded at the Bar—" This was not the bargain that I made; the contract properly construed does not provide for the event which has happened and is therefore not binding because it has no application ". Hardship or unexpected expense falling on one of the parties to a commercial adventure can never excuse him from it so long as the adventure remains recognisably that on which the parties embarked.

The appeal tribunal who stated the Case here, after finding as a fact that the sellers could have shipped the contracted goods within the contract period and that it would have been more expensive to ship via the Cape rather than via the Canal, concluded that this did not make the performance of the contracts commercially impossible. This last is I think a conclusion of law from the facts found and is not binding on this court, but the opinion expressed must necessarily be of great weight because it is the opinion of commercial men well acquainted with the situation. It was said that this impossibility is a question of degree, and, in so far as it is, the question is one of fact, but in the end the question of frustration or no is one for the court, and in my judgment ASHWORTH, J., came to a correct conclusion and one with which I agree.

I must face the fact that this involves disagreeing with the decision of MCNAIR, J., in *Green's* case (26), for I cannot see any distinction between that case and this. Both arise out of the same events; both concern c.i.f. contracts, and, though the form of the contracts and their dates differ to some extent, I do not think the differences are relevant. It is true that in *Green's* case (27) the contract was made on Sept. 6, 1956, when perhaps the storm clouds did not so far cover the horizon as at the dates involved in the instant case, viz., Oct. 12 and still more Oct. 31, 1956, but it was found as a fact that on Oct. 12 the parties still assumed that the Canal would be available. There is no such finding as to Oct. 31, by which time hostilities likely to affect the Canal had already begun, but there is nothing to justify the view that the Cape route was even then contemplated. I do not feel that *Green's* case (27) can be distinguished on the mere ground of difference in date. I admit that dissent smacks of temerity, but I am consoled by the fact that all the commercial arbitrators have negatived frustration and that McNair, J., alone among the judges who have considered the problem was of the other opinion. This opinion when questioned proves to depend on a mere consideration of the length of the voyage. This no doubt was an important difference, and after Nov. 9 involved the shippers in an unexpected expense, but as I have already pointed out neither the date of arrival nor the physical circumstances of the voyage can be supposed to be circumstances vitally affecting the efficacy of the adventure. Both these events affect the interest of the buyer and are indifferent to the seller, who is not warranted in sheltering behind them in order to save, what is alone affected, his pocket.

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(21) [1956] 2 All E.R. at p. 159; [1956] A.C. at p. 727.

(22) (1863), 32 L.J.Q.B. 164.

(23) (1874), L.R. 10 C.P. 125, *affirming* L.R. 8 C.P. 572; 2 Asp. M.L.C. 435.

(24) [1919] A.C. 435; 14 Asp. M.L.C. 370.

(25) The words attributed in VIRGIL'S AENEID, Book 4, line 338, to Aeneas answering Dido's rage are—

" . . . nec conjugis umquam
praetendi taedas aut haec in foedera veni."

The form " non haec in foedera veni " is the form of quotation of this passage used in the law to express a repudiation of alleged non-fulfilment of a contract.

(26) [1958] 3 All E.R. 115; [1959] 1 Q.B. 131.

The Case shows clearly that trade in these goods between these ports was not stopped by the closure of the Canal; it was merely diverted, and I am quite unable to agree that the doctrine of frustration can relieve the sellers from their obligations.

I would dismiss this appeal.

As to the *Tsakiroglou* case, Diplock, J., did not feel himself at liberty to consider whether he would have treated it as a case of frustration. Having concurred in the findings of McNair, J., in *Green's* case (27) so far as the time of performance is the relevant one and not the time of the contract, he found himself confronted by what has been called the " special finding " of the appeal board in para. 12 (vi) of the Case Stated. I need not repeat the words of this special finding, which the learned judge treated as a finding of fact like an answer given by a jury in answer to a judge's charge. The learned judge therefore treated himself as bound by this finding, and, interpreting it as being equivalent to a finding that the adventure was not frustrated, he held himself bound to accept it. I do not think that I should have taken this view. The finding seems to me to be in fact the expression of an opinion to the effect that the one voyage was not commercially or fundamentally different from the other. At the highest it was, I think, the finding of a secondary fact, namely, an inference from the primary facts. Such an inference is, as I understand it, open to review in the Court of Appeal. In my judgment, therefore, the learned judge should have treated himself as free to express his own opinion on this question. Had he done so he might have felt bound to follow McNair, J. This case, however, if the special finding be ignored, seems to me indistinguishable from the *Gaon* case, in which Ashworth, J., refused to follow McNair, J., a decision with which I agree. In my judgment, therefore, Diplock, J., came to the right conclusion, though by a different and mistaken route.

Appeals dismissed.

Solicitors: *Richards, Butler & Co.* (for the sellers in both cases); *Bernard Samuel Berrick & Co.* (for the buyers in *Tsakiroglou & Co., Ltd.* v. *Noblee & Thorl G.m.b.H.*); *Rowe & Maw* (for the buyers in *Albert D. Gaon & Co.* v. *Societe Interprofessionelle des Oleagineux Fluides Alimentaires*).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

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(27) [1958] 3 All E.R. 115; [1959] 1 Q.B. 131.

BRYAN *v.* ROBINSON.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Salmon, JJ.), April 8, 1960.]

Criminal Law—Insulting behaviour whereby a breach of the peace may be occasioned—Touting by woman for customers for non-alcoholic refreshment house—London—Metropolitan Police Act, 1839 (2 *&* 3 *Vict. c.* 47), *s.* 54, *para.* 13.

The appellant was one of a number of hostesses employed at a non-alcoholic refreshment house in Dean Street, W.1. The hostesses took turns for fifteen minutes to stand in the doorway of the refreshment house to attract customers and each hostess was given a commission on drinks bought by customers introduced by her and in her company. At 10.55 p.m. one evening, the appellant, while standing in the doorway, leaned out, smiled, beckoned and spoke to three men who were walking in the street. The men were annoyed and immediately walked across the street and away from the refreshment house. The appellant was charged with using " insulting behaviour whereby a breach of the peace may have been occasioned, contrary " to the Metropolitan Police Act, 1839, s. 54, para. 13.

Held: the appellant's behaviour was not of such character that a breach of the peace might be occasioned thereby, and therefore an offence against s. 54, para. 13 of the Metropolitan Police Act, 1839, had not been established.

Appeal allowed.

[As to street offences in the Metropolitan Police District, see 31 HALSBURY'S LAWS (2nd Edn.) 691, para. 1018.

For the Metropolitan Police Act, 1839, s. 54, para. 13, see 24 HALSBURY'S STATUTES (2nd Edn.) 819.]

Case Stated.

This was a Case Stated by the chief metropolitan magistrate, SIR LAURENCE DUNNE, in respect of his adjudication as a magistrates' court sitting at Bow Street.

On May 6, 1959, an information was preferred by the respondent, John Robinson, a Metropolitan Police officer, against the appellant, Lorraine Bryan, that she on May 1, 1959, at Dean Street, W.1, did use insulting behaviour whereby a breach of the peace might have been occasioned, contrary to the Metropolitan Police Act, 1839, s. 54, para. 13. The information was heard on May 26, 1959, when the following facts were found: (i) at 10.55 p.m. on May 1, 1959, the appellant was present in Dean Street and standing in the doorway of premises at No. 48, which premises contained a non-alcoholic refreshment house licensed under the Refreshment Houses Act, 1860 (colloquially known as a " near-beer " establishment); (ii) the appellant, from her position in the doorway, leaned out, smiled, beckoned and spoke to three men who were walking in the street past the front door of the premises; (iii) the three men were annoyed by the appellant's conduct and immediately walked across the street and away from the premises; (iv) on the evening in question the appellant was working at the refreshment house as a hostess. The hostesses took fifteen minute turns to stand in the doorway to attract customers and each hostess was given a commission by the proprietors of the refreshment house on drinks bought by customers introduced by her and in her company; (v) the appellant was at the time in question touting for customers on behalf of the proprietors of the refreshment house and this touting or solicitation was in view of the time and the locality of a nature to affront the person so solicited and might provoke a breach of the peace. It was contended for the appellant that the offence had not been committed either in a public place or in a thoroughfare as required in s. 54 of the Act of 1839 and that the facts as adduced in evidence by the informant and accepted by the magistrate were insufficient to constitute the offence as contained in s. 54, para. 13 of the Act. The magistrate found the offence proved and convicted the appellant and fined her 40s.

M. Beckman for the appellant.
Paul Wrightson for the respondent.

LORD PARKER, C.J., stated the facts and continued: Two points were taken on the Case Stated. The first was that in any event this offence did not take place, to use the words of the Metropolitan Police Act, 1839, " in any thoroughfare or public place ". Counsel for the appellant has quite properly abandoned that point. The second point is that the primary facts found by the chief magistrate could not in law support a finding that an offence under the section had been committed. Section 54 of the Metropolitan Police Act, 1839, provides:

> ". . . Every person shall be liable to a penalty not more than 40s., who, within the limits of the metropolitan police district, shall in any thoroughfare or public place, commit any of the following offences; (that is to say,) . . . 13. Every person who shall use any threatening, abusive, or insulting words or behaviour with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned."

The relevant words for the purposes of this case are:

> " Every person who shall use any . . . insulting . . . behaviour . . . whereby a breach of the peace may be occasioned."

It is said that the mere finding that the appellant leaned out from the doorway, smiled and beckoned, coupled with the finding that three men were annoyed, is sufficient to justify the inference or the finding that she used insulting behaviour " whereby a breach of the peace may be occasioned ". It is clear from the Case Stated that the appellant was merely touting for this refreshment house. There is no suggestion that it was a disreputable establishment or brothel, or that her solicitation was for the purposes of prostitution. In my judgment, the words of para. 13, to which I have referred, must be read as one. There must be insulting behaviour of such a character that a breach of the peace may be occasioned. Looking at the matter in that way, I find it difficult to see how a mere leaning out, smiling and beckoning without more could amount to such insulting behaviour of a character " whereby a breach of the peace may be occasioned ". It is true that three men were annoyed, but quite clearly somebody can be annoyed by behaviour which is not insulting behaviour. The mere fact that they were annoyed really carries the matter no further. Even if it can be said that a reasonable person would be likely to treat the gestures as insulting, they were certainly not in my judgment of such a character " whereby a breach of the peace may be occasioned ". Accordingly, in my judgment this appeal will have to be allowed.

There is little doubt that this practice in London may be highly objectionable, and it may be that steps will have to be taken to prevent this sort of thing occurring. This court, however, is concerned with the question whether or not the actions in the present case can be brought within the Metropolitan Police Act, 1839, and in particular s. 54, para. 13. In my judgment they cannot. Accordingly, I would allow this appeal.

ASHWORTH, J.: I agree.

SALMON, J.: I agree.

Appeal allowed. Appellant awarded costs in Divisional Court and in magistrates' court.

Solicitors: *Joelson & Co.* (for the appellant); *Solicitor, Metropolitan Police.*

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

R. *v.* COKAR.

[Court of Criminal Appeal (Lord Parker, C.J., Ashworth and Salmon, JJ.), April 11, 1960.]

Criminal Law—Evidence—Previous charge—Cross-examination of prisoner as to a previous charge—Prisoner acquitted of previous charge—Questions inadmissible—Conviction quashed—Interpretation of Criminal Evidence Act, 1898 (61 *&* 62 *Vict. c.* 36), *s.* 1, *proviso* (*f*) (i).

The appellant was charged at the County of London Sessions with entering a dwelling-house at night with intent to steal. He had entered by climbing in at a window and was found some ten minutes later in a sleeping posture before the fire. In cross-examination he was questioned as to a previous occasion when he was found on private premises and had been charged. On that occasion he had been acquitted. On appeal against conviction,

Held: the questions were inadmissible, being prohibited by proviso (f) to s. 1 of the Criminal Evidence Act, 1898*, and not being within exception (i) to that prohibition because that exception removed the prohibition only when there had been conviction, but here the appellant had been acquitted; therefore the conviction in the present case would be quashed.

Maxwell v. *Director of Public Prosecutions* ([1934] All E.R. Rep. 168) considered.

Appeal allowed.

[As to cross-examination of defendant and admissibility of evidence on previous charges, see 10 Halsbury's Laws (3rd Edn.) 449-453, paras. 828, 829, note (i), 831; and for cases on the subject, see 14 Digest (Repl.) 511-513, *4948, 4949, 4960, 4965,* 515, *4981, 4983* and 3rd Digest Supp.

For the Criminal Evidence Act, 1898, s. 1, proviso (f) (i), see 9 Halsbury's Statutes (2nd Edn.) 614.]

Case referred to:

Maxwell v. *Director of Public Prosecutions,* [1934] All E.R. Rep. 168; [1935] A.C. 309; 103 L.J.K.B. 501; 151 L.T. 477; 98 J.P. 387; 24 Cr. App. Rep. 152; 14 Digest (Repl.) 515, *4983.*

Appeal.

The appellant, Jottai Cokar, was convicted on Feb. 15, 1960, at the County of London Sessions of entering a dwelling-house by night on Jan. 14, 1960, with intent to steal contrary to s. 27 (1) of the Larceny Act, 1916. He was sentenced to eighteen months' imprisonment. He appealed against conviction. The main ground of appeal was that the prosecution was wrongly allowed to cross-examine the appellant about a previous incident in relation to which the appellant had been charged before a magistrates' court in December, 1959, when he was acquitted of being on enclosed premises for an unlawful purpose. In the course of argument on the appeal the authorities listed below† were cited in addition to that mentioned in the judgment.

Miss Marilyn E. Wigoder for the appellant.

M. Corkrey for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: This is in some ways a curious case. The appellant, a native of West Africa, was convicted at the County of London Sessions of entering a dwelling-house by night with intent to steal, and he was sentenced to eighteen months' imprisonment. From that conviction he appeals to this court by leave of the court.

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* Section 1, proviso (f) of the Criminal Evidence Act, 1898, so far as material, reads: "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged . . . unless (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged".

† Archbold's Criminal Pleading Evidence and Practice (34th Edn.), para. 1304; *Makin and Wife* v. *A.-G. for New South Wales,* [1894] A.C. 57; *Stirland* v. *Director of Public Prosecutions,* [1944] 2 All E.R. 13; [1944] A.C. 315.

The facts are in a very short compass and the details do not matter, but at some time after midnight on Jan. 14, 1960, the appellant climbed into a house in Portland Grove, S.W.8, where a Mr. Ballantyne was asleep. He opened the window and got in, and when Mr. Ballantyne woke up, as he thinks, ten minutes later, or got up ten minutes later, he found the appellant sitting in a chair before the fire asleep and with Mr. Ballantyne's overcoat over him. He apparently had made no attempt to steal anything, and there was loose cash in the room which had not been touched. The sole issue was: Had he entered that night with intent to steal?

The appellant was a man of poor intelligence. He was cross-examined, and the answers which he gave were very unsatisfactory and not by any means always to the point. The suggestion which the prosecution sought to make was that he, the appellant, knew that it was no offence if he were just found sleeping on the premises. Again, the answers were: " I do not know ", and answers of that sort, and ultimately leave was sought to cross-examine the appellant as to a previous occasion on which he had been found on private premises and had been charged. In fact he had been acquitted, but it was sought to introduce this evidence to show that on the occasion of the previous charge he must have learned that to be on premises for an innocent purpose such as sleeping was in law no offence. The questions were allowed and, as I have said, the appellant was ultimately convicted.

Whether or not those questions should have been allowed depends on the true interpretation of s. 1 of the Criminal Evidence Act, 1898, and, in particular, proviso (f), which provides:

> " A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character . . ."

There is a complete prohibition of suggesting to a man that he has been previously charged, whatever the result of the charge. The exceptions are threefold and, as is well known, the second and third exceptions are cases where the prisoner has put his character in issue by attacking the evidence of the prosecution or giving evidence himself of good character. No question of that sort is concerned in this case, and the sole question is whether the questions became admissible by reason of the first exception [i.e., proviso (f) (i)] which is in these terms:

> " Unless—(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged."

That, as is well known, is directed to the common class of case where evidence of previous convictions is admissible to show system, and matters of that sort. It is to be observed that the exception is only dealing with the case where proof that he has " committed or been convicted " of another offence is admissible evidence. There is no reference in the exception to being " charged " and, accordingly, it seems to this court that the prohibition against any of the matters in the first part of proviso (f) is only lifted, if I may use that word, when it is sought to prove that he has committed or been convicted of the other offence. Provided that proof of that other offence is admissible evidence, it would be clearly proper as leading up to proof of conviction to say to the prisoner: " Were you charged? ", and if yes, " Were you convicted?", but it seems to this court quite impossible, under exception (i) aforesaid, to question a man in regard to a charge in respect of which he was acquitted.

A Reference has been made to *Maxwell* v. *Director of Public Prosecutions* (1) and, in particular, to a passage in the speech of VISCOUNT SANKEY, L.C. In the passage in question VISCOUNT SANKEY, L.C., said this (2):

> "It does not result from this conclusion that the word 'charged' in proviso (f) is otiose. It is clearly not so as regards the prohibition; and when
> B the exceptions come into play there may still be cases in which a prisoner may be asked about a charge as a step in cross-examination leading to a question whether he was convicted on the charge . . ."

Pausing there, if exception (i) came into play and it was sought to prove that he had been convicted of the previous offence, it would be perfectly possible leading up to that to ask him in the first place whether he had been charged. VISCOUNT
C SANKEY, L.C., goes on (3):

> "or in order to elicit some evidence as to statements made or evidence given by the prisoner in the course of the trial on a charge which failed, which tend to throw doubt on the evidence which he is actually giving, though this last class of case must be rare and permissible only with great safeguards."

D The court has not found it altogether easy to understand to what VISCOUNT SANKEY, L.C., was referring in that last passage; but it might well cover the case where the prohibition has been lifted by the prisoner putting his character in issue. True, he could not then be asked about the charge resulting in acquittal as negativing good character because as has been said such a charge or acquittal is merely a misfortune and does not tend to show bad character. But, the
E prohibition having been removed, it would be possible then to refer to a charge on which the prisoner had been acquitted in order to bring up evidence as to statements made at that trial which tended to conflict with the evidence which he was giving in the current trial. Read in that way, this court does not think that *Maxwell's* case (1) is in any way a proposition for the fact that questions may be put in regard to a charge resulting in an acquittal when the sole
F ground for removing the prohibition is exception (i), namely, proof that he has been charged and convicted of another offence.

In these circumstances, the court feels that cross-examination in this case on the lines referred to was wrongly allowed. It was clearly a matter which was bound to have a considerable influence on the jury, and the court feels that in all the circumstances the only possible course is to quash the conviction.
G Accordingly, the appeal is allowed and the conviction quashed.

Appeal allowed. Conviction quashed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(1) [1934] All E.R. Rep. 168; [1935] A.C. 309.
(2) [1934] All E.R. Rep. at pp. 173, 174; [1935] A.C. at p. 320.
(3) [1934] All E.R. Rep. at p. 174; [1935] A.C. at p. 320.

H

Re CABORN-WATERFIELD.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Salmon, JJ.), April 5, 12, 1960.]

Extradition—Habeas corpus—Fugitive convicted and sentenced in his absence by French court for crime in France—Notice by fugitive for re-trial—No appearance by fugitive—Conviction and sentence confirmed—No appeal—Meaning of " conviction for contumacy "—Effect of French jugement par défaut *and* jugement iteratif défaut*—Fugitive committed to prison in England to await extradition on ground of being an accused person—Whether committal bad as fugitive was a convicted person in French law—Extradition Act,* 1870 (33 *&* 34 *Vict. c.* 52), *s.* 10, *s.* 26.

The expression " conviction for contumacy " in the definition of " conviction " in s. 26 of the Extradition Act, 1870, describes the French conviction " per contumace " and includes the French " jugement par défaut ", but does not include the French " jugement iteratif défaut ", which is a final conviction on surrender for which an offender would be sent to prison without further trial (see p. 182, letters F and G, post).

Re Coppin ((1866), 2 Ch. App. 47) considered.

In 1955 the applicant was summoned to appear before a criminal court in France on a charge of larceny. He did not attend the court and on Apr. 10, 1956, he was convicted in his absence and sentenced to four years' imprisonment. This judgment or conviction was known in French law as a " jugement par défaut ". On June 2, 1956, he gave notice in accordance with French law to have the judgment set aside and the case re-tried in his presence. The applicant was thereupon duly summoned to appear before the French court in October, 1956, but he again failed to appear and offered no excuse for his absence. The court then pronounced judgment against the applicant for the second time, confirming the conviction and sentence. This judgment or conviction was known in French law as a " jugement iteratif défaut ". No notice of appeal having been given by the applicant within the prescribed time limit, the judgment became final. In 1960 the applicant was arrested in London on a warrant issued by leave of the chief magistrate, which recited that requisition had been made for the surrender of the applicant " suspected and accused of the commission of the crime of larceny within the jurisdiction of the government of France ", and called on the applicant to show cause why he should not be surrendered. The applicant came before the magistrate who committed the applicant to prison " on the ground of his being accused of the commission of the crime of larceny " in France.

By the Extradition Act, 1870, s. 10, the magistrate must commit to prison (a) a fugitive criminal accused of an extradition crime, if, inter alia, evidence is produced which would, according to English law, justify the committal for trial of the prisoner if the crime had been committed in England and (b) a fugitive criminal alleged to have been convicted of an extradition crime, if evidence of the conviction is produced. The applicant now applied for a writ of habeas corpus on the grounds (a) that he was not " accused of an extradition crime " within the meaning of s. 10 of the Act of 1870 and (b) that the proceedings in France were contrary to natural justice in that he had been tried in his absence.

Held: the applicant would be discharged from custody since, although the proceedings in France in no way offended against English views of natural justice, the warrant of arrest and the warrant of committal wrongly described the applicant as " accused " of the crime of larceny whereas by virtue of the " jugement iteratif défaut " he was a convicted person.

Quaere whether the English courts are bound to commit a fugitive offender under s. 10 of the Extradition Act, 1870, on proof of a conviction or whether they can inquire into the question whether or not the conviction was secured by means which offend against English notions of natural or substantial justice.

[As to the meaning of conviction in relation to extradition crimes, see 16 Halsbury's Laws (3rd Edn.) 564, para. 1155, note (i), and as to the duty of the magistrate, see ibid., pp. 574, 575, para. 1186; and for cases on the subject, see 24 Digest (Repl.) 988-990, *5-20*.

As to the form of warrant of arrest, see 16 Halsbury's Laws (3rd Edn.) 569, para. 1167, note (f); and for cases on the subject, see 24 Digest (Repl.) 996, 997, *47-54*.

For the Extradition Act, 1870, s. 10, s. 26, Sch. 2, see 9 Halsbury's Statutes (2nd Edn.) 881, 888, 890.

For the Magistrates' Courts Act, 1952, s. 15, see 32 Halsbury's Statutes (2nd Edn.) 435.]

Cases referred to:

Coppin, Re, (1866), 2 Ch. App. 47; 30 J.P. 776; sub nom. *Ex p. Dubois* (*alias Coppin*), 36 L.J.M.C. 10; 15 L.T. 165; 24 Digest (Repl.) 1003, *103*.

R. v. *Browne*, (1906), 70 J.P. 472; 14 Digest (Repl.) 293, *2711*.

R. v. *Wilson*, (1877), 3 Q.B.D. 42; 48 L.J.M.C. 37; sub nom. *Re Wilson*, 37 L.T. 354; 41 J.P. 708; 24 Digest (Repl.) 989, *9*.

Motion for writ of habeas corpus.

The applicant, Michael David George Patrick Caborn-Waterfield, applied by motion, pursuant to leave given on Mar. 25, 1960, for an order that a writ of habeas corpus should issue directed to Her Majesty's Secretary of State for Home Affairs and to the Governor of Brixton Prison in respect of an order made by the metropolitan magistrate, Mr. Bertram Reece, at the Bow Street Magistrates' Court on Mar. 23, 1960, for the committal of the applicant for the purpose of his surrender for extradition at the request of the French government. Notice of the motion was given to the French government. The facts appear in the judgment of the court, which was delivered by His Lordship, Salmon, J.

F. H. Lawton, Q.C., and *M. D. Sherrard* for the applicant.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*), *J. R. Cumming-Bruce* and *R. A. Barr* for the Secretary of State for Home Affairs.

J. H. Buzzard and *Miss M. B. M. MacMurray* for the Governor of Brixton Prison.

M. Koenig for the French Embassy.

Cur. adv. vult.

Apr. 12. **SALMON, J.**, read the following judgment of the court: On Oct. 25, 1955, the applicant, Michael Caborn-Waterfield, together with certain other persons was duly summoned by the Public Prosecutor in France to appear before the criminal court at Grasse to answer a charge of having stolen approximately 23 million French francs and 7,000 U.S.A. dollars from a certain Mr. Warner at Antibes towards the end of the month of August, 1953. The case came on for hearing at Grasse on Jan. 5, 1956. The applicant was represented by counsel but did not appear in person. The case for the prosecution appeared to be formidable and the court intimated that the applicant should be given a further opportunity of attending, should he wish to do so, in order to contradict or explain the evidence against him. Thereupon the applicant's counsel applied for an adjournment of the trial so that the applicant might attend and give evidence at the adjourned hearing. The court granted the application and adjourned the trial until Apr. 10, 1956. The applicant, however, failed to attend the adjourned hearing and his counsel appeared only out of courtesy to the court to say that he had no further instructions. The applicant was then convicted of the charge against him and sentenced to four years' imprisonment. This conviction A in his absence is known to the French criminal law as a "jugement par défaut". Anyone against whom such a judgment is pronounced has the right at any time thereafter, on notice, to have the judgment set aside and the case re-tried in his presence. On June 2, 1956, the applicant through his advocate gave the appropriate notice and was duly summoned to appear before the criminal court at Grasse on Oct. 4, 1956. On that date the applicant again failed to appear B before the court and has never advanced any excuse for his absence. The court then, in accordance with the French law, pronounced judgment against the applicant for the second time and confirmed the former conviction and sentence. This judgment of Oct. 4, 1956, is known to the French criminal law as "jugement itératif défaut". Unless a notice of appeal against such a judgment is given within ten days it becomes final. No notice of appeal was given and accordingly C under French law the conviction stands and the applicant is liable to serve the four year prison sentence imposed on him.

On Jan. 12, 1960, the applicant was arrested in London on a warrant issued by leave of the chief magistrate. The warrant is in the form prescribed in Sch. 2 to the Extradition Act, 1870. It states on its face that requisition has been made to Her Majesty's Secretary of State for Home Affairs for the surrender of the D applicant "suspected and accused of the commission of the crime of larceny within the jurisdiction of the government of France". It is to be observed that the form of warrant makes provision for the arrest of a suspected or accused person or a convicted person with an intimation that the inappropriate words should be struck out. The words " or convicted " were struck out of the warrant. On Mar. 23, 1960, the applicant was brought before a magistrate at Bow Street E Magistrates' Court "to show cause why he should not be surrendered in pursuance of the Extradition Act, on the ground of his being accused of the commission of the crime of larceny" in France. The facts, including the French law to which I have already referred, were all put in evidence by the respondents before the magistrate. Leading counsel for the applicant took two points before the magistrate. He argued that no order should be made against the applicant first because F the applicant was not a person "accused of an extradition crime" within the meaning of s. 10 of the Extradition Act, 1870, inasmuch as he had already been convicted of the crime in respect of which his extradition was sought. Counsel argued secondly that the proceedings in France were contrary to English notions of substantial or natural justice in that the applicant had been tried in his absence.

The magistrate rejected both the points taken by counsel and committed the G applicant to Her Majesty's Prison at Brixton on the ground that he was suspected and accused of stealing 25 million French francs and 2,000 U.S.A. dollars at Antibes in France on or about Aug. 25 or 26, 1955. The applicant now applies to this court for a writ of habeas corpus and has served notice of this application on Her Majesty's Secretary of State for Home Affairs, the Governor of Her Majesty's Prison at Brixton and the French government. In this court leading H counsel has argued the same points on behalf of the applicant as he argued before the learned magistrate. Counsel for the respondents dealt with these points in the reverse order to that in which counsel for the applicant took them. It would perhaps be convenient to deal with these points in the same order as that in which they were dealt with by the respondents' counsel.

The Attorney-General contends that the courts of this country are bound to I commit under s. 10 of the Extradition Act, 1870, on proof of a conviction and cannot inquire into the question whether or not the conviction was secured by means which offend our notions of natural or substantial justice. According to the argument, even if the conviction in the present case were contrary to natural justice the magistrate was still bound to commit. The Attorney-General argues that the well known common law principle that the courts of this country will not enforce a foreign judgment if it offends against English views of substantial justice has no application to proceedings under the Extradition Act, 1870. He

A argues that that Act excludes this principle and gives the courts no discretion but compels them to commit on proof of a conviction. He says that where the legislature intends to give the courts a discretion in the case of fugitive offenders it does so in plain terms as in s. 10 of the Fugitive Offenders Act, 1881, (1). He contends that the legislature in passing the Extradition Act, 1870, intended that our courts should be bound by the foreign conviction even if it grossly contravened all English notions of substantial justice. In such a case he contends that B the legislature has enacted that the liberty of the subject should depend not on the decision of the courts but on the discretion of the executive—the executive having power under the Act to refuse to surrender the alleged fugitive criminal.

This point is one of great importance, but on the view we take of the facts it does not fall to be decided in the present case and we prefer to express no opinion on it. C We are completely satisfied that the proceedings in France in no way offended against English views of substantial justice. The applicant was treated with complete fairness and indeed was shown every consideration by the French court. He was fully apprised of the very strong case that he had to meet, and repeatedly given the fullest opportunity of meeting it. He elected not to do so and on three separate occasions, without any excuse, he failed to appear in person before the French court. Accordingly, it certainly does not lie in his mouth to D complain that the case was dealt with in his absence. It is, moreover, to be observed that in this country there are cases, admittedly most exceptional, in which a man accused of misdemeanour may be tried and sentenced in his absence: see *R.* v. *Browne* (2) and the Magistrates' Courts Act, 1952, s. 15. We accordingly reject the second point taken on behalf of the applicant.

E Counsel for the applicant's first point turns on the true construction of s. 10 of the Extradition Act, 1870. The material words of that section are as follows:

> "In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial F of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.
>
> "In the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, prove that the prisoner G was convicted of such crime, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged."

If one looks at the section alone it is plain beyond argument that the applicant was a person "convicted of an extradition crime" within the meaning of the second paragraph of that section and not a person "accused of an extradition crime" within the meaning of the first paragraph of that section. H When an accused person is committed under the first paragraph of s. 10 and surrendered to a foreign government he is surrendered for trial. Before that course is taken the magistrate has to be satisfied that a prima facie case is made out. When a convicted person is committed under the second paragraph of s. 10 and surrendered to a foreign government he is surrendered to serve his sentence, in which case all that is necessary in the magistrates' court is to prove his conviction.

I In the present case the applicant was committed under the first paragraph of s. 10 as an accused person but there is no question of his being tried if he is surrendered. He has already been tried, convicted and sentenced in France. If surrendered, he will go to prison to serve his sentence without any further proceedings. Accordingly, if s. 10 means what it plainly says, the learned magistrate has wrongly committed the applicant under the first paragraph of s. 10.

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(1) 9 HALSBURY'S STATUTES (2nd Edn.) 901.

(2) (1906), 70 J.P. 472.

The respondents argue, however, that the prima facie meaning of the words "accused" and "convicted" in s. 10 are altered by s. 26 of the Extradition Act, 1870. This is an interpretation section and states:

> "The terms 'conviction' and 'convicted' do not include or refer to a conviction which under foreign law is a conviction for contumacy, but the term 'accused person' includes a person so convicted for contumacy."

We agree with counsel for the Governor of Brixton Prison that these words must contemplate a conviction in respect of an extradition crime for contumacy. The respondents contend that the applicant has been so convicted for contumacy and that accordingly he was properly committed as an accused person under the first paragraph of s. 10. The meaning of the words "for contumacy" in this statute is somewhat obscure and hitherto has never been considered by the courts. In our view these words were introduced into s. 26 in order to bring the Act of 1870 into line with the decision in *Re Coppin* (3). This view is supported by PIGGOTT ON THE LAW RELATING TO FUGITIVE OFFENDERS at p. 129. Before the passing of the Extradition Act, 1870, this country had entered into extradition treaties with France and the U.S.A. Each of these treaties was the subject of a separate Act of Parliament passed in 1843. These statutes were the first Extradition Acts to be passed in England. The statute governing the treaty with France was the Extradition Act, 1843. Under that Act only a person accused of committing an extradition crime could be extradited. No one who had been convicted in France and escaped to England could be extradited in respect of such conviction. The question arose in that case whether Coppin was an accused or a convicted person. He was the subject of a conviction "par contumace" in France for forgery and fraud. In the course of his judgment in *Re Coppin* (3) LORD CHELMSFORD, L.C., made an elaborate investigation into the effect in French law of a conviction "par contumace". He found (4) that if a person so convicted

> "'... is arrested or surrenders himself, that judgment is annulled, so that it is exactly the same as if no proceedings had been taken against him, and then he undergoes his trial for the offence with which he was charged'."

The Lord Chancellor came to the conclusion that a person convicted "par contumace" could not properly be described otherwise than as an accused person, since on his apprehension the judgment against him is annulled and he is put on his trial. In our view the words "for contumacy" in s. 26 were intended as a translation of the French words "par contumace". This view accords with that expressed in CLARKE UPON EXTRADITION (4th Edn.), at p. 233. In our judgment a conviction for contumacy does not include a final judgment "iteratif défaut" which is radically different in character from a conviction "par contumace". A fugitive criminal convicted "par contumace" would on his surrender be tried, whereas a fugitive criminal subject to a final conviction "iteratif défaut" would on his surrender be sent straight to prison without any further trial.

It is to be observed that s. 26 makes no reference to a conviction "par défaut". This may be because the researches into French law by those responsible for drafting it, did not go beyond a consideration of the judgment in *Re Coppin* (3). According to the evidence before us a conviction "par défaut" is exactly the same in character as a conviction "par contumace". The former is a decision of a tribunal correctional which has jurisdiction over "délits" and the latter is the decision of a "cour d'assises" which has jurisdiction over other types of crime. Applying the reasoning of LORD CHELMSFORD in *Re Coppin* (3) it is clear that anyone subject to a "jugement par défaut" comes into the category of an accused person rather than into the category of a convicted person. Accordingly, even although a judgment "par défaut" is not expressly referred to in s. 26 in our view any alleged fugitive criminal subject to such a judgment would properly

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(3) (1866), 2 Ch. App. 47.

(4) (1866), 2 Ch. App. at p. 53.

A be proceeded against and committed as an accused person under the first paragraph of s. 10 of the Extradition Act. But the applicant is not such a person, for he is subject to a final " jugement iteratif défaut ".

The respondents have sought to rely on art. VII (c) of the Extradition Treaty made between England and France in 1876. The English version of that article reads as follows:

B

> " Persons convicted by judgment in default or arrêt de contumace shall be in the matter of extradition considered as persons accused and, as such, surrendered."

The respondents argue that on a true construction of the treaty " persons convicted by judgment in default " include persons subject to a final judgment " iteratif défaut ", and that the words of the treaty must be read into the Extradition Act so as to qualify s. 10. C Even if the suggested construction of the treaty were correct, which in our judgment it is not, it would not avail the respondents. The treaty may be prayed in aid to limit the scope of the Extradition Act (*R.* v. *Wilson* (5)), but not to extend it. Were there any ambiguity in the Act it might be possible to look at the treaty in order to resolve the ambiguity. There is, D however, no ambiguity in the relevant sections of the Act and the treaty certainly cannot be used to alter the plain meaning of the words " accused " or " convicted " in s. 10. The applicant being subject to a final judgment " iteratif défaut " will if surrendered go straight to prison to suffer the sentence imposed on him. If one looks at the realities of the situation, he is, in the fullest sense of the words, a convicted person and in no sense an accused person. In any event E art. VII (c) of the treaty does not in our view apply to judgments " iteratif défaut ". Such judgments are certainly not expressly mentioned in the article, and we think that the omission is intentional. As we have already indicated " jugement par défaut " and " arrêt de contumace " are essentially of the same character. Anyone subject to such judgments is much more akin to an accused person than he is to a convicted person. On the other hand, judgments " iteratif F défaut " are of an entirely different character. Anyone subject to such a judgment, certainly to such a final judgment, is clearly in the class of convicted persons and not in the class of accused persons.

In our view the parties to the treaty agreed that the persons referred to in art. VII (c) should be treated as accused persons because in reality that is what they are. There is no reason to suppose that the parties intended that those who G are in reality convicted persons such as the applicant should be dealt with otherwise than as convicted persons. We have accordingly come to the clear conclusion that counsel for the applicant's first point is a good one. We have reached this conclusion with considerable reluctance for the applicant appears to be entirely devoid of merit. Had he been proceeded against and committed as a convicted person it is difficult to see in the circumstances of this case how he could have H succeeded in this court. The point raised before us on the construction of the statute is, however, of some importance and, as the Attorney-General has said, goes far beyond the scope of this particular case. There can be no doubt that on the true construction of the statute the applicant's committal as an accused person was wrong in law. Accordingly, the application succeeds and the applicant, who has surrendered to his bail and is before this court, will be discharged.

Order accordingly.

Solicitors: *Blacket Gill & Prior* (for the applicant); *Treasury Solicitor* (for the Secretary of State for Home Affairs); *Director of Public Prosecutions* (for the Governor of Brixton Prison); *Rowe & Maw* (for the French Embassy).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(5) (1877), 3 Q.B.D. 42.

PIKE *v.* MICHAEL NAIRN & CO., LTD.

[Chancery Division (Cross, J.), March 22, April 7, 1960.]

Practice—Originating summons—Service—Waiver—Originating summons to which appearance not required—Whether service can be waived and application made for dismissal for want of prosecution—R.S.C., Ord. 53D, *r.* 5—*R.S.C., Ord.* 54, *r.* 4E—*Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2 *c.* 56), *s.* 64 (1) (*b*).

An originating summons in the non-inter-partes form to which appearance is not required to be entered was issued on Apr. 13, 1959, in the Chancery Division under R.S.C., Ord. 53D, r. 2 and r. 5, by tenants claiming a new tenancy of business premises under the Landlord and Tenant Act, 1954. Rules of court (see R.S.C., Ord. 53D, r. 5 (2) and Ord. 54, r. 4E) seemed to assume that the summons should be served at least fourteen days before the return day, but the rules did not expressly so require. The issue of the originating summons had the consequence, under s. 64 (1) (b) of the Act of 1954, that the existing tenancy was extended until the expiration of three months from the date when the application would be finally disposed of. The tenants did not serve the originating summons, but obtained an order standing it over generally with liberty to restore. They did not restore it. On Feb. 24, 1960, the landlords took out a summons to dismiss the originating summons for want of prosecution. The tenants contended that the landlords, not having been served with the originating summons, had no locus standi in relation to it.

Held: although the landlords had not been served, they were entitled to appear on the application for dismissal, since service was required by the Rules of the Supreme Court in their interests and they could waive being served; in the circumstances the originating summons would be referred to the master with directions to hear it after giving both sides opportunity to file evidence.

Fell v. *Christ's College, Cambridge* ((1787), 2 Bro. C.C. 278) and *Oulton* v. *Radcliffe* ((1874), L.R. 9 C.P. 189) applied.

Fraser v. *Cooper, Hall & Co.* ((1883), 23 Ch.D. 685) distinguished.

[As to the waiver of service, see 30 Halsbury's Laws (3rd Edn.) 365, para. 679, note (e); and as to appearance to an originating summons, see ibid., 368, para. 685.

As to the procedure on an application for a new tenancy for business premises, see 23 Halsbury's Laws (3rd Edn.) 896, para. 1721.

For the Landlord and Tenant Act, 1954, s. 64, see 34 Halsbury's Statutes (2nd Edn.) 441.]

Cases referred to:

Fell v. *Christ's College, Cambridge*, (1787), 2 Bro. C.C. 278; 28 E.R. 153.

Fraser v. *Cooper, Hall & Co., Waddell* v. *Fraser*, (1883), 23 Ch.D. 685; 52 L.J.Ch. 684; 48 L.T. 754; 40 Digest (Repl.) 460, *451*.

Oulton v. *Radcliffe*, (1874), L.R. 9 C.P. 189; 43 L.J.C.P. 87; 30 L.T. 22; 16 Digest 121, *198*.

Procedure Summons.

This was an application by landlords, Michael Nairn & Co., Ltd., by summons dated Feb. 24, 1960, for the dismissal for want of prosecution of an originating summons, issued on Apr. 13, 1959, and asking for a new tenancy of business premises under Part 2 of the Landlord and Tenant Act, 1954. The landlords were named as respondents to the originating summons, which was issued by the tenants but the landlords had not been served. The originating summons was one to which an appearance was not required to be entered. The tenants contended that the landlords could not be heard in the case until they had been served. The facts appear in the judgment.

G. Avgherinos for the applicants, the landlords.

R. E. Megarry, Q.C., and *L. Joseph* for the respondents, the tenants.

Cur. adv. vult.

Apr. 7. **CROSS, J.**, read the following judgment: On Apr. 13, 1959, Oliver Noel Pike, Sam Rostron and Doreen Mary Pike, who claimed to hold a tenancy of certain premises at Greenwich from Michael Nairn & Co., Ltd., took out an originating summons to which they made that company respondents asking for the grant of a new tenancy of the premises under Part 2 of the Landlord and Tenant Act, 1954. It is stated in the body of the summons that on Dec. 16, 1958, the respondent landlords had given a written notice to the first two applicants purporting to determine the tenancy on June 24, 1959, and saying that the landlords would oppose any application for the grant of a new tenancy on the ground that they intended to demolish the premises or a substantial part of them. By virtue of s. 64 (1) (b) of the Landlord and Tenant Act, 1954, the issue of the summons had the effect of extending any existing tenancy of the tenants, the applicants, until the expiration of three months from the date when the application should be finally disposed of. R.S.C., Ord. 53D, r. 5 (1), provides that no appearance need be entered to an originating summons asking for a new tenancy under the Act of 1954. The summons issued in this case was therefore in the form prescribed in App. K, No. 1G, to the Rules of the Supreme Court. It called on the landlords to attend on the hearing of this application before the master at his room at the Royal Courts of Justice at the time specified in the margin —which was May 6, 1959, at 11.30 in the morning. It further informed them that they need not enter an appearance but that if they did not attend by their solicitor at the time and place mentioned such order would be made and proceedings taken as the judge might think just and expedient. R.S.C., Ord. 54, r. 4E, provides that every summons, not being an originating summons to which an appearance is required to be entered, shall be served two clear days before the return thereof unless in any case it shall be otherwise ordered; but r. 5 (2) of R.S.C., Ord. 53D, provides that an originating summons under the Act of 1954 shall be returnable at a date which will allow at least fourteen days to elapse between the date of service on the respondent and the return date. Rule 5 (3) of the same order provides that no affidavit need be filed in the first instance in support of or in answer to any such summons but that on the return day or at any subsequent hearing such directions shall be given as to the filing of affidavits and otherwise as to the course of the proceedings including, if need be, the giving of notice to other persons or the making of other persons parties to the proceedings as may appear expedient. These rules obviously assume that the applicants will serve the summons on the respondents at least fourteen days before the return date and that the respondent will have an opportunity of attending on that date before the master and making such representations as he wishes to make with regard to the future course of the proceedings. The tenants in this case did not serve the summons on the landlords at all but the tenants attended themselves before the master on May 6, 1959, and asked for and obtained an order that the summons should stand over generally with liberty to restore. By pure coincidence, a representative of the solicitors acting for the respondents happened to be in the master's room at the time waiting for another case in which he was engaged to come on, and heard what was done in this case on that occasion. No step has since been taken by the tenants to restore the originating summons, and, on Feb. 24, 1960, the landlords took out a summons against the tenants in the pending proceedings asking for an order that the originating summons should be dismissed for want of prosecution on the ground that the tenants had failed to serve it on the landlords or to take any steps to proceed with it since the date of its issue, or for such further or other order or direction as the court might think fit to make. That summons now comes before me as a procedure summons and the tenants have taken the point that the landlords, not having been served with the originating summons, have no locus standi in the case at all, and that, unless and until the tenants choose to serve the originating summons on the landlords they cannot be heard. A

I should be very sorry to have to give effect to this contention. By the mere issue of a summons under this Act a tenant extends his existing tenancy until the proceedings are disposed of. If the rent which he is paying is less than the rent which he will have to pay under a new lease, if he gets one, he has an incentive to delay the proceedings as long as possible and the worse his case the greater is the incentive. Since the rules do not provide that a summons shall lapse if not served within a specified time an obvious means of gaining time is to issue the summons and not serve it. There may, of course, be cases in which it is right that the application for a new tenancy should stand over pending the determination of some other issue between the parties with regard to the existing tenancy, but even in such cases the respondent should have an opportunity of being heard when the question of standing over the summons is being considered. I am, therefore, glad to say that in my judgment the tenants' submission is unfounded. The service of the process of the court is made necessary in the interests of the defendant so that orders may not be made behind his back. A defendant, therefore, has always been able to waive the necessity of service and to enter an appearance to the writ as soon as he hears that it has been issued against him, although it has not been served on him (see *Fell* v. *Christ's College, Cambridge* (1), *Dalton* v. *Radcliffe* (2)). Counsel for the tenants while conceding that a defendant to an action commenced by writ—which is the traditional process of this court—could enter an appearance without being served, contended that a defendant or respondent to an originating summons could not do so, since the originating summons is simply the creature of the rules of court made under the Supreme Court of Judicature (Consolidation) Act, 1925. In this connexion, he relied on the decision of BACON, V.-C., in *Fraser* v. *Cooper, Hall & Co.* (3). In that case, the defendants, who were thinking of bringing a counterclaim not only against the plaintiffs but also against a third person who was not a party to the action, delivered their defence and counterclaim which named the third party as one of the defendants to the counterclaim to the solicitors acting for the plaintiffs, who happened also to be the solicitors for the third party. These solicitors purported to enter an appearance on behalf of the third party to the counterclaim, though it had never been served on him under the rule which then corresponded to R.S.C., Ord. 21, r. 12. The judge held that though, for some purposes, counterclaims were to be treated as independent actions, someone who was not a party to an action and who happened to hear that the defendants had printed and delivered to the plaintiffs a defence and counterclaim which named him as a defendant to the counterclaim was not entitled to enter an appearance to the counterclaim as though the delivery of the counterclaim to the plaintiffs was equivalent to the issue of a writ against him. That case does not appear to me to have any bearing on this. An originating summons is strictly analogous to a writ; indeed, in some cases at least, proceedings started by originating summons are "actions" within the meaning of that word (4) as used in the rules of court, and I see no reason why a defendant or respondent to an originating summons should not be able to waive service of the summons on him and enter an appearance to it. Counsel for the tenants then points out that even if this were so the landlords in this case have not in fact entered an appearance; but R.S.C., Ord. 53D, r. 5 (1), provides that they need not do so and therefore in my judgment they can, if they choose, waive service and claim to be heard on the summons.

Suppose that the landlords, having heard of the issue of this summons, had instructed their solicitors to appear for them on the return day—as the summons directed—and to oppose an adjournment; could the tenants have prevented the master from hearing them? Counsel for the tenants was forced to submit that they could and in order to make his case consistent he was forced to go further and to submit that the master would have had no power under R.S.C., Ord. 53D, r. 5 (3), to order the applicants to serve the summons on the respondents. This is a reductio ad absurdum of the whole argument. R.S.C., Ord. 53D, r. 6, provides that persons who have not been made parties to the summons in the first place may apply to the court to be joined as parties. It would be the height of absurdity if a man who has not been named as a party at all could claim to be heard while a man who had been made a party had no locus standi because he had not been served. Counsel for the tenants finally submitted that, even if the landlords could be heard, they could not, under the rules, apply to dismiss the originating summons for want of prosecution unless the case amounted to an abuse of the process of the court. I have not heard the landlords on that point and I express no view on it nor do I express any view whether what the tenants have done or have not done in this case amounts to an abuse of the process of the court. Their failure to serve the summons on the landlords certainly calls for some explanation but they possibly will be able to give some explanation of it which does not involve an admission that they have abused the process of the court. All I shall do is to send the summons back to the master with directions to him to hear it after giving each side an opportunity to file such evidence on it as they wish.

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(1) (1787), 2 Bro. C.C. 278.

(2) (1874), L.R. 9 C.P. 189.

(3) (1883), 23 Ch.D. 685.

(4) The meaning of the word "action" is stated in 1 HALSBURY'S LAWS (3rd Edn.) 5

In conclusion I would add this. The Committee on Chancery Chambers and the Chancery Registrars' Office have pointed out in para. 68 and para. 72 of their recent Report (5) that the existing procedure in cases under Part 2 of the Landlord and Tenant Act, 1954, is very unsatisfactory. This case illustrates how urgently it is in need of reform. So long as the rules contain no provision for the automatic dismissal of a summons which is not promptly served there appears to be nothing to prevent an applicant from issuing a summons and putting it in his pocket. Where, however, as here, the applicants obtain a return day and appear before the master on it and the respondents do not appear I think that, in order to prevent abuse so far as possible, the masters should in future inquire whether the summons has been served and, if it has not been served, should direct service of it unless they are satisfied that the respondent in fact knows of its issue and consents to its standing over.

Order remitting the originating summons to the master, with direction that it be heard.

Solicitors: *Baker, Dodsworth & Co.* (for the applicants, the landlords); *Clintons* (for the respondents, the tenants).

[*Reported by* E. Cockburn Millar, *Barrister-at-Law.*]

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(5) Cmd. 967. The committee, who were under the Chairmanship of Lord Justice Harman, reported in March, 1960.

HOPKINS *v.* MANNERS.

[COURT OF APPEAL (Pearce and Harman, L.JJ.), April 7, 8, 1960.]

County Court—Costs—Fixed costs—Further costs—Claim for damages for personal injury—Payment in by defendant of sum for damages plus fixed costs—Acceptance by plaintiff—Application for order for further costs—County Court Rules, Ord. 11, *r.* 1 (3) (c), *as amended by S.I.* 1959 *No.* 1251.

To allow extra costs, beyond the fixed costs indorsed on a county court summons, where money paid into court with admission of liability under C.C.R., Ord. 11, r. 1, is accepted, must be the exception and not the rule; such extra costs may be allowed in the discretion of the court under the amended r. 1 (3) (c) only where the ungenerosity of the amount of the solicitor's costs indorsed becomes injustice (see p. 192, letters E and C, post).

The plaintiff issued proceedings in the county court claiming £200 damages for personal injury suffered in a road traffic accident. The amount indorsed on the summons for court fee was £4 2s. and for the solicitors' charge was £4, totalling £8 2s. The defendant paid into court £60 with an admission of liability, and the £8 2s. costs. The plaintiff gave notice of acceptance and then applied to the registrar under C.C.R., Ord. 11, r. 1 (3) (c), for an order for further costs to be allowed. Before the hearing of this application the plaintiff's solicitors sent a list of items for which they intended to apply and which constituted in fact a bill of costs. This included a charge of £10 for preparatory work on the case, including attending the plaintiff and taking a proof of evidence, attending a magistrates' court to take notes of evidence in relation to criminal proceedings arising out of the accident, correspondence with defendant's insurers, etc. At the hearing of the application the registrar intimated that the plaintiff's solicitors might add to their list two additional items, namely, the cost of a medical report (£2 12s. 6d.) and the cost of a police report (£1), both of which reports had been obtained before the delivery of the particulars of claim. The registrar, however, declined, as a decision on general principle (without taxation of items), to make any order for further costs. The plaintiff appealed to the judge who excluded the two additional items from the bill of costs and also declined to make any order for further costs. On appeal,

Held: the decision of the county court refusing further costs should stand because—

(i) whether the plaintiff's application to the county court was an interlocutory application under C.C.R., Ord. 13, r. 1, or an appeal under C.C.R., Ord. 37, r. 5, the onus of satisfying the court that an order should be made was on the plaintiff, who had failed to discharge it, and the county court judge was under no duty to refer back the bill to the registrar for taxation, and

(ii) unless there was some reason for ordering otherwise under C.C.R., Ord. 13, r. 1 (3) (c), it was still the rule that the defendant should not be liable for any costs other than those indorsed on the summons, and, the judge having exercised his discretion, the Court of Appeal would not interfere.

Appeal dismissed.

[**Editorial Note.** The amount of the fixed charges (£4) indorsed on the summons was the amount allowed on scale 4, since the scale applicable was determined by the amount claimed, which exceeds £100; but the amount paid into court, and accepted, was less than £100, so that the bill of costs was prepared on scale 3 (see p. 189, letter C, post).

As to liability for costs on payment of part of claim, see 9 HALSBURY'S LAWS (3rd Edn.) 231, para. 526, note (u); and for cases on the subject, see 13 DIGEST (Repl.) 459, *826-828* and Supplement.]

Case referred to:

Reid v. *Thomas Bolton & Sons, Ltd.*, [1958] 1 All E.R. 465; [1958] 1 W.L.R. 266; 3rd Digest Supp.

Appeal.

The plaintiff appealed against the decision of His Honour JUDGE GAGE at Southend County Court on Feb. 4, 1960, whereby he refused to make an order under C.C.R., Ord. 11, r. 1 (3) (c), for further costs to be paid by the defendant to the plaintiff. The nature of the charges which the plaintiff sought to be allowed is shown by the list of items or bill which he put forward and which is printed below; this is the amended form after two items (medical report and police report, numbered 33 (a)) had been added in accordance with the registrar's permission. The county court judge subsequently disallowed the addition of these two items (numbered 33 (a)) which were not in the bill originally put forward. The form of the bill, so far as relevant, was as follows:

PLAINTIFF'S BILL OF COSTS—SCALE III

		£	s.	d.	£	s.	d.
23	Letter before action					5	0
1	Instructions to sue				1	0	0
2	Preparing particulars of claim				1	5	0
18	Attending to enter plaint					5	0
	Paid plaint fee	4	2	0			
13	Arranging for attendance of witness without subpoena					5	0
6	Part fee preparing for trial including considering facts, evidence and law, preparation of notes of fact or argument, attending plaintiff taking proof of evidence, attending magistrates' court taking notes of evidence, correspondence with defendant's insurers, attending their representative discussing case, perusing police report, perusing medical report.				10	0	0
26	Taxation of costs				1	10	0
35	Postages and incidentals		5	0			
33 (a)	Paid for police report	1	0	0			
	Paid for qualifying fee to expert witness	2	12	6			
		£7	19	6	£14	10	0

The defendant, within eight days of service, paid into court £60 by way of damages and £8 2s.* costs indorsed on the summons. The facts appear in the judgment of PEARCE, L.J., at p. 190, letter D, post.

J. W. Miskin for the plaintiff.

B. W. Chedlow and *A. A. V. C. Gregory* for the defendant.

PEARCE, L.J.: The relevant parts of C.C.R., Ord. 11, r. 1, read:

> "(1) Where the only relief claimed in an action is the payment of money, the defendant may, within eight days of the service of the summons on him inclusive of the day of service, pay into court in satisfaction of the claim (a) the whole amount of the claim and the costs stated on the summons; or (b) so much of the claim as he admits to be due from him to the plaintiff, together with the costs (including court fees) which would be entered on a summons for that amount under pt. I of App. D."

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* Compare C.C.R., Ord. 11, r. 1 (1) (b), as regards the amount to be paid in for costs.

Sub-rule (2) deals with the case where the whole amount of the claim is paid in. Sub-rule (3) reads:

> "Where a lesser amount is paid into court, together with the appropriate costs under para. (1) (b) of this rule, and the plaintiff elects to accept that amount in satisfaction of his claim (a) he shall within four days after receipt by him of notice of payment into court deliver or send by pre-paid post to the registrar and to every defendant a notice of acceptance; (b) on receipt by the registrar of the notice of acceptance the action shall be stayed; and (c) the defendant shall not be liable for any further costs unless the court otherwise orders."

The words "unless the court otherwise orders" were added by a recent amendment (1) made in consequence of *Reid* v. *Thomas Bolton & Sons, Ltd.* (2). In that case this court, in holding that the rule applied to unliquidated as well as to liquidated claims, pointed out that the rule as then framed caused hardship in cases where a plaintiff had had to incur unusual costs before the plaint was actually issued, and was prevented by the rule from recovering them on accepting a payment in made by the defendant in accordance with the rule. The amendment gives the court a discretion to make an order allowing further costs.

The facts of the present case are as follows. The plaintiff was injured in a motor car collision. Correspondence followed between the solicitors to the parties. On Dec. 16, 1959, the plaintiff issued a summons with particulars of claim settled by the plaintiff's solicitors claiming £200 damages. Fixed costs and fees were indorsed on the summons amounting in all to £8 2s. On Jan. 6, 1960, the plaintiff's solicitors received notice of payment in of £60 with an admission. Within four days proper notice of acceptance was given. The plaintiff's solicitors took the view that their disbursements and costs exceeded the fixed costs on the summons and determined to apply under the amended Ord. 11, r. 1 (3) (c), in order that they might obtain further costs. The application was made to the registrar. Before it was heard, the plaintiff's solicitors, on Jan. 11, had sent a bill of costs. It was said by the plaintiff's counsel that that was not a proper bill but that it was rather a list of the items in respect of which they were intending to apply. However, it seems to me that it was really a bill of costs to which they were claiming to be entitled. On the hearing of that application the registrar was given that document. It showed that the disbursements to which the plaintiff's solicitors thought that they were entitled were £4 7s. and the charges which they wished to make were £14 10s. In fact, before the particulars of claim were delivered the plaintiff's solicitors had had a medical report on the plaintiff which cost them £2 12s. 6d., and they had paid to the police authorities £1 for a report in connexion with criminal proceedings that were brought in respect of the accident. During the hearing before the registrar the plaintiff's solicitors' clerk mentioned that these two items had been omitted from the list of items sent to the defendant's solicitors, and the registrar said that they could be added. However, he ruled against the plaintiff on general principles and declined to make any order for further costs. The plaintiff's solicitors then appealed to the learned judge. He considered *Reid* v. *Thomas Bolton & Sons, Ltd.*, and certain words used in the judgment therein (3), and said:

> "It seems to me therefore that in order to decide whether the registrar has exercised his discretion aright in this case I must look to see whether it is a case where costs before action could not be avoided, bearing in mind of course that the solicitors will receive the sum of £4 (4) from the defendant in respect of such costs."

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(1) S.I. 1959 No. 1251. (2) [1958] 1 All E.R. 465. (3) [1958] 1 All E.R. at p. 467.

(4) Being the amount indorsed in the summons for solicitor's charges; see C.C.R., App. D., Table IV (Scale 4). The appropriate court fee was £4 2s., making with the £4, the £8 2s. as the aggregate costs indorsed on the summons.

He then considered the matter in more detail and dismissed the appeal.

It is plain that the wording of C.C.R., Ord. 11, r. 1 (3) (c) vests a discretion in the court. The plaintiff on this appeal seeks to show that the learned judge exercised that discretion wrongly and misdirected himself. He relies on two points. The first is this: the learned judge excluded from his consideration two items, namely, the cost of obtaining the medical report and the cost of obtaining the police report. With regard to those the judge said this:

> " [The solicitor for the plaintiff] also tells me that he has incurred expense in respect of a medical and police report. Neither of these items is in the bill of costs which was before the registrar and is now before me, and I do not see that I can accept as evidence something said by an advocate in the course of his argument."

It is said that the learned judge erred and that he should either have referred the matter back for investigation by the registrar, or have adjourned it for affidavit evidence from the solicitor as to those items. Counsel for the plaintiff argues that the application was being made to the judge under C.C.R., Ord. 13, r. 1, para. (c) of which says:

> " No affidavit shall be necessary in the first instance, but the judge or registrar may direct evidence to be adduced in such manner as he thinks fit."

As to the first point, I see no good ground for interference by this court. Whether the application to the court was an interlocutory application under C.C.R., Ord. 13, r. 1 (see para. (h)), as the plaintiff contends, or was an appeal under C.C.R., Ord. 37, r. 5, from a final order made by the registrar, as the defendant contends, the onus was on the plaintiff to satisfy the judge that an order should be made. He failed to do so. The judge had a discretion, if he wished, to adjourn the matter for further evidence, and I have no doubt that he would have done so had he felt that justice required it. No doubt he viewed with a certain disfavour items which had been omitted from the bill and which the plaintiff afterwards sought to obtain. It may be that they did not get such favourable consideration as they would have had if they had been inserted in the bill in the first instance; but that is often the fate of omissions. I certainly do not accept the contention that the judge had a duty to send the case back for taxation. The rule does not, as it seems to me, envisage that procedure where cases have been settled by payment in. No doubt the judge has power to make such an order if it is appropriate, but even where further costs are allowed, I should surmise that that cumbrous method, with its necessary further expenses, would rarely commend itself to the judge.

The second point was this: it is said that the learned judge was plainly wrong in saying that the work dealt with under item 6 of the bill of costs was not necessary before the issue of the summons. That item reads as follows:

> " Part fee preparing for trial including considering facts, evidence and law, preparation of notices of fact or argument, attending plaintiff taking proof of evidence, attending magistrates' court taking notes of evidence, correspondence with defendant's insurers, attending their representative discussing case . . ."

Counsel for the plaintiff argues that it is obvious on general grounds that the plaintiff's solicitors must have and should have incurred costs exceeding the amount indorsed on the summons: costs in investigating the case, in considering the law and in ascertaining that he had a good case before issuing the summons. This argument, however, would apply in every case and an order for further costs would, if it is sound, be the normal order. The words of the rule, however, show a clear intention that an order for further costs should not be the normal order. In spite of counsel for the plaintiff's fair and forcible argument, he has not persuaded me that the court should interfere. In my view the learned judge was right in his approach to the problem and it was a matter for his discretion. A

Unless there is some reason for ordering otherwise, the rule that the defendant shall not be liable for any further costs still holds good. The recent amendment now allows the court to order otherwise, but on the wording of the rule it is for the plaintiff to satisfy the court that it should do so. The object of the rule was to promote a speedy settlement of just claims. It was designed to encourage defendants to make reasonable payments into court with the knowledge that B thereby the costs would ordinarily be limited to the sum indorsed on the summons and to prevent their being deterred from so doing from fear that thereby they might be incurring an unliquidated liability for costs. The county court rules as to costs are designed on austere rather than luxurious lines. Just as party and party costs exclude things which, though not strictly necessary, may well be prudent and desirable expenditure as between solicitor and client, so this rule in C the general interests of litigants keeps the costs down to a level which may in general be ungenerous to the plaintiff's solicitor. Where, in the opinion of the court, the circumstances are such that ungenerosity becomes injustice, it has discretion to make an order. But there are two sides to the question. It is hard that a plaintiff who has incurred costs should not receive them in full; but it is also hard that a defendant who has paid a sum into court with a general D expectation of limiting his liability to the amount of costs indorsed on the summons should find it increased after the acceptance of his payment in. It is for the judge to find the solution in each case and to order otherwise in cases where he is satisfied that justice needs it.

I would dismiss the appeal.

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HARMAN, L.J.: I agree. This seems to me clearly a matter for the discretion of the judge. Extra costs must be the exception and not the rule, as the form of the rule shows, and it is for the judge to decide whether justice demands that something more than the normal reward should be given. It was said in this case that the judge erred in the exercise of his discretion because he excluded the two items amounting to £3 12s. 6d. to which my Lord has referred. Even F if he should not have excluded them, but should have taken them in, he was still in a position to say, as I see it, that there was nothing sufficient to convince him that the conventional £8 2s. was not the proper measure of the plaintiff's reward, and, as he had materials on which he could exercise that discretion in that sense, I do not think that it is for us to interfere, still less to encourage the view that something which adds to the costs of proceedings and the uncertainty of litigation G should be made not the exception but the rule.

Appeal dismissed.

Solicitors: *Drysdale, Lamb & Jackson* (for the plaintiff); *John Holt* (for the defendant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

HOLLOWAY AND ANOTHER *v.* DOVER CORPORATION.

[COURT OF APPEAL (Lord Evershed, M.R., Pearce and Harman, L.JJ.), April 4, 5, 1960.]

Compulsory Purchase—Compensation—Date by reference to which right to compensation is determined—Notice to treat served in 1949*—Nothing further done—Claimants' leasehold term of business premises expired in* 1954 *but their lease continued under statute—Claimants claimed compensation in* 1957 *for compulsory purchase—Acquiring authority obtained freehold in* 1957*—Notice to quit given to terminate lease in* 1958*—Whether claimants entitled to compensation pursuant to the notice to treat—No proprietary interest acquired pursuant to notice to treat.*

The claimants held business premises under a lease for twenty-one years expiring on Oct. 11, 1954. A notice to treat under a compulsory purchase order was deemed to have been served by the local authority on the claimants on Feb. 11, 1949. No further action was taken and the claimants remained in possession. On Mar. 21, 1957, the claimants claimed compensation from the local authority. On May 16, 1957, the local authority in exercise of statutory powers caused the freehold of the premises to vest in themselves. In October, 1957, the local authority served on the claimants a notice to quit under the Landlord and Tenant Act, 1954, expiring on Oct. 11, 1958. In January, 1958, the claimants gave a counter-notice requiring the grant to them of a new lease, but the claimants and the local authority agreed an amount of compensation to be paid to the claimants pursuant to s. 37 of the Act of 1954 and the matter proceeded no further. On the question (referred by the claimants to the Lands Tribunal on May 7, 1958) whether the claimants were entitled pursuant to the Acquisition of Land (Assessment of Compensation) Act, 1919, to compensation arising out of the notice to treat,

Held: the claimants were not entitled to compensation because the material date for assessing compensation was either the date when the claimants claimed compensation (March, 1957) or the date when they instituted proceedings before the tribunal (May, 1958) and, as events had happened, nothing had been or was being acquired then from the claimants by the local authority under compulsory powers pursuant to the notional notice to treat.

R. v. *Kennedy* ([1893] 1 Q.B. 533) considered.

Appeal allowed.

[As to the date at which compensation is estimated, see 10 HALSBURY'S LAWS (3rd Edn.) 8, para. 7 and pp. 105, 106, para. 178; and for cases on the subject, see 11 DIGEST (Repl.) 136, 137, *198-200.*]

Cases referred to:

R. v. *Kennedy*, [1893] 1 Q.B. 533; 62 L.J.M.C. 168; 68 L.T. 454; 57 J.P. 346; 11 Digest (Repl.) 191, *575.*

R. v. *Stone*, (1866), L.R. 1 Q.B. 529; 35 L.J.M.C. 208; 14 L.T. 552; 30 J.P. 488; 11 Digest (Repl.) 190, *571.*

Case Stated.

This Case was stated by the Lands Tribunal for the decision of the Court of Appeal pursuant to the Lands Tribunal Act, 1949, s. 3 (4) and R.S.C., Ord. 58A, for the determination of the question whether, in the events which had happened, the claimants could maintain their claim to compensation against the acquiring authority, Dover Corporation, in respect of the compulsory acquisition of the business premises which the claimants, at the date of the compulsory purchase order and its confirmation, held under a lease, but which lease expired in 1954 prior to the acquiring authority's having become entitled to the freehold or having dispossessed the claimants.

The facts appear in the judgment of LORD EVERSHED, M.R.

J. R. Willis, Q.C., and *E. A. Vaughan-Neil* for the acquiring authority, Dover Corporation.

D. P. Kerrigan for the claimants.

LORD EVERSHED, M.R.: This is an appeal on a preliminary question which may be stated thus: whether, in the circumstances of this case, there can be any right to compensation at all on the part of the present claimants? The claimants are Mrs. Holloway and Mr. Harlow. It is not clear that Mr. Harlow ever had any direct proprietary interest, but he is a partner with Mrs. Holloway, in the business of a bakery carried on on the premises in question, No. 33, Woolcomber Street and Trevanion Street, Dover.

The interest of the claimants—for simplicity I will refer to them as " the bakery "—was under a lease for twenty-one years granted in 1933, which, in the ordinary course, would expire on Oct. 11, 1954. The premises at Woolcomber Street appear to have been in that part of Dover which had suffered a great deal of war damage. It is apparent from the decision that as early as 1944 there had been discussions between the Dover Corporation (the appellants here) and the bakery and the latter's landlords, a company called G. W. Chitty & Co., Ltd. In regard to the premises it was plain that in the circumstances substantial reconstruction work would have to be done, not only on these particular premises but over a considerable area in which No. 33, Woolcomber Street is situated. The point of the discussions from the beginning have been or have included the possibility of finding the bakery some alternative premises, but not too far away, on which they could carry on the bakery business. The first positive step towards such a reconstruction occurred in 1947 when the Borough of Dover obtained a compulsory purchase order which was subsequently called the Borough of Dover (Central Area No. 1) Compulsory Purchase Order, 1949, having been confirmed by the Ministry of Town and Country Planning on Feb. 8, 1949. The order so confirmed incorporated what is called the expedited completion procedure to be found set out as taken from the original Town and Country Planning Act, 1944, [Sch. 6] in Sch. 11 to the Act of 1947. One of its effects [para. 1] was that a notice to treat was deemed to have been served on all persons interested in the property in question. So it is that on Feb. 11, 1949, as has been clearly conceded here, a notice to treat is deemed to have been served on Hopper's Bakery. It will be appreciated that at that date, February, 1949, the bakery still had five and a half years or more to run under its lease. Therefore, it clearly had an interest in land which was capable of being acquired compulsorily by an acquiring authority. In fact, however, no further step was taken by the bakery on the one side or the corporation on the other. I gather that the negotiations which I have mentioned continued, but that is all. So you reach Oct. 11, 1954, when the lease, according to its terms, expired. Apart from certain statutory rights, it would then have followed that the bakery ceased to have any interest whatever in the property in Woolcomber Street. There would have been nothing which anybody could have acquired, compulsorily or otherwise. It has, however, to be remembered that certain statutory protection has been given to lessees who carry on businesses. The relevant statute today is the Landlord and Tenant Act, 1954. By the terms of that Act a tenancy to which the Act applies is not to be determined, or treated as determined, until a notice to quit by the landlord has been served in accordance with the terms of the Act, viz., a six months' notice to quit. On receipt of such a notice, the tenant under the legislation then has a right to give notice that he desires the landlord to grant him a new lease, and that, in certain circumstances, may be granted on such terms as to rent and otherwise as a court may determine. By s. 30 of that Act, however, the landlord may put forward certain objections to the granting of a new lease, and one of them contained in sub-s. (1) (f) is that the property is to be substantially demolished or reconstructed. If that is established, then there is no power in a court to grant the lessee a new lease. That was the situation in which the bakery found themselves on the expiration of their lease in 1954.

The next step that was taken was some two and a half years later, when, on Mar. 21, 1957, the bakery made a claim for compensation against the corporation. That claim is contained in an exhibit attached to the decision. I do not propose to read the whole of it, but after stating the name of the claimants and the description of the business it states that the landlords, Messrs. G. W. Chitty & Co., Ltd., had granted the bakery at the rent of £40 per annum a lease for twenty-one years from Oct. 11, 1933. On the face of that, therefore, the lease as such had expired at the date the claim was made. It seems that a value payment had been made in respect of the war damage. That presumably was made to the bakery, but there is no further evidence about it. The particulars of claim were "£440 profit rental" and £2,345 "goodwill and loss on forced sale". That was the claim. It was not immediately or ever acceded to.

On May 16, 1957, two months after this claim, the corporation in exercise of their statutory powers as an acquiring authority caused the freehold of the premises to be vested in themselves. Messrs. G. W. Chitty & Co., Ltd., therefore were replaced as the bakery's landlords, and the interest of Chittys was acquired compulsorily or expropriated by the corporation. Having done that, in October, 1957, the corporation, as landlords by assignment, served on the bakery the notice to quit which the Act of 1954 envisaged. By that notice the rights of occupation of the bakery of these premises would come to an end on Oct. 11, 1958, that being the date stated in the notice to quit. At the beginning of 1958, the bakery served on their then landlords, the corporation, a notice under the Landlord and Tenant Act, 1954, stating that they required the granting of a new lease. The matter did not go to any form of trial, for an agreement was made in January, 1958, whereby a price equivalent to twice the rateable value of the premises was agreed to be paid to the bakery by way of compensation (1) since they would not obtain anything else. It is right, however, to say that that agreement was by its terms expressed to be without prejudice to any claim which the bakery might have under the Acquisition of Land (Assessment of Compensation) Act, 1919, for expropriation or compulsory acquisition of their interest in the land. Finally, on May 7, 1958, the claimants, the bakery, referred the question of the assessment of the compensation which they claimed as due to them to the Lands Tribunal, pursuant to the Lands Tribunal Act, 1949.

The preliminary question which I have already stated arises at once, and for obvious reasons: could the bakery make any claim for compensation under the Acquisition of Land (Assessment of Compensation) Act, 1919? It was argued that they could not. The tribunal, however, held otherwise and thought that they could. The tribunal's conclusions are stated in the decision, and I will read some of them. The tribunal said:

> "The 'proceedings' in this case arise out of the submission on Mar. 21, 1957, of a claim for compensation arising out of a notice to treat deemed to have been served on Feb. 11, 1949 (the material date). At that time (Mar. 21, 1957) the acquiring authority had not acquired the freehold interest which was vested in them on May 16, 1957. The relationship of landlord and tenant did not exist between the parties until May, 1957, and the notice to quit was not served on the claimants until Oct. 26, 1957."

The tribunal proceeds to distinguish this case from that of *R.* v. *Kennedy* (2) to which I will shortly refer hereafter. The decision concluded:

> "The compensation is to be assessed as at the material date in accordance with the provisions of s. 2 of the Acquisition of Land Act, 1919, as modified by the Town and Country Planning Acts, 1947 to 1954."

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(1) Compensation was paid pursuant to s. 37 of the Landlord and Tenant Act, 1954.
(2) [1893] 1 Q.B. 533.

The tribunal was therefore of opinion that one had to look back to February, 1949, at which date the claimants, the bakery, had an interest, viz., the unexpired residue of five and a half years of the term of the lease of 1933.

I confess that I for my part have come clearly to the conclusion that, in the circumstances of this case, no claim for compensation under the Acquisition of Land (Assessment of Compensation) Act, 1919, can be put forward by the bakery. The effect of a notice to treat is stated, among other places, in CRIPPS ON COMPENSATION (8th Edn.), p. 59, and is also stated in similar terms by BLACKBURN, J., in *R.* v. *Stone* (3). I read from CRIPPS:

> " A notice to treat is not in itself a contract, nor is it necessarily a step putting in force compulsory powers, but is an act of a neutral character which according to circumstances, may be followed either by an agreement or by the enforcement of compulsory process. A notice to treat creates a relation between the owner and the promoters, but does not constitute a contract of sale until the price has been agreed or ascertained under the provisions of the Lands Clauses Acts. The land remains the property of the owner at law and in equity, but the promoters or the owner have acquired the right to have the price ascertained by the procedure indicated in the Lands Clauses Acts or the Acquisition of Land Act, 1919, and the owner may compel a settlement of the price . . ."

The settlement is now made by the Lands Tribunal. The answer, I think, to the claim of the bakery in this case lies in the simple proposition that, as things turned out, the corporation never acquired anything from them at all. No interest in the land of any kind was acquired by the corporation under their compulsory powers. The notice to treat which is sometimes described as creating a quasi-contract no doubt affected the rights of the bakery under their subsisting lease, because, had the corporation proceeded to exert their compulsory powers, then their interest might have been compulsorily taken over. The bakery has said with force at this hearing that their interest was to that extent rendered precarious. Its value for commercial purposes was adversely affected. That is true. They could no doubt have invoked the provisions of the Act and had a price fixed for payment as on a compulsory acquisition, and in that way could have had their interest assured for the purposes of compensation as it was in 1949 and 1950. Had they invoked the necessary provisions to that effect, the corporation would then have had to make up their mind whether they would go on and acquire the remainder of the lease (as they could have done) or whether they would tell the bakery that they would withdraw the notice so far as it affected the bakery. In the latter case they might well under s. 5 of the Act of 1919 have had to pay compensation for the expenses and loss incurred by reason of the service of the notice to treat or the deemed service of the notice to treat. But nothing like that happened. The bakery continued in enjoyment of the premises. They continued to carry on throughout their bakery business not only until the lease expired but also for some time thereafter. They made a claim under the Act of 1954 against their landlords (who in the meantime had become the corporation) and indeed we were informed that they did not even give up possession when the notice to quit expired in 1958.

The position in the end of all seems to me plain and incontrovertible, viz., that when the powers and jurisdiction of the Lands Tribunal were invoked it had become quite clear that no proprietary right of the bakery had been compulsorily acquired by the Dover Corporation, and, therefore, there was no subject-matter for which the corporation was liable to pay to the claimants, the bakery, any compensation. That seems to me the common sense of it and nothing that counsel for the bakery in his careful argument has adduced has satisfied me that there is any answer to it. The same in effect is no less true at the date when the claim was put forward, because at that time (in 1957) the only right which the bakery had was a right to continue in possession until they were served with a notice to quit. That was a right which they enjoyed apart altogether from the Acquisition of Land (Assessment of Compensation) Act, 1919, but which again had not been affected by anything that the corporation had done.

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(3) (1866), L.R. 1 Q.B. 529.

I said previously that I would make a short reference to *R.* v. *Kennedy* (4) because it was much relied on before the tribunal and the tribunal has distinguished the present case from it. In that case the person whose property had been affected was Colonel North. The Bexley Heath Railway Company under its statutory powers served a notice to treat on Colonel North in May, 1891. At that time Colonel North's interest in the land was the unexpired residue, which was quite substantial, of a lease for thirty years. Under the lease, however, his landlords had at certain dates the right to terminate the lease on three months' notice. Nothing further was done immediately after the notice to treat by the railway company or by Colonel North. The next event was that on June 30, 1892, Colonel North's landlord, who happened to be the Crown, exercised their powers under the lease and gave three months' notice so that the lease would expire on Sept. 30, 1892. Shortly after that event, viz., on July 20, 1892, the railway company invoked their powers under the Lands Clauses Consolidation Act, 1845, s. 85, and took possession. So that they did in fact, by virtue of their compulsory powers, expropriate Colonel North's proprietary interest. But the point of the case was this. It was said for Colonel North that he was entitled to be compensated by assessing his interest as it had stood at the date of the notice to treat, in May, 1891, when he still had a considerable number of years to run. On the other side, on behalf of the company, it was said: "No. At the relevant date the only interest Colonel North had was the rest of a three months' period which was left to him under the notice to quit." There is this passage in the judgment of CAVE, J. (5):

> "Nothing was done under that notice to treat. The company might have taken proceedings to settle the compensation; Col. North might have compelled them to take proceedings; but neither party acted, both apparently being content that matters should remain in statu quo . . ."

I pause there to observe that all that is exactly parallel to the present case. The citation continues (5):

> "and it was not until after the Crown had given the notice to quit that the railway company took proceedings under s. 85 [i.e., it took steps under that section to evict Col. North and possess themselves of his property]. I endeavoured to elicit from the learned counsel for Col. North what his claim was; but he was very reticent upon the subject. The claim had either not been made out, or was not ready for production, and the result was that I could not ascertain what the claim precisely was. I have therefore arrived at the conclusion, perhaps not unnaturally under the circumstances, that Col. North has no claim except for the loss of the right to occupy the particular piece of land in question from July 20, 1892, when possession was taken, down to the expiration of his interest, which would be less than three months . . ."

It was said that the case was distinguishable from this case because there were independent proceedings which had superseded in all respects the notice to treat. There was no doubt that Colonel North was entitled to some compensation because he was expropriated by the railway company; but the interest which he had at the date of his expropriation was very much less than the interest which he had at the date of the notice to treat. I do not think that it follows from anything that is said in the judgment that the steps taken under s. 85 by the railway company superseded entirely and for all purposes the original notice to

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(4) [1893] 1 Q.B. 533.

(5) [1893] 1 Q.B. at p. 537.

treat. I do not find any intimation to that effect in the arguments including the A
argument put forward by the railway company. Rather, as it seems to me, the steps under s. 85 were taken consequentially on the original notice to treat. I do not therefore think that that case is so distinguishable on the facts from the present case that we should hold, as the tribunal seem to have done, that the material date for the purposes of assessing compensation in this case was the date of the notice to treat. Certainly I do not think there is anything which by implica- B
tion can be extracted from *R.* v. *Kennedy* (6) which produces that result. As I have said, however, I prefer to base my conclusion on the simple fact that at what, I think, were the relevant dates, which I prefer to put as being either the date of the institution of the Lands Tribunal procedure, or, putting it at the best for the bakery, the date when they made their claim, no proprietary rights of the bakery had been compulsorily acquired for which, therefore, the Acquisition of Land C
(Assessment of Compensation) Act, 1919, provided compensation.

The truth is that in the event there never was any expropriation. No doubt, as I have indicated and as was said in *R.* v. *Kennedy* (6), the bakery might have forced the hands of the Dover Corporation had they chosen to do so at a much earlier stage. Into that I need not go further because they did not do so. I conclude, therefore, that there can be no claim for compensation in the circum- D
stances of this case on the part of the bakery. Although we have not gone at all fully into the facts, I am at any rate comforted by this. My conclusion, I think, accords with plain common sense, and I also feel strongly on the material before me that, even if there were some ground on which the bakery could claim to have compensation determined, in the circumstances the amount of it would be nothing or entirely negligible. E

PEARCE, L.J.: I agree, and I have nothing to add.

HARMAN, L.J.: I also agree, and I cannot usefully add anything to what my Lord has said.

Appeal allowed.

Solicitors: *Wilkinson, Howlett & Moorhouse*, agents for *Town clerk*, Dover (for the Dover Corporation); *Long & Gardiner*, agents for *Bradley, Chitty & Scorer*, Dover (for the claimants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(6) [1893] 1 Q.B. 533.

PEAK (VALUATION OFFICER) *v.* BURLEY GOLF CLUB. HARDING (VALUATION OFFICER) *v.* BRAMSHAW GOLF CLUB, LTD.

[COURT OF APPEAL (Lord Evershed, M.R., Pearce and Harman, L.JJ.), March 29, 30, 31, 1960.]

Rates—Rateable occupation—Common land—Golf course—Crown land subject to rights of common—Crown licence to golf clubs to maintain and use golf courses—No power to exclude commoners or public.

Unenclosed land in different parts of the New Forest owned by the Crown subject to the rights of commoners and to the public's practice of wandering over it at will was used by two golf clubs, the Bramshaw club and the Burley club, each under a licence from the Forestry Commissioners which allowed the club to use an existing golf course there and to maintain the course, subject to certain conditions. In both cases there was provision for payment and for reinstating the land if the licence were withdrawn. In the case of the Bramshaw club a condition was that there should be no interference with pasturage, i.e., the rights of commoners, and the area of the course was not defined on the plan to which the licence referred. In the case of the Burley club it was stated that the permission granted should " not afford exclusive right of user over the " course, and the area and limits of the course were shown on the plan to which the licence referred. Under the licences the golf clubs maintained the courses, including the greens, fairways, bunkers and tees, in a fit state for play and regularly used the courses for playing golf. They demanded and accepted green fees from people who played but did nothing about it when people refused to pay. Caravans were parked on the land, picknickers frequented it and forest ponies wandered over it. The clubs were assessed to rates as being in occupation of the courses. On appeal,

Held: the clubs were not in rateable occupation of the courses since they had no exclusive right of user by reason of the rights of the commoners and inability to exclude the public, and, in the case of the Bramshaw club, by reason of the absence of any defined rateable hereditament.

Appeals allowed.

[**Editorial Note.** Although the golf clubs were not rateable because they had not exclusive occupation, it would not follow that the commoners were rateable; see, e.g., *R.* v. *Alnwick Corpn.* ((1839), 9 Ad. & El. 444).

As to exclusive occupation for rating purposes, see 27 HALSBURY'S LAWS (2nd Edn.) 351-357, paras. 782-786; and for cases on the subject, see 38 DIGEST 440-450, *113-173*.]

Cases referred to:

Laing (John) & Son, Ltd. v. *Kingswood Assessment Area Assessment Committee*, [1949] 1 All E.R. 224; [1949] 1 K.B. 344; 113 J.P. 111; 2nd Digest Supp.

Westminster Corpn. v. *Southern Ry. Co.*, [1936] 2 All E.R. 322; [1936] A.C. 511; 105 L.J.K.B. 537; sub nom. *Re Southern Ry. Co.'s Appeals*, 155 L.T. 33; 100 J.P. 327; Digest Supp.

Cases Stated.

The appellant golf clubs were assessed to rates in respect of two golf courses in the New Forest which they maintained and used for the playing of golf under licences from the Forestry Commissioners. They appealed by way of Cases Stated against decisions of the Lands Tribunal (SIR WILLIAM FITZGERALD, President) given on Oct. 31, 1958, and reported (1958), 4 R.R.C. 139, determining that they were rateable in respect of the courses, on the ground that they were not in rateable occupation of the courses.

J. R. Willis, Q.C., and *Frank Whitworth* for the clubs. A
Maurice Lyell, Q.C., and *J. R. Phillips* for the valuation officers.

LORD EVERSHED, M.R.: I will ask HARMAN, L.J., to deliver the first judgment.

HARMAN, L.J.: These are appeals by way of Cases Stated signed on B June 15 and 19, 1959, from a decision of the Lands Tribunal dated Oct. 31, 1958, by which it was held that three golf clubs had rateable occupation of their several courses situated within the boundaries of the New Forest in the county of Southampton. That decision was pronounced at the instance of land valuation officers appealing from decisions of a local valuation court for Hampshire given on Nov. 15, 1957. There were three appeals to the tribunal which, C however, heard all the cases together and decided each of them in favour of the valuation officer. There are two appeals to this court. Some technical difficulty is caused by the fact that one appellant is a members' club which cannot properly appear by its name while the other is a limited company which can.

The members' club is styled the Burley Golf Club and its appeal concerns the "golf course and club house at Burley, Ringwood, Hampshire". The company D is styled the Bramshaw Golf Club, Ltd., and that appeal concerns "land used as a golf course, Brook, Bramshaw, Hampshire": the company's club house is not within the boundaries of the forest. The third body is styled the New Forest Golf Club, and its case concerned "land used as a golf course with a club house at Southampton Road, Lyndhurst, Hampshire"; it has not appealed.

These appeals are not concerned with the club houses within the boundaries E of the forest, they being admittedly in rateable occupation. The decision treated all these cases as turning on the same point. In the Burley case, the local valuation court had confirmed an assessment of £30, which the tribunal increased to £45, while in the Bramshaw case the local valuation court had deleted the assessment altogether, while the tribunal made an assessment of £50.

When the facts are looked into they are not altogether similar, the documents F under which the two courses are occupied being in different terms. Moreover, the area occupied by the Burley Club is shown in outline on a plan, whereas the plan in the Bramshaw case gives no indication of metes and bounds.

The question in each case is whether the club is in rateable occupation of its course. The first question, therefore, is, what is the nature of rateable occupation? To answer this, the best guide drawn to our attention is to be found in G *John Laing & Son, Ltd.* v. *Kingswood Assessment Area Assessment Committee* (1). In that case contractors at an aerodrome had put up buildings for the purposes of their contract work, garages, canteens and so on. The question was whether, in spite of the paramount occupation of the site by the Crown, the contractors were in rateable occupation of the structures so put up. TUCKER, L.J., giving judgment laid down this test. He says (2): H

> "... I do not think there is any controversy with regard to those ingredients [of rateable occupation]: First, there must be actual occupation; secondly, it must be exclusive for the particular purposes of the possessor; thirdly, the possession must be of some value or benefit to the possessor; and, fourthly, the possession must not be for too transient a period."

Of these four ingredients, the second is the material consideration here, viz., I whether the possession of the courses by the occupying golf clubs is exclusive for the particular purposes of the possessor. It is admitted that the occupation is of value, because green fees are collected, also that it is not of so transient a nature as not to be rateable, because, although precarious, on a yearly licence, it has in fact continued for half a century.

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(1) [1949] 1 All E.R. 224; [1949] 1 K.B. 344.
(2) [1949] 1 All E.R. at p. 228; [1949] 1 K.B. at p. 350.

As a pendant to that case, I should refer to *Westminster Corpn.* v. *Southern Ry. Co.* (3). Lord Russell of Killowen there pointed out (4) that it was no longer the law that a tenancy was an essential to rateable occupation. Occupation under a licence or easement may be enough. His Lordship said (5):

> "In my opinion the crucial question must always be what in fact is the occupation in respect of which someone is alleged to be rateable, and it is immaterial whether the title to occupy is attributable to a lease, a licence, or an easement."

The question for us is how do the clubs measure up to these criteria? Such facts as there are, and they are jejune enough, must be gathered from the Cases Stated, but before examining these it may be well to say a word about that romantic area styled the New Forest, well known to all of us from our youth up, if not from personal knowledge, then from Captain Marryatt's "The Children of the New Forest" or Maurice Hewlett's "The Forest Lovers". The area of the forest extends, we are told, to over 80,000 acres in the county of Southampton and it has been the subject of a number of statutes in comparatively recent times. Our attention was called to a local Act, the New Forest Act, 1877, which referred to parts of an Act of 1698, another Act of 1808, and another of 1851. In s. 3 of the Act of 1877, the forest is defined as meaning for the purposes of the Act:

> "The unenclosed lands whereof Her Majesty is seised in her domain as of fee, subject to the rights of commoners therein or thereover, situate within the boundaries of the New Forest in the county of Southampton including all such lands as may at the commencement of this Act be enclosed in pursuance of any commission"

under former Acts. There is mention there of a register kept of commoners and their holdings in the forest. The latest Act seems to have been the New Forest Act, 1949, which is styled "An Act to make further provision as respects the New Forest in the county of Southampton", and it deals first with the "verderers" of the forest who are the principal officers in charge of the area. They have various powers such as that of making bye-laws under s. 9. Under s. 18, there is power in the Minister—by which is meant the Minister of Agriculture, Fisheries and Food—to grant easements and licences for any period not exceeding sixty years on such terms as to payment and otherwise as may be specified in the licences. The licences in the present case do not seem to have been given under those powers, but, I suppose, under earlier powers which were granted to the Forestry Commissioners. We were also referred to the Forestry Act, 1927, and certain bye-laws made under that Act which apply when made with the consent of the verderers of the New Forest. In 1945 the ownership of most of the royal forests was transferred to the Minstry of Agriculture, but it appears that the Minister has in many cases, including that of the New Forest, delegated the management of the forest to the Forestry Commissioners, and that is the governing body which appears in the cases before us.

As is well known, there are many commoners in the forest having rights of turbary, estovers, pasture, pannage, and so forth, but the legal position of the general public, if indeed it has any legal right, is less clear. But it was agreed (and it is notorious) that the public has for many years been accustomed, whether under a dedication by the Crown or by sufferance, to wander at will and according to inclination over the unenclosed portions of the forest subject in recent times to the bye-laws promulgated, as I have said, by the commissioners under the Act of 1927. A copy of those bye-laws is annexed to the Cases and sets out a long list of acts prohibited except under the written authority of the commissioners. They do not appear to me to be relevant to the appeals.

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(3) [1936] 2 All E.R. 322; [1936] A.C. 511.
(4) [1936] 2 All E.R. at p. 328; [1936] A.C. at p. 532.
(5) [1936] 2 All E.R. at p. 329; [1936] A.C. at p. 533.

I turn now to the Cases Stated and first to the Bramshaw case. After a formal part, the Case cites some facts which I will rehearse later, and annexed to it is the decision of the Lands Tribunal. There is a number of statements in this decision which I find a little difficult to reconcile with any evidence before us. So far as is relevant the President begins by saying this (6):

> " The local valuation court accepted the contention of the respondents that the golf courses themselves were not rateable because the respective clubs are not in exclusive occupation of the land. Each of the golf courses has been in existence for over fifty years. Each course is held by the club under a licence granted by the Forestry Commission. This licence is granted on the payment of a certain sum per year. The licence states that it gives to the club a licence to use the links for the purpose of playing golf and for maintaining the links and generally to take charge of the ground."

That last is a very unfortunate statement because it appears that it can only be based on a document dated in 1913, a licence long superseded in the case of this golf club. Having gone so far, the President says this (7):

> " It is admitted that forest ponies wander over the courses, caravans are parked there and people come and picnic there. It is, of course, a well-known fact that many golf courses all over the country are on common land and that the committees of these golf clubs cannot prevent the public from exercising their right to enter such land and to enjoy themselves on it . . ."

Where he got that from I do not know—presumably from his own knowledge as there is no evidence on the subject. He goes on to say (8):

> " Those clubs have not the exclusive possession of the golf course in the sense that many other golf clubs have which own the land on which they play, but in my view this does not bar these golf clubs from possessing a right over and above that possessed by the public using the common."

I cannot find any evidence to support that finding either. The President continues (8):

> " I ask myself the question what does this licence give to these golf clubs? It gives them the right to lay out and maintain the golf course."

With all respect to the learned President, there is nothing about " laying out " in any licence here. He goes on (8):

> " That involves the making of greens and tees and erecting on the land the usual appurtenances of a golf course such as flags and direction boards. It must be borne in mind that we are not attempting to rate the game of golf, what it is sought to rate is a golf course. It appears to me that each of these clubs has, by virtue of its licence, an exclusive right to construct these golf courses and to play golf on them. This in my opinion is sufficient to give them rateable occupation . . ."

It may well be that, if there were such an exclusive right as the President mentions, that would be a conclusion of law which would be unassailable. It is a conclusion of law because, as he states, it is " by virtue of its licence ". He is construing the licence.

When one looks at " the licence " in the Bramshaw case, there are two letters, one of Mar. 20, 1913, which looks like the beginning of the Bramshaw Club. That is an answer by the secretary of the Office of Woods and Forests to an application made to him on behalf of the club or its predecessor in title for the use of a golf course then already laid out, apparently by a private person. The application was

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(6) See 4 R.R.C. at p. 140.

(7) See 4 R.R.C. at pp. 140, 141.

(8) 4 R.R.C. at p. 141.

> " for permission to play golf on the above links originally formed by the late Mr. de Crespigny and for that purpose to maintain the greens and generally to take charge of the ground."

That is the source of the words " generally to take charge of the ground ", quoted by the learned President. The letter then says that the Secretary of State, Mr. Runciman, " is willing to give a new permission during the pleasure of this department ", and then there are set out certain conditions, one of which is that, if the permission be determined " the surface of the soil, if required, is to be restored to its original condition ". It was an annual permission which has gone on ever since subject apparently to renewed applications.

The next document that we have is apparently the current permission dated Oct. 8, 1954, and signed by Mr. Foard for the deputy surveyor of the New Forest, and it says this: " I refer to your application for permission to maintain (i) a golf course " and a number of other chattels on the land of the golf course at Bramshaw " as shown by red crosses on the enclosed tracing ". Then he says: " I am instructed to grant you the required permission on the following terms and conditions ". There is to be a payment, and then it says this: " This permission constitutes a revision of the existing permissions numbered 26 ". No. 26 is the one that I last read. Then it goes on to say that there is to be no interference with the pasturage, i.e., with the rights of the commoners. I do not think that I need read any more except that there is a repeated stipulation that the ground shall be put right, if the permission be withdrawn. The plan annexed or attached shows somewhere more or less in its middle the " golf course at Brook Common "; there is no indication where the golf course is, except that, I suppose, it is somewhere within the four corners of the plan.

The Case Stated in the Burley case is in the same terms as the other, but the letter of licence, though written on Oct. 9, 1954, only one day after the one I have last read, is in a different form. Why that should be so passes the wit of a lawyer to understand. Mr. Foard, writing to the club's honorary secretary, says this:

> " I refer to your application on behalf of the Burley Golf Club for permission to maintain a golf course, a length of track, two wicket entrances and a notice board at Burley, near Ringwood, Hants, as shown by red colour and crosses and brown colour on the enclosed tracing . . . I am instructed to grant you the required permission on the following terms and conditions."

There is a condition as to payment, and then follows this:

> " The Forestry Commission will not be responsible for any repairs to any of the subjects of the permission and this permission does not afford exclusive right of user over the area comprising the golf course."

It is said to be revocable and personal to the grantees. There is provision for reinstating the hedge or fence or wall and the surface of the soil if permission be withdrawn. The plan shows by lines the extent of the area covered by the licence.

There apparently the Case Stated ended but the parties were not unnaturally not satisfied that all the facts relevant had been stated by the tribunal and they asked for further facts to be stated. This was done in the same terms at the end of each Case and runs as follows:

> " (a) The respondent golf club maintained the course occupied by it, including the greens, fairways, bunkers and tees in a fit state for play, and the course was regularly used for the purpose of playing golf. (b) Although the respondent golf club demanded and accepted green fees of people who played on the course, if people (as they did) came and played on them and refused to pay green fees the club did nothing about it. (c) The sums

received by the respondent golf club from the collection of green fees formed a substantial part of their total income."

To my mind, the conclusion of the tribunal in each case is based simply on the construction placed on what is called the licence. This seems to me an ambiguous conclusion when there are, as I have explained, three different documents of licence and the tribunal seems to have based itself on the 1913 one in the Bramshaw case which has been superseded. Each of the two documents of 1954 permits the maintenance of a golf course, i.e., of an existing golf course and no more. In the Bramshaw case no area is defined on the plan. In the Burley case the plan does show a line of demarcation. The licence in the Burley case expressly states that it gives no exclusive right of user over the area. The Bramshaw licence is silent on this point but provides that the commoners' right of pasture be not interfered with. One adds the findings that the forest ponies wander over the course at will, that caravans are parked there and picnickers frequent the place. Finally, members of the public who do not pay green fees when asked are suffered to play nevertheless without let or hindrance. I cannot see any occupation which can pass the second of the tests applied in *John Laing & Son, Ltd.* v. *Kingswood Assessment Area Assessment Committee* (9), viz., that the occupation must be exclusive for the purpose for which the land is used by the licensee.

I hold that the tribunal was not justified in its statement at the end of the decision that each of the clubs has by virtue of its licence " an exclusive right to construct these golf courses and to play golf on them ". There is no exclusive right as is shown expressly in one case and impliedly in the other by the fact that the commoners as of right still have the right of pasture over the course and cannot be excluded. Moreover, I see nothing in either licence to justify the exclusion of the public. In my judgment, it does not appear that either of these clubs has a rateable occupation of its golf course. There is the additional element in the Bramshaw case that I cannot find any rateable hereditament defined; I should have thought that before levying a rate one must be able to say what the hereditament was on which the rate was to be levied. That element is not present in the other case but, none the less, I think that the two are in pari materia, and I would allow both these appeals.

PEARCE, L.J.: I agree with the reasons which my Lord has given. It is not correct to say that each of these clubs has by virtue of its licence " an exclusive right to construct these golf courses ". Nor can it be properly said, in my view, that by the terms of their licence the clubs have an exclusive right to play golf on the courses. One of the licences expressly says that it does not afford an exclusive right of user over the area comprising the golf course. In practice the clubs do not prevent unauthorised persons playing on the courses. Nor, I think, do their licences give them any right to do so, as long as the Crown allows the public free access to this part of the forest. I cannot agree with the suggestion that the Crown by granting the licence are impliedly forbidding the public to play golf on the course or giving to the licensees an implied authority to prevent the public from doing so. The bye-laws do not prevent it. There is no finding that such user by the public is trivial. Moreover, in seeing how far the club's occupation is exclusive for its purposes, viz., keeping up the course and playing golf, one cannot disregard the members of the public who walk there and picnic there and park their caravans there. The club has no right to prevent them, and, although their presence on the course is directed to a different end from the purposes of the members, it does, I think, constitute some interference with the club's occupation for its particular purposes. I agree that the appeal should be allowed.

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(9) [1949] 1 All E.R. 224; [1949] 1 K.B. 344.

LORD EVERSHED, M.R.: I, too, am of the same opinion. An alternative suggestion made by counsel for the valuation officers was that we should refer the matter back to the tribunal for further findings of fact, but I think that in this case it would not be right so to do. The President of the Lands Tribunal founded his conclusion on what appears to be the construction placed by him on the licences. For the reasons which HARMAN, L.J., has stated, I do not think that the licences, as a matter of fair construction, suffice to determine, certainly not to establish, the essential requirements of exclusive possession for the purposes of the golf course. In addition, as HARMAN, L.J., also explained, the parties requested the tribunal to state further facts and those further facts are stated in para. 4 in each of the Cases. They clearly fall short of establishing the necessary quality of possession.

In those circumstances, it would not be right that there should be in these cases a second hearing of the matter so to speak, with the possibility that then a more clear or precise conclusion of fact would be reached. The valuation officers who were the appellants before the tribunal, did not establish the necessary premises for rateable occupation. I agree that the appeals accordingly should be allowed.

Appeals allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Mawby, Barrie & Letts*, agents for *Bell, Pope & Bridgwater*, Southampton (for the clubs); *Solicitor of Inland Revenue* (for the valuation officers).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

R. *v.* WOODBURY LICENSING JUSTICES, *Ex parte* ROUSE.
R. *v.* WOODBURY LICENSING JUSTICES, *Ex parte* OLDHAM.

[QUEEN'S BENCH DIVISION (Streatfeild, Ashworth and Hinchcliffe, JJ.), April 1, 1960.]

Licensing—Justices—Hearing of application for licence—Mandamus—Second session inadvertently fixed more than one month after first session—Refusal of justices to hear applications—Licensing Act, 1953 (1 *&* 2 *Eliz.* 2 c. 46), *Sch.* 2, *Part* 1, *para.* 5.

Paragraph 5 of Sch. 2, Part 1, of the Licensing Act, 1953, requires the second session of the general annual meeting of licensing justices to be held "not . . . later than one month after the first day of the general annual licensing meeting". By inadvertence licensing justices fixed their second session for a date more than one month after such day. On the date fixed for the second session the justices, realising their mistake, declined to hear an application for a new justices' licence and an application for the removal of a licence on the ground that by reason of para. 5 they had no jurisdiction to do so. The applicants for the licences applied to the Queen's Bench Division for an order of mandamus to the justices commanding them to hear and determine their applications.

Held: (i) the court had jurisdiction to grant, and would grant, the order for mandamus.

R. v. *Farquhar* ((1874), L.R. 9 Q.B. 258) applied.

(ii) no order for costs would be made against the justices as they acted purely by mistake, not improperly or mala fide.

R. v. *Bell, etc. JJ., Ex p. Flinn & Sons* ((1899), 15 T.L.R. 487) distinguished.

Observations on the validity of the previous notices of application* and on the publication of notice of the date of the hearing pursuant to the mandamus (see p. 207, letter G, post).

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* I.e., the notices of intention to make application for the grant of a new licence prescribed by the Licensing Act, 1953, Sch. 3, Part 1, para. 1, and the notice of intention to make application for the special removal of a licence prescribed by Part 4, para. 1 (b) of that Schedule.

[As to mandamus to licensing justices, see 22 HALSBURY'S LAWS (3rd Edn.) 612, para. 1262; and for a case on the subject, see 30 DIGEST (Repl.) 20, *121*.

For the Licensing Act, 1953, Sch. 2, Part 1, para. 5, see 33 HALSBURY'S STATUTES (2nd Edn.) 294.]

Cases referred to:

R. v. *Bell, etc. JJ., Ex p. Flinn & Sons,* (1899), 15 T.L.R. 487; 30 Digest (Repl.) 76, *580*.

R. v. *Farquhar,* (1874), L.R. 9 Q.B. 258; 39 J.P. 166; 30 Digest (Repl.) 20, *121*.

R. v. *Kingston JJ.*, [1932] Brewery Trade Review 154.

Rochester (*Mayor*) v. *R.* (1858), E. B. & E. 1024 (120 E.R. 791); 27 L.J.Q.B. 434.

Motions for mandamus.

Two applicants applied by notices of motion for orders of mandamus to the licensing justices for the petty sessional division of Woodbury in the county of Devon, commanding them to hear and determine according to law two applications, that in the case of the applicant Ernest George Rouse being an application for the grant of a justices' licence authorising the applicant to sell by retail intoxicating liquor for consumption at a restaurant at 8, High Street, Littleham-cum-Exmouth, and for costs. The second motion was for a like order in relation to an application for special removal of a justices' licence. The facts appear in the judgment of STREATFEILD, J.

F. Irwin for the applicants on both motions.

The respondents did not appear and were not represented.

STREATFEILD, J.: In these two cases application was made on Feb. 11 and Feb. 12, 1960, respectively by two applicants, one for a justices' licence and the other for a removal. The annual general licensing meeting in this particular area had been held on Feb. 1. Under Sch. 2 of the Licensing Act, 1953, Part 1, para. 5, the second meeting of the justices should have been held not earlier than the sixth day after the first session and not later than one month after the first day of the annual general licensing meeting. The justices, forgetting that the year 1960 is leap year, ordered the second meeting to take place on the first Monday in March, believing that that was within one month of their first meeting. Unfortunately, Mar. 1, which no doubt was the date that they really believed that they were fixing, although they did not say so, was a Tuesday. They sit on Mondays, so the first Monday in March was Mar. 7. That was more than five weeks after the first meeting, and therefore, prima facie, was a date which they could not fix under para. 5 of Sch. 2. When the applicants attended in order to make their applications, they were then told that the justices could not hear them because it was more than five weeks since the last meeting. The result is that the applicant in each case, through no fault of his own, will miss the granting of the licence or the removal, as the case may be, for another year. Accordingly, they move this court for an order of mandamus to the justices to hear and determine their applications.

There is mentioned in PATERSON'S LICENSING ACTS (68th Edn.), p. 1025 (1), a case in 1932, *R.* v. *Kingston JJ.*; that case was in 1932 and is on all fours with the present case. It is reported only in the Brewing Trade Review of that year (2). It seems to us that the principle on which we can act in order to set this matter right is contained in *R.* v. *Farquhar* (3). BLACKBURN, J., there said this (4):

> " All we can do is to grant a mandamus to the justices to hold a licensing meeting to hear and consider the objection to the renewal on notice to the

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(1) The account of the case is in the notes to Sch. 2 to the Licensing Act, 1953.

(2) [1932] Brewing Trade Review 154.

(3) (1874), L.R. 9 Q.B. 258.

(4) (1874), L.R. 9 Q.B. at p. 262.

A applicant, and to decide, after hearing him, according to law and fact. We have power to order the justices to do this now, though the proper time has gone by, on the authority of the decision of the Exchequer Chamber in *Mayor of Rochester* v. *R.* (5). The rule, therefore, will be absolute for a mandamus commanding the licensing justices, or some of them, to hold a meeting, with notice to the applicant, and then to hear and determine the B question of the renewal of his licence."

QUAIN, J., said (6):

> "The intention of s. 42 [of the Licensing Act, 1872] is that there should be a due hearing, and it is only on the objection failing in point of law or on the facts that he is entitled to the renewal. But to say that merely because C he has not been required to attend at the adjourned meeting, he is now to have a licence granted as of course, is a proposition quite unmaintainable. The mandamus must be to the justices to assemble a meeting for the purpose of hearing Gardner's application, they having given him notice to attend, and hearing the case just as they would had they proceeded regularly in the first instance under s. 42 (2)."

D ARCHIBALD, J., concurred, saying (6):

> "I am of the same opinion, it being understood that the mandamus is to be in the limited form to hear and determine only."

Those words cover the present situation and this court has power to make an order absolute calling on the justices to hold a meeting for the purpose of hearing and determining these two applications. E

ASHWORTH, J.: I agree.

HINCHCLIFFE, J.: I also agree.

STREATFEILD, J.: The justices should hear the applications in such time as will enable the applicants to give notice to the confirming authority.

F *F. Irwin:* The confirming authority meet on May 3, 4 and 5, 1960. The notice to the confirming authority is twenty-one days' notice. Moreover in respect of both applications certain other notices had to be given (7), which were given in time to enable the justices to hear the applications on Mar. 7. There may be opposition to the applications. I submit that these other notices remain G good.

STREATFEILD, J.: Those notices that have already been given are good notices. The applicants must, however, notify the parties, and it would be prudent to publish notification of the date of the hearing that is being ordered to take place.

H *F. Irwin* then applied for costs against the justices, and referred to *R.* v. *Bell, etc. JJ., Ex p. Flinn & Sons* (8).

STREATFEILD, J.: This was not oppressive. It certainly was not improper, nor was it mala fide. It was a pure mistake. In those circumstances we do not make an order for costs against the justices.

Applications granted.

Solicitors: *Field, Roscoe & Co.*, agents for *Ford, Simey & Ford,* Exmouth (for the applicants).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

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(5) (1858), E. B. & E. 1024.

(6) (1874), L.R. 9 Q.B. at p. 262.

(7) See footnote p. 205, ante.

(8) (1899), 15 T.L.R. 487.

NOTE.

MORRIS MOTORS, LTD. *v.* PHELAN.

[CHANCERY DIVISION (Roxburgh, J.), March 22, 1960.]

Injunction—Sale of goods—Motor car—Selling as new a car that was not new—Form of injunction.

Case referred to:

Morris Motors, Ltd. v. *Lilley*, [1959] 3 All E.R. 737; [1959] 1 W.L.R. 1184.

Motion.

The plaintiffs, Morris Motors, Ltd., moved for an injunction restraining the defendant, John Phelan, by himself or by his servants or agents or otherwise " from advertising, offering for sale, or selling any motor vehicle not being a new motor vehicle of the plaintiffs' manufacture as and for a new motor vehicle of the plaintiffs' manufacture and from falsely representing that any motor car of the plaintiffs' manufacture is new when it is to the defendant's knowledge not new ". The defendant was prepared to give an undertaking in the terms of the notice of motion, and to treat the motion as the trial of the action.

C. F. Mayson for the plaintiffs.
F. E. Skone James for the defendant.

ROXBURGH, J., refused to make an order embodying an undertaking in the terms of the notice of motion on the ground that such an order would be misleading in view of the decision in *Morris Motors, Ltd.* v. *Lilley* (1) in which a particular meaning was attributed to the word " new ". His LORDSHIP said that the notice of motion must be amended and indicated that he was prepared to make an order embodying an undertaking of the defendant in the terms of an amended notice of motion restraining the defendant (whether by himself or by his servants or agents or any of them or otherwise howsoever) " from advertising offering for sale or selling any motor vehicle not being a new motor vehicle of the plaintiffs' manufacture as and for a new motor vehicle or falsely representing that any motor vehicle of the plaintiffs' manufacture is new after it has been the subject of a retail sale by a distributor or dealer, has been registered with the local county council, has had number plates put upon it and has been driven away by the purchaser." That form of words would follow, almost precisely, the words of WYNN-PARRY, J., in *Morris Motors, Ltd.* v. *Lilley* (2).

[Counsel for the defendant then consented and gave an undertaking in that form.]

Solicitors: *Osmond, Bard & Westbrook* (for the plaintiffs); *Peacock & Goddard*, agents for *Rothera, Sons & Langham*, Nottingham (for the defendant).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

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(1) [1959] 3 All E.R. 737.

(2) See [1959] 3 All E.R. at p. 739, letter I.

CHILDS TRUSTEE CO. *v.* INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Cross, J.), March 16, 17, 18, April 6, 1960.]

Estate Duty—Passing of property—Property deemed to pass—Policies of assurance—Policies brought into resettlement by tenant for life—Trustees directed to invest proceeds on maturity—Trust fund held for tenant for life during his lifetime and thereafter for another for life—Liability of policy moneys to estate duty on death of tenant for life—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 1, *s.* 2 (1) (*b*), (*d*).

Estate Duty—Exemption—Purchase—Property passing by reason of purchase—Resettlement—Life tenant receiving payments out of capital and bringing in policies of life assurance—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 3 (1).

Under a settlement a fund was held on trust for T. for life with remainders to his son D. in tail subject to incumbrances on land comprised in the fund, thirteen charges on T.'s life interest secured by policies of assurance on T.'s life, various family charges and two small terminable rentcharges under the Settled Land Act, 1925, s. 85. T. and D. agreed that some £25,000 should be raised out of capital to pay off eleven of the thirteen charges on T.'s life interest, and that a further £1,200 should be paid out of capital to T., that the two terminable rentcharges should be extinguished and T. released from his liability in respect of them, that two of the policies of assurance on T.'s life should be converted into fully paid policies on his life for an aggregate sum of £8,100 and brought into settlement by T., and that the balance of the trust fund should be resettled subject to the incumbrances and charges not otherwise dealt with, and subject to an annuity of £500 per annum to D. for life. Pursuant to this agreement on Apr. 30, 1940, D. disentailed with the consent of T. and on the same day a resettlement was made by T. and D. under a joint power reserved to themselves by the disentailing deed. By the resettlement, subject to a joint power of appointment and the subsisting charges, the settled lands were resettled on trust to pay £500 per annum to D. during his life and otherwise on trust for T. for life, and after his death for D. for life with various remainders over. By cl. 28 of the resettlement T. assigned the policies of assurance on his life and " all moneys assured by or to become payable thereunder " to the trustees on trust that the trustees " shall as soon as may be after the maturity of the said policies respectively get in and receive the money to become payable thereunder . . . and shall stand possessed of the net residue thereof after discharging all costs and expenses of recovering and receiving the same " on the trusts thereinafter déclared. The policy moneys were directed to be held on such trusts as T. and D. should by deed appoint and subject thereto (and subject to the exercise of another power of appointment which, in the events which happened, never became exercisable) on the trusts on which " capital money or investments representing the same would be held ". On Jan. 25, 1958, T. died leaving D. surviving and estate duty was claimed in respect of moneys totalling £8,100 which then became payable under the policies so settled, under the Finance Act, 1894, s. 1, s. 2 (1) (b), or s. 2 (1) (d). The joint power of appointment conferred by the resettlement on T. and D. was never exercised.

Held: (i) the policies did not pass on the death of T. under either s. 1 or s. 2 (1) (b) of the Act of 1894 because T. had no interest in the policies which ceased on his death.

Westminster Bank, Ltd. v. *Inland Revenue Comrs.* ([1957] 2 All E.R. 745) distinguished.

(ii) the policies were not exempt from estate duty by virtue of s. 3 (1) of the Act of 1894 (as passing only by reason of a purchase) because the policies were merely brought into the settlement to replace pro tanto assets taken out and the policies were not sold by T. to D.

A.-G. v. *Hawkins* ([1901] 1 K.B. 285) followed. *Lethbridge* v. *A.-G.* ([1907] A.C. 19) distinguished.

(iii) on the true construction of the resettlement D. had no interest in the policies during T.'s lifetime, but D.'s life interest arose on T.'s death and T. had provided the policies, which were accordingly liable to duty on T.'s death to the extent of D.'s life interest under s. 2 (1) (d) of the Act of 1894.

Per CURIAM: if plaintiffs claim that the property in question is wholly or partially exempt from duty on the ground that full or partial consideration has been given to the deceased, they ought to file evidence with regard to the value of the consideration unless it is agreed by the commissioners (see p. 217, letter E, post).

[As to property which passes and property which is deemed to pass on a death under the Finance Act, 1894, s. 1, s. 2 (1) (b) or s. 2 (1) (d), see 15 HALSBURY'S LAWS (3rd Edn.) 10, 13, 25, paras. 14, 22, 47; and for cases on the subject, see 21 DIGEST 7-10, 15, 16, *21-27*, *34-42*, *73-80*.

As to property passing by reason of purchase, see 15 HALSBURY'S LAWS (3rd Edn.) 46, para. 92; and for cases on the subject, see 21 DIGEST 17-19, *97-110*.

For the Finance Act, 1894, s. 1, s. 2 (1) (b), (d), and s. 3 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 348, 350, 353.]

Cases referred to:

A.-G. v. *Hawkins*, [1901] 1 K.B. 285; 70 L.J.K.B. 195; 83 L.T. 531; 64 J.P. 791; 21 Digest 15, *76*.

D'Avigdor-Goldsmid v. *Inland Revenue Comrs.*, [1953] 1 All E.R. 403; [1953] A.C. 347; [1953] 2 W.L.R. 372; 3rd Digest Supp.

Hodson's Settlement, Re, Brookes v. *A.-G.*, [1939] 1 All E.R. 196; [1939] Ch. 343; 108 L.J.Ch. 200; 160 L.T. 193; Digest Supp.

Lethbridge v. *A.-G.*, [1907] A.C. 19; 76 L.J.K.B. 84; 95 L.T. 842; 21 Digest 18, *99*.

Ward v. *Inland Revenue Comr.*, [1956] 1 All E.R. 571; [1956] A.C. 391; [1956] 2 W.L.R. 578; 3rd Digest Supp.

Westminster Bank, Ltd. v. *A.-G.*, [1939] 2 All E.R. 72; [1939] Ch. 610; 108 L.J.Ch. 294; 160 L.T. 432; Digest Supp.

Westminster Bank, Ltd. v. *Inland Revenue Comrs.*, *Wrightson* v. *Inland Revenue Comrs.*, [1957] 2 All E.R. 745; [1958] A.C. 210; [1957] 3 W.L.R. 427; 3rd Digest Supp.

Adjourned Summons.

This summons was issued by the trustees of a resettlement dated Apr. 30, 1940, under the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 3, that it might be determined whether they were accountable by reason of the death on Jan. 25, 1958, of Thomas Edmund Sotheron Estcourt for estate duty in respect of policies of assurance specified in the said resettlement (or the moneys payable under the policies), and, if so, that the extent of their liability might be determined.

E. I. Goulding for the plaintiffs.

B. L. Bathurst, Q.C., and *E. Blanshard Stamp* for the defendants.

Cur. adv. vult.

Apr. 6. **CROSS, J.**, read the following judgment: Before the execution of a disentailing deed and a resettlement on Apr. 30, 1940, certain lands, investments and capital moneys were held in trust for the late T. E. S. Estcourt (whom I shall call "Captain Estcourt") for life with remainder to his son T. D. G. S. Estcourt (whom I shall call "Desmond") in tail subject (a) to various incumbrances affecting the fee simple of the land, (b) to thirteen charges on Captain Estcourt's life interest which were secured by policies of assurance on his life, (c) to certain family charges, and (d) to two small terminable rentcharges expiring in 1949 and 1951 created in favour of the inheritance under s. 85 of the Settled Land Act, 1925. Captain Estcourt and Desmond who could together dispose of the settled property as they liked subject to the incumbrances entered into an arrangement of which the main terms were as follows:—(i) A sum of £25,528 was to be raised out of the capital moneys and used to pay off eleven of the thirteen charges on Captain Estcourt's life interest. (ii) A further sum of £1,222 was to be raised out of capital and paid to Captain Estcourt. (iii) The terminable rentcharges were to be extinguished, and Captain Estcourt was to be released from his liability for outstanding instalments amounting to about £220. (iv) Two of the policies on Captain Estcourt's life which would be revested in him on the discharge of the charges on his life interest were to be converted into fully paid policies on his life for an aggregate sum of £8,100 and brought into settlement by him. (v) The lands and the balance of the investments and capital moneys were to be resettled in the usual way subject to the incumbrances on the fee simple of the lands and the existing family charges and the two remaining charges on Captain Estcourt's life interest and also subject to an annuity of £500 per annum payable to Desmond for life with power to him if he should die in his father's lifetime to appoint an annuity of £300 to his widow for life to continue if she too died in Captain Estcourt's lifetime for the benefit of his children.

In pursuance of this arrangement Desmond on Apr. 30, 1940, disentailed the lands and capital moneys with the consent of Captain Estcourt and on the same day a resettlement was executed by them under the joint power reserved to themselves by the disentailing deed. The resettlement was made between Captain Estcourt and Desmond of the one part, and Childs Trustee Co. as trustees of the other part. After reciting the agreement which was described to be by way of family arrangement and the fact that in pursuance of it the trustees had set aside proceeds of sale of certain investments sufficient to provide the sums to be raised out of capital and that the two policies in question had been duly converted into fully paid policies, Captain Estcourt and Desmond irrevocably appointed that the settled lands should thenceforth be held by Captain Estcourt subject to the incumbrances on the fee, the family charges and the two subsisting charges on his life interest but discharged from the terminable rentcharges on such trusts as he and Desmond should by deed jointly appoint and in default of appointment (either under that power or certain other joint powers arising only if Desmond should die in the lifetime of Captain Estcourt) on trust that Desmond should receive a rentcharge of £500 during his life (with provision in case he should die in the lifetime of Captain Estcourt for the payment of the other agreed rentcharges for the benefit of his widow and children) and subject thereto in trust for Captain Estcourt during his life by way of restoration of his original life estate and after his death in trust for Desmond during his life with remainder in trust for Desmond's sons successively in tail male with numerous remainders over. The resettlement gave the successive life tenants the usual power to appoint rentcharges to their surviving wives and husbands and to charge the lands with portions for their younger children. Clause 28 which resettled the balance of the investments and capital moneys and under which the two policies of assurance were brought into settlement was in the following terms:

> " 28. (1) Captain Estcourt and the said Desmond Estcourt in exercise of the power for this purpose given to them by the deed of disentail and of all other powers enabling them and as settlors hereby jointly and irrevocably appoint that all and singular the investments and moneys mentioned in the First Schedule hereto shall henceforth go remain and be held upon the trusts and with and subject to the powers hereinafter declared concerning the same. (2) Captain Estcourt as settlor hereby assigns unto the trustee all those policies of assurance effected in his own name and on his own life mentioned in the Fifth Schedule hereto and all moneys assured by or to become payable

> thereunder to hold unto the trustee upon trust that the trustee shall as soon as may be after the maturity of the said policies respectively get in and receive the money to become payable thereunder respectively and shall stand possessed of the net residue thereof after discharging all costs and expenses of recovering and receiving the same (hereinafter called "the policy moneys") upon the trusts and with and subject to the powers hereinafter declared concerning the same.
>
> (3) The investments and moneys appointed by sub-cl. (1) of this clause and the policy moneys shall go and be held upon such trusts and in such manner generally as Captain Estcourt and the said Desmond Estcourt shall from time to time or at any time by deed revocable or irrevocable jointly appoint And in default of and subject to any such appointment and if the said Desmond Estcourt shall die in the lifetime of Captain Estcourt upon such trusts and in such manner generally as Captain Estcourt and the person for the time being entitled to the first interest for life in remainder under the limitations of the settled land hereinbefore contained expectant on the death of Captain Estcourt and the failure or determination of all intermediate limitations in tail male or in tail or if such tenant for life in remainder shall be under the age of twenty-one years Captain Estcourt and the trustees shall from time to time or at any time by deed revocable or irrevocable jointly appoint but so that no appointment under the last mentioned power shall operate to overreach the beneficial interests in the premises appointed of the widow and children of the said Desmond Estcourt by reference to the provisions of clauses 5, 6, 8, 18 and 19 hereof And in default of and until and subject to any appointment under the powers aforesaid or either of them upon the trusts and subject to the powers and provisions upon and subject to which capital money or investments representing the same would be held."

Captain Estcourt died on Jan. 25, 1958, leaving Desmond him surviving and on his death the Inland Revenue Commissioners claimed estate duty on the policy moneys totalling £8,100 which then became payable on the footing that they passed on Captain Estcourt's death under s. 1 or s. 2 (1) (b) of the Finance Act, 1894, or alternatively estate duty under s. 2 (1) (d) on the value of Desmond's life interest therein at Captain Estcourt's death. This summons has been taken out by Childs Trustee Co. as trustees of the resettlement against the Inland Revenue Commissioners to determine whether either of these claims is justified. The plaintiffs have argued first that the policy moneys would not have been liable to duty under either head of charge even if the settlement of them had been a voluntary settlement by Captain Estcourt and alternatively that if the policy moneys are, prima facie, within either head of charge the fact that the settlement of them was the outcome of a bargain between Captain Estcourt and Desmond for which Captain Estcourt received full consideration frees them from any charge to duty.

The first question which I have to consider is whether on the true construction of the resettlement Captain Estcourt had an interest in the policies which ceased on his death. Counsel for the commissioners submitted that he had, either because cl. 28 (2) and (3) of the resettlement gave him such an interest or alternatively because those provisions make no disposition of the beneficial interest in the policies during the rest of his lifetime and that therefore he took a life interest in them by way of resulting trust. I cannot accept either of these contentions. By cl. 28 (2) the trustees are directed to hold the policies until Captain Estcourt's death and then to collect the policy moneys from the company and in cl. 28 (3) they are directed to hold the policy moneys subject to any appointment to the contrary under any of the joint powers therein mentioned

> "upon the trusts and subject to the powers and provisions upon and subject to which capital money or investments representing the same would be held."

That means, I think, so far as the policy moneys are concerned, on the trusts of the settlement subsisting at Captain Estcourt's death, i.e., in the events which happened, on trust for Desmond for life with remainders over. Captain Estcourt was not given a life interest in the policies nor did he take any interest in them by way of resulting trust since they were held from the first on trust for those beneficially interested after his death. The case is, in my judgment, distinguishable from *Westminster Bank, Ltd.* v. *Inland Revenue Comrs.* and *Wrightson* v. *Inland Revenue Comrs.* (1). In both those cases the fully paid policies in question were on the life of the settlor. He was given no interest in them; but it was held that the settlements on their true construction gave vested life interests in possession in them before the settlor's death to the same persons as would become entitled to life interests in the policy moneys on the death of the settlor if the policies remained in force until that date. It was, that is to say, the view of the majority of the House of Lords that if the policies had been surrendered in the lifetime of the settlor or the insurance companies had been liquidated and the trustees had received a dividend in the liquidation, the life tenants would have been entitled to be paid the income of the investments representing the surrender moneys or the dividend in the liquidation. Here, on the other hand, if the policies had been surrendered in Captain Estcourt's lifetime, or the trustees had received a dividend in the liquidation of the insurance company, I do not think that either Captain Estcourt or Desmond acting independently could have required the trustees to invest the surrender moneys or dividend and pay him the income of the investments during the rest of Captain Estcourt's lifetime. Captain Estcourt was given no life interest whatever in the policies and Desmond's life interest in the policy moneys was only to begin on Captain Estcourt's death. What the position would have been had Captain Estcourt and Desmond in such circumstances purported to exercise the joint power of appointment I do not say. But in the absence of such exercise the court would, I think, have directed either that the surrender moneys or dividend be applied in the purchase of another fully paid policy payable on Captain Estcourt's death or if it had directed the money to be invested would have ordered the income to be accumulated for the rest of Captain Estcourt's lifetime.

Counsel for the commissioners then submitted that even if the true view was that Captain Estcourt had no interest in the policies they nevertheless passed under s. 1 or s. 2 (1) (b) on his death by reason of the change in the respective interests of Desmond and the remaindermen in them which then took place. If the policies had been surrendered, their proceeds invested, and the income accumulated for the rest of Captain Estcourt's lifetime there is no doubt that the investments and accumulations would have been liable to estate duty on his death. The income which up to the date of his death would have been applied primarily for the benefit of capital, would on his death have begun to be paid to Desmond. By reason of this change in the enjoyment of the income the investments and accumulations would have "passed" on Captain Estcourt's death (see *Re Hodson's Settlement, Brookes* v. *A.-G.* (2)). Counsel argued that if the respective rights of Desmond and the remaindermen in the policies during Captain Estcourt's lifetime were such that had the policies been surrendered and the proceeds invested the income of the proceeds would have been accumulated, it followed that the unsurrendered policies ought to be held themselves to pass on Captain Estcourt's death when the policy moneys became payable, and Desmond began to enjoy a life interest in possession in them. This is a novel contention on the part of the Revenue. In *Westminster Bank, Ltd.* v. *A.-G.* (3), the Attorney-General accepted the position that in circumstances such as these duty was not payable under s. 1 of the Finance Act, 1894, on the capital value of the policy moneys, but only under s. 2 (1) (d) on the value of the life interest in them which came into possession on the death of the life assured. Again in the two cases (4) in the House of Lords in 1957 duty was only claimed under s. 2 (1) (d) on the value of the life interests arising on the death of the settlors. But counsel for the commissioners submitted that *D'Avigdor-Goldsmid v. Inland Revenue Comrs.* (5) had shown that the old view that estate duty on life policies was payable under s. 2 (1) (d) on the arising of a beneficial interest in the policy moneys on the death of the life assured was wrong in principle and that if one concentrated one's attention, as it now appeared that one should, on the rights of the beneficiaries in the policy itself, it followed that the policy itself passed under s. 1 or s. 2 (1) (b) in such a case as this. I cannot accept this argument. It is true enough that if the policies had been surrendered, and the income of the invested proceeds had been accumulated the investments and accumulations would have passed under s. 1 on the death of Captain Estcourt but I do not think that it follows in the least from this that the unsurrendered policies passed under s. 1 on his death. If the policies had been surrendered and the proceeds invested the remaindermen would have had an interest in the income which accrued and was invested during Captain Estcourt's lifetime. The longer he lived the larger the accumulation would be. There would therefore have been a real change in the respective interests of Desmond and the other beneficiaries on Captain Estcourt's death. But in fact the policies were retained and never yielded any income during Captain Estcourt's lifetime. In such circumstances nothing passed from the other beneficiaries to Desmond on the death of Captain Estcourt. All that happened was that Desmond's life interest in the policy moneys which had previously been a reversionary life interest, became a life interest in possession, and that the interests of the other beneficiaries in the policy moneys which had previously been doubly reversionary in that they were expectant on the death both of Captain Estcourt and of Desmond became expectant only on the death of Desmond. In my judgment, therefore, the claim of the commissioners to duty on the capital of the policy moneys under s. 1 or s. 2 (1) (b) fails quite apart from the fact that this settlement was not a voluntary settlement. On the other hand, if it had been a voluntary settlement, I cannot see how the claim for duty under s. 2 (1) (d) on the value of Desmond's life interest could have been resisted. I understood counsel for the plaintiffs to submit that Desmond had a life interest in possession in the policies before Captain Estcourt's death, but, as I have said, I think that his life interest was reversionary until Captain Estcourt's death.

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(1) [1957] 2 All E.R. 745; [1958] A.C. 210.
(2) [1939] 1 All E.R. 196; [1939] Ch. 343.
(3) [1939] 2 All E.R. 72; [1939] Ch. 610.

I turn therefore now to consider whether the prima facie claim for duty on the value of Desmond's life interest under s. 2 (1) (d) is affected by the fact that the resettlement was the outcome of a bargain between Captain Estcourt and Desmond. Section 3 (1) of the Finance Act, 1894, provides that estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a bona fide purchase from the person under whose disposition the property passes where such purchase was made for full consideration in money or money's worth paid to the vendor for his own use and benefit and s. 3 (2) provides that where any such purchase was made for partial consideration in money or money's worth paid to the vendor for his own use and benefit the value of the consideration shall be allowed as a deduction from the value of the property for the purpose of estate duty. Counsel for the plaintiffs contends that in this case if the policy moneys passed at all they passed by reason only of a purchase of them by Desmond from his father for full consideration in money or money's worth. Captain Estcourt received under the family arrangement (a) the reversion on his death to a sum of £26,750 and (b) the extinction of the liability for rent-charges. What he gave in exchange for this was (a) the two fully paid policies on his life and (b) the rentcharges payable to Desmond during his life, or in the family. Counsel submitted that as Captain Estcourt was seventy-two years old at the time, it was clear that what he received was worth more than what he gave, and that therefore the conditions of exemption contained in s. 3 were satisfied. In *A.-G.* v. *Hawkins* (6), the court had to consider the application of s. 3 to a family arrangement of this sort. There, as here, the family property had been settled on the father for life with remainder to the son in tail male. The father had borrowed a large sum on the security of his life interest coupled with policies of assurance on his life. In addition, he owed considerable unsecured debts. His son, too, was in financial difficulties. By arrangement between them the property was disentailed and resettled, subject to a joint power of appointment, on the father for life with remainder to the son absolutely. The son then joined with the father (i) in converting the mortgages on the father's life interest into mortgages on the fee simple of the property, and (ii) in raising substantial sums out of capital to discharge his father's unsecured debts. In return the son had paid to him a smaller sum out of capital and was given an annuity during his father's lifetime. Further, the father assigned the policies to trustees and charged his life interest with payment of the premiums on them and the interest under the mortgages. It was provided that if any of the policies, some of which were terminable policies, became payable in the father's lifetime, the trustees should apply the moneys received in reduction of the mortgages. Subject to that provision the policies and the moneys payable under them were held in trust for the son absolutely. No moneys became payable under any of the policies during the father's lifetime and on his death the Crown claimed estate duty under s. 2 (1) (d) on the moneys which then became payable to the son. It was argued for the son that the arrangement was a transaction under which he had acquired the absolute interest in the policies for full consideration and that therefore the exemption under s. 3 (1) applied. Kennedy and Phillimore, JJ., rejected that contention. They were prepared to assume that the father received full consideration for anything that he gave up under the arrangement but they held that nevertheless he had not sold the policies to his son. The policies were brought into settlement to replace as far as possible the capital that was taken out and the son had no title to them in possession until his father's death. Counsel for the plaintiffs sought to distinguish that case from this on the ground that in *A.-G.* v. *Hawkins* (6) it was possible that the father himself might derive some benefit from the policies before he died because a terminable policy might have become payable in his lifetime and the proceeds used in reduction of the mortgage, the interest on which the father had to pay. But what prevented the court from holding that the son had purchased the policies from his father was the fact that the son did not obtain complete dominion over them, not the fact that the other person who had an interest in them was the father. In this case although Captain Estcourt retained no interest in the policies Desmond did not obtain an absolute interest in them. It was part of the arrangement that they were to be brought into settlement to benefit the remaindermen as well as Desmond. *A.-G.* v. *Hawkins* (6) is therefore to my mind indistinguishable in principle from this case and if it is still good law it is decisive against the second contention of the plaintiffs. It was argued, however, that the later case of *Lethbridge* v. *A.-G.* (7) shows that *A.-G.* v. *Hawkins* (6) was wrongly decided. There again a father who was tenant for life of a family estate had raised money by charges on his life interest supported by policies of assurance on his life. By a family arrangement between him and his son who was tenant in tail the estates were disentailed, and the son concurred with his father in mortgaging them for a sum sufficient to pay the father's debts. In return the father assigned the policies to the son and created a trust of the rents during his life for payment of the interest on the mortgages, the premiums on the policies, and an annuity to the son. Subject to these trusts the estates were resettled on the father for life with remainder to the son. It will be seen that in *Lethbridge* v. *A.-G.* (8), unlike *A.-G.* v. *Hawkins* (9), the policies were assigned out and out to the son. He could have surrendered them at any time, and, as the House of Lords held, if he had done so he would have remained entitled to be paid out of the rents during his father's lifetime a sum equal to the premiums. On these facts the House of Lords, reversing the Court of Appeal, held that no estate duty was payable on the policy moneys under s. 2 (1) (d) on the father's death. The only member of the House who referred to *A.-G.* v. *Hawkins* (9) was Lord Atkinson. He regarded the point in issue as being whether or not s. 3 of the Act of 1894 applied to the case. He held that it did, and distinguished *A.-G.* v. *Hawkins* (9) on the ground that there the policies had not been assigned absolutely to the son. Lord Loreburn, L.C., and Lord Macnaghten, on the other hand, with whom the other members of the House concurred, decided the case independently of s. 3 on the ground that the father could not be said on the facts to have " provided " the policies within the meaning of s. 2 (1) (d) at all. Counsel for the plaintiffs submitted that the reason why Lord Loreburn and Lord Macnaghten held that the father did not provide the policies was simply the fact that he had received full consideration for anything that he gave up under the arrangement with his son, and he argued that as in this case Captain Estcourt received full consideration for everything which he gave up under the arrangement he did not provide the two policies in question, even if he cannot be said to have sold them to Desmond. Now undoubtedly there are passages in the speeches of Lord Loreburn and Lord Macnaghten which lend colour to this submission. Thus Lord Loreburn, after pointing out that the general purpose of s. 2 (1) (d) was to prevent a man escaping estate duty by subtracting from his means during his life money or money's worth which was to reappear when he died in the form of a beneficial interest arising on his death, said (10) that the father in the case before him had subtracted nothing from his means since he had received full consideration from his son for his assignment of the policies and the charge of the premiums on his income. Again, Lord Macnaghten pointed out (11) that it was not by the father's gift or at his cost or by means of any expenditure on his part that the policies were vested in the son since the father received full consideration from the son for everything which he gave up. Further it is to be observed that these very passages in the speeches of Lord Loreburn and Lord Macnaghten were referred to by the Privy Council in *Ward* v. *Inland Revenue Comrs.* (12) as showing that the House of Lords in *Lethbridge* v. *A.-G.* (8) construed the word " provided " in s. 2 (1) (d) as carrying with it the idea of bounty on the part of the deceased. " Where ", asked counsel for the plaintiffs, " is the element of bounty in this case?" On the other hand I find it difficult to believe that Lord Loreburn and Lord Macnaghten were really intending to say that even in a case where it was part of the arrangement between father and son that the policies should be brought into settlement by the father for the benefit of other persons as well as the son, the fact that the father received full consideration from the son for everything which he gave up, including the policies, must itself necessarily involve the consequence that the father did not " provide " the policies within the meaning of s. 2 (1) (d). In the first place, if their Lordships meant that, it would appear to follow that *A.-G.* v. *Hawkins* (9) was wrongly decided. That case was argued purely on s. 3. It appears never to have occurred to anyone to suggest that the father did not provide the policies. Yet he received full consideration for bringing them into settlement and therefore on the view which I am considering the case was not within s. 2 (1) (d) at all. Again if Lord Loreburn and Lord Macnaghten meant what counsel for the plaintiffs submits that they meant it would have been unnecessary for them to stress, as each of them did, that the son in *Lethbridge*

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(4) [1957] 2 All E.R. 745; [1958] A.C. 210.
(5) [1953] 1 All E.R. 403; [1953] A.C. 347.

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(6) [1901] 1 K.B. 285.

(7) [1907] A.C. 19.

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(8) [1907] A.C. 19. (9) [1901] 1 K.B. 285. (10) [1907] A.C. at p. 23.
(11) [1907] A.C. at p. 25.
(12) [1956] 1 All E.R. at p. 575; [1956] A.C. at pp. 401, 402.

v. *A.-G.* (13) became the absolute owner of the policies. Of course, if the creation of interests in the policies in other persons is simply the act of the son—if the father is prepared to agree to the son taking the policies absolutely and the son decides on his own account to allow them to be brought into settlement—one can see that it is the son and not the father who really provides the policies for the beneficiaries. But where, as here, it is part of the arrangement between father and son that the policies shall be brought into settlement by the father for the benefit of others as well as the son, I should have thought that the policies could fairly be said to have been provided for the beneficiaries by the father, by arrangement with the son, even though the father received under the arrangement full consideration for everything which he gave up, including the policies. From the point of view of the remaindermen the father here was one of the providers of the policies even though he may have driven a hard bargain with the son in insisting that they should be brought into settlement. If I were satisfied that the House of Lords in *Lethbridge* v. *A.-G.* (13) intended to hold that there should be read into s. 2 (1) (d) some such words as " to the extent that such purchase or provision is an act of bounty on the part of the deceased ", I should, of course, give effect to that view without hesitation; but as I am by no means clear that they meant so to decide, I feel at liberty to give effect to my own view of the question and to leave it to a higher court to say that *A.-G.* v. *Hawkins* (14) was wrongly decided. On the second point, therefore, I hold that the plaintiffs fail.

There remains one other matter to be mentioned. If the plaintiffs in a case of this sort claim that the property in question is wholly or partially exempt from duty on the ground that full or partial consideration has been given to the deceased, they ought, I think, to file evidence with regard to the value of the consideration unless it is agreed by the commissioners. In this case there was no evidence before me as to the value of what Captain Estcourt received under the arrangement as compared with what he gave up and counsel for the commissioners, while admitting, as is indeed obvious, that Captain Estcourt received some consideration for the settlement of the policies, did not admit that it was full consideration. In the view which I have formed, the point does not arise for I have held that even on the assumption that he received full consideration duty is payable; but if a higher court holds that I am wrong on this point then unless the parties can agree the figures the question of the value of the consideration will have to be decided on proper evidence.

Declaration accordingly.

Solicitors: *Lawrence, Graham & Co.* (for the plaintiffs); *Solicitor of Inland Revenue.*

[*Reported by* E. Cockburn Millar, *Barrister-at-Law.*]

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(13) [1907] A.C. 19.

(14) [1901] 1 K.B. 285.

MITCHELL AND ANOTHER (INSPECTORS OF TAXES) *v.* ROSS.
MITCHELL AND ANOTHER (INSPECTORS OF TAXES) *v.* HIRTENSTEIN.
MITCHELL AND ANOTHER (INSPECTORS OF TAXES) *v.* MARSHALL.
TAYLOR-GOOBY (INSPECTOR OF TAXES) *v.* TARNESBY.
TAYLOR-GOOBY AND ANOTHER (INSPECTORS OF TAXES) *v.* DREW.

[Court of Appeal (Lord Evershed, M.R., Pearce and Harman, L.JJ.) March 2, 3, 4, 7, 8, 24, 1960.]

Income Tax—Deductions in computing profits—Expenses—Medical specialist in private practice—Holder of part-time appointments as consultant—Profits of office assessable under Sch. E—Expenses not deductible under Sch. E—Whether deductible as expenses of profession under Sch. D—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 122 (*Sch. D, para.* 1, *proviso*), *s.* 156 (*Sch. E, para.* 2).

A consultant radiologist, who was in private practice and was assessed to income tax on profits so earned under Sch. D of the Income Tax Act, 1952, also held part-time appointments at hospitals of a regional hospital board. The duties of the appointments were such as might be assigned by the board for the purpose of providing hospital and specialist services at the hospital under the National Health Service Act, 1946, which provided for such part-time specialists to be officers of the board. The appointments made provision as to the number of hours to be worked, place of residence, notice of the taking of " leave " and a pension, and there was in fact a fixed retiring age and the appointments were terminable by the consultant only on reasonable notice. The consultant had undertaken voluntarily domiciliary consultations for which he received payments, and another consultant holding similar appointments had received payments for the duties of a locum tenens rendered during the absence of part-time consultants. It was found by the Special Commissioners of Income Tax that the part-time appointments were a necessary part of the exercise of the consultant's profession and were incidental thereto. The consultant was assessed to income tax in respect of profits arising from the appointments under Sch. E to the Income Tax Act, 1952, deductions of expenses being allowed only to the limited extent permissible under the Rules applicable to that Schedule. On appeal,

Held: (i) each consultant was properly assessed under Sch. E in respect of the profits of the appointments, including those in respect of domiciliary consultations and locum tenens work (which were duties of the office), since he was the holder of an office within the meaning of s. 156, para. 2 (Sch. E) and s. 122, para. 1, proviso (Sch. D) of the Income Tax Act, 1952.

Davies v. *Braithwaite* ([1931] All E.R. Rep. 792) distinguished.

(ii) in so far as expenses incurred in relation to the appointments would be deductible under Rules applicable to Sch. D but not under Rules applicable to Sch. E the consultant was entitled to deduct them under Sch. D, since on the findings of the commissioners the consultant had but one calling or profession to which his appointments were incidental and the expenses were therefore " money wholly and exclusively laid out or expended for the purposes of the . . . profession " and were deductible under s. 137 (a) of the Income Tax Act, 1952.

Decision of Upjohn, J. ([1959] 3 All E.R. 341) affirmed on the first point and reversed on the second.

[As to the position of consultants and specialists in relation to the hospital authority, see 26 HALSBURY'S LAWS (3rd Edn.) 19, 20, para. 27.

As to what constitutes an office within Sch. E, s. 156 of the Income Tax Act, 1952, as amended by s. 10 of the Finance Act, 1956, see 20 HALSBURY'S LAWS (3rd Edn.) 306, para. 563; and as to expenses incurred for the purposes of a profession, see ibid., 166-170, paras. 286-292; and for cases on the subjects, see 28 DIGEST (Repl.) 222 et seq., *955* et seq.; 87 et seq., *329* et seq.

For the Income Tax Act, 1918, Sch. D. Case II and Sch. E, see 12 HALSBURY'S STATUTES (2nd Edn.) 153-155, 176. For s. 18 of the Finance Act, 1922, see ibid., 234. For s. 123 (Sch. D, Case II) and s. 137 (a) and for s. 156 (Sch. E) of the Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.) 116, 134, 149.]

Cases referred to:

Davies v. *Braithwaite*, [1931] All E.R. Rep. 792; [1931] 2 K.B. 628; 100 L.J.K.B. 619; 145 L.T. 693; 18 Tax Cas. 198; 28 Digest (Repl.) 155, *605*.

Fry v. *Salisbury House Estate, Ltd.; Jones* v. *City of London Real Property Co., Ltd.*, [1930] All E.R. Rep. 539; [1930] A.C. 432; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266; 28 Digest (Repl.) 33, *148*.

Great Western Ry. Co. v. *Bater*, [1922] 2 A.C. 1; 91 L.J.K.B. 472; 127 L.T. 170; 8 Tax Cas. 231; 28 Digest (Repl.) 222, *957*.

Household v. *Grimshaw*, [1953] 2 All E.R. 12; 34 Tax Cas. 366; [1953] 1 W.L.R. 710; 28 Digest (Repl.) 237, *1040*.

Hughes v. *Bank of New Zealand*, [1938] 1 All E.R. 778; [1938] A.C. 366; 107 L.J.K.B. 306; 158 L.T. 463; 21 Tax Cas. 472; 28 Digest (Repl.) 264, *1174*.

McMillan v. *Guest*, [1942] 1 All E.R. 606; [1942] A.C. 561; 111 L.J.K.B. 398; 167 L.T. 329; 24 Tax Cas. 190; 28 Digest (Repl.) 236, *1035*.

St. Aubyn v. *A.-G.*, [1951] 2 All E.R. 473; [1952] A.C. 15; 3rd Digest Supp.

Appeals.

The first appellant taxpayer appealed to the Special Commissioners of Income Tax against assessments to income tax as follows: for 1951-52 under Sch. E £3,024; for 1952-53 under Sch. E £3,276 and under Sch. D £1,500; for 1953-54 under Sch. E £3,385 and under Sch. D £1,000; and for 1954-55 under Sch. D £1,000. The grounds of appeal were that, in computing the profits or gains under Sch. E for the relevant accounting periods, the taxpayer's remuneration as a consultant radiologist under the Birmingham Regional Hospital Board and payments made to him in respect of domiciliary visits had been included contrary to law and that the assessments should be reduced accordingly; and that the assessments under Sch. D, being estimated, should be adjusted in accordance with the taxpayer's accounts of the profits or gains for the relevant accounting periods.

The first taxpayer contended: (i) that his activities as a consultant radiologist constituted the carrying on of a profession and that the entirety of the profits and gains arising from those activities was therefore assessable to income tax under Case II of Sch. D and not otherwise; (ii) that his part-time appointments were not offices or employments within the meaning of Sch. E; (iii) that, if any such part-time appointment was an office or employment within the meaning of Sch. E, the tenure thereof was an incident in the course of the carrying on of his profession as a consultant radiologist and any remuneration therefrom constituted a receipt of that profession to be included in computing the profits or gains thereof under Sch. D; and, accordingly, (iv) that the assessments under Sch. E should be reduced and the assessments under Sch. D should be adjusted to correspond with the figures shown in the taxpayer's accounts; in the alternative (v) that, if the assessments under Sch. E were in principle well founded, the outgoings shown in the taxpayer's accounts were allowable deductions in computing his profits or gains assessable under Sch. D in so far as they were not allowable as expenses under Sch. E; and, in any event, (vi) that any profits or gains arising to the taxpayer in respect of domiciliary visits were proper to be regarded as profits or gains of his profession assessable under Sch. D and not as emoluments of offices or employments assessable under Sch. E.

The Crown contended: (i) that the taxpayer's remuneration as consultant radiologist under the Birmingham Regional Hospital Board was properly to be included in the assessments made on him under Sch. E; (ii) that the payments made to the taxpayer by the board in respect of his part-time appointment as a consultant radiologist under the National Health Service Act, 1946, constituted remuneration received by the taxpayer in respect of an office or employment of profit within the meaning of Sch. E; (iii) that the taxpayer exercised a profession or vocation in respect of which he was assessable under Case II of Sch. D only in so far as he carried on a private practice as consultant radiologist outside the National Health Service; (iv) that, in computing the taxpayer's profits under Sch. E in respect of his part-time appointment, only such expenses as were allowable under that Schedule and the rules applicable thereto were deductible and that, in computing the taxpayer's profits or gains under Case II of Sch. D in respect of his private practice, only such expenses as were allowable under that Schedule and Case and the rules applicable thereto were deductible and the outgoings shown in the taxpayer's accounts fell to be dealt with accordingly; (v) that the payments made to the taxpayer under the National Health Service scheme in respect of domiciliary consultations in the course of his part-time appointment were properly to be regarded as emoluments of an office or employment assessable under Sch. E and not as profits or gains assessable under Sch. D.

The commissioners found that each of the taxpayer's part-time appointments as consultant radiologist to certain hospitals under the Birmingham Regional Hospital Board was an office or post and the remuneration derived therefrom together with the fees received in respect of domiciliary consultations carried out in connexion therewith was the profit of an office within the meaning of Sch. E to the Income Tax Act, 1918 (as amended by s. 18 of the Finance Act, 1922), and s. 156 of the Income Tax Act, 1952. They also found that at all material times the taxpayer exercised the profession of consultant radiologist, his part-time hospital appointments being a necessary part of the exercise of that profession by him and merely incidental thereto, notwithstanding that a great deal of his time was thereby taken up. They held that on the authorities an individual might have an engagement or hold a post in the same line as his profession at large, but that the contract governing such engagement or post might nevertheless be nothing but an incident in the conduct of his professional career. In such case the profits or gains arising therefrom fell to be assessed as part of his professional earnings under Sch. D. On this principle they held that the remuneration received by the taxpayer from his part-time hospital appointments fell to be assessed under Case II of Sch. D as part of the profits or gains of his profession, and so also did the fees received in respect of his domiciliary consultations. The Crown appealed by way of Case Stated to the High Court.

The contentions of the parties and the decisions of the commissioners in the other four cases were substantially the same, except that the fourth and fifth taxpayers in their final contentions submitted that any profits or gains arising to them in respect of locum tenens work, as well as domiciliary visits, were proper to be regarded as profits or gains of their profession assessable under Sch. D and not as emoluments of offices or employments assessable under Sch. E. The Crown contended that these payments, made in the course of the part-time appointments, were properly to be regarded as emoluments of an office or employment assessable under Sch. E and not as profits or gains assessable under Sch. D. The commissioners found that the remuneration received by the two taxpayers in respect of their temporary appointments to act as locum tenens was in each case the profit of an office within the meaning of Sch. E to the Income Tax Act, 1918 (as amended by s. 18 of the Finance Act, 1922), and s. 156

of the Income Tax Act, 1952; and that the two taxpayers' temporary appointments to act as locum tenens were a necessary part of the exercise of their profession and merely incidental thereto, notwithstanding that a great deal of their time was taken up by them and the part-time appointments. The commissioners held on these facts that fees received by these taxpayers from their appointments as locum tenens fell to be assessed under Case II of Sch. D as part of the profits or gains of their profession, like the remuneration of their part-time appointments and the fees for domiciliary consultations. On July 21, 1959 (reported [1959] 3 All E.R. 341), Upjohn, J., allowed the Crown's appeals by way of Cases Stated against these decisions, holding that the taxpayers were assessable in respect of the profits of their part-time appointments under Sch. E, and that the expenses of such appointments, including those of domiciliary visits and of acting as locum tenens, were deductible only under the Rules applicable to Sch. E. The taxpayers appealed to the Court of Appeal.

Heyworth Talbot, Q.C., and *J. L. Creese* for the taxpayers.

R. O. Wilberforce, Q.C., *E. Blanshard Stamp* and *A. S. Orr* for the Crown.

Cur. adv. vult.

Mar. 24. The following judgments were read.

LORD EVERSHED, M.R.: The five appeals in which we are now giving judgment have raised the same questions in substance, two in number. For the purposes of the hearing in this court, as for the purposes of the hearing before Upjohn, J., the facts in the case of the taxpayer, Dr. Ross, have been taken as typical of all five cases, and I shall, as did the learned judge, treat the facts relating to Dr. Ross, appearing from the Case Stated by the Special Commissioners on Dr. Ross's appeal against the assessments made against him, as typical of the facts relevant to all the appeals, and therefore as constituting the necessary basis for this judgment on all the appeals. As the learned judge justly observed, the material circumstances are set out most fully in the Case Stated, which contains also an analysis of the relevant provisions of the National Health Service Act, 1946, and of various statutory instruments made thereunder. Like him, therefore, I shall confine myself to such brief statement of facts as will suffice to make clear the nature of the questions for our decision and the reasons for my conclusions on them.

The taxpayer, Dr. Ross, is and has at all material times been a qualified and registered medical practitioner. He is and has at all material times been, in common with the other appellants, of the category of medical practitioners known as specialists. The word is so commonly understood that it requires no further exposition. It is used in its commonly understood sense (and so as to be applicable to the taxpayer and the other appellants) in the Act of 1946 itself, particularly in s. 3 and s. 14, to which I shall later make again some reference. The taxpayer's specialist activity is that of a consultant radiologist. In that capacity he attends private patients, and he also holds a part-time appointment by contract with the Birmingham Regional Hospital Board at certain hospitals in the area of the board. The professional activities of the other appellants are in all material respects wholly similar. The only difference between them is that, whereas in the case of the taxpayer and three of the other appellants the fees received in the relevant years of assessment from private patients were appreciably less than the emoluments from the hospital appointments, in the case of the remaining appellant, Dr. Hirtenstein, the fees from private patients exceeded the hospital emoluments. But no point was made before us arising out of the distinction.

I can now state the first of the questions debated before us. It is this: Should the taxpayer be assessed for income tax in respect of the profits or gains or emoluments arising to him from his practice as a consultant radiologist, alike from his private patients as from the hospital appointment, entirely under the relevant rules of Sch. D? The taxpayer's contention is that he should. Or, as the Crown contends, should he be assessed under Sch. D in respect of the profits or gains arising from his private patients and under Sch. E in respect of his emoluments under his hospital appointment? I have so far deliberately, and for reasons which will later sufficiently appear, avoided the use of the word "profession"; but it has not been in dispute that the taxpayer's profits or gains from his services to private patients and his emoluments from his hospital appointment alike arose from his practice, his one "job in life", as a consultant radiologist.

I should assume that nine people out of every ten—indeed, that everyone not versed or experienced in the intricacies and anomalies that the heritage of a century and a half of income tax legislation has bequeathed—would, on hearing the questions that I have posed, inquire, "What can it matter? Why should it matter?" And emphasis is given to the inquiry by the commissioners' findings that the taxpayer's part-time hospital appointment, no less than his private practice, was a part, and indeed a "necessary" part, of his profession as a consultant radiologist. The actual language of the finding, supplemented after the case had been sent back to them by Roxburgh, J., for the purpose, was as follows:

> "We also find that at all material times [the taxpayer] exercised the profession of consultant radiologist, his part-time hospital appointments being a necessary part of the exercise of that profession by him and merely incidental thereto, notwithstanding that a great deal of his time was thereby taken up. We do not seek to describe the profession of consultant radiologist in general."

There was some discussion before us of the exact significance of the language that I have quoted, which Upjohn, J., described as not entirely happy. But this much was quite clear and not in dispute: that, for one in the taxpayer's position who was earning his living as a consultant radiologist, the undertaking of part-time hospital appointments was part of his job (and again I deliberately do not use the word "profession")—and a part of it which, as a matter of practical necessity for professional success, he had to do. And the same is true of the other four appellants, save for the substitution for "consultant radiologist" of their respective specialist activities.

Why, then, should it matter whether the taxpayer is assessed wholly under Sch. D or partly under that Schedule and partly under Sch. E? The answer is that, notwithstanding the unity of the taxpayer's calling as a consultant radiologist, the allowances and deductions which he may make under the two Schedules differ. The rules for chargeability under Sch. D are now to be found in Part 5 of the Income Tax Act, 1952, beginning with s. 122. By s. 137 (a), the permissible deductions are in effect defined, so far as relevant, as sums wholly and exclusively expended for the purposes of the taxpayer's profession or vocation. Liability under Sch. E is expounded in Part 6 of the Act, beginning at s. 156. I shall not here recite the language of the two charging sections, which in material respects show a certain lack of conformity. But the disconformity is further exhibited by the circumstance that, for the appropriate allowances under Sch. E, it is necessary to turn to Sch. 9 to the Act, para. 7 of which reads as follows:

> "If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to expend money wholly, exclusively and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed."

To the reader in the present age (which is sometimes described as that of the internal combustion engine), the reference to the horse will be somewhat startling. Its presence is evidence of the long ancestry of the paragraph, re-enacted in succeeding consolidating statutes; for it reflects the fact, interesting, if hardly relevant today, that the means and speed of conveyance of an inhabitant of this island from one place to another depended in Napoleon's days, as it had depended in the days of Julius Caesar, on the performance of the horse. More important, however, for present purposes is that the standard of permissible deductions under Sch. E is that of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the taxpayer's office or employment. Thus the standard is in two respects stricter than that appropriate to the taxpayer assessed under Sch. D; for (i) not only must the expenses be wholly and exclusively but they must also be necessarily incurred, and (ii) they must be incurred not merely for the purposes of the taxpayer's office or employment but, according to the language, actually in the performance of the duties of it.

When Sch. E was first devised it was limited in its application to the holders of certain public offices tabulated in para. 5 of the Schedule. It may well be that the stricter standard of allowances was appropriate and sensible in the case of the holders of such offices, whether equestrian or otherwise, starting with the holders of offices belonging to either House of Parliament; and it may also be that 150 years ago the class of Sch. D taxpayers was far smaller than it is today. But in 1922 there was transferred from the embrace of Sch. D to that of Sch. E a large class of taxpayers covered by the language of what is now the proviso to s. 122 (1) of the Act of 1952 and reflected in s. 156, para. 2. It is, of course, altogether beyond the scope of this judgment to attempt to define the limits of the transferred class. For my present purposes it is sufficient to observe that it covers the large class of taxpayers who receive their remuneration after deduction of tax under what is called the P.A.Y.E. system. I hope, therefore, that I am not exceeding my judicial duty if I venture to suggest (probably not for the first time) that Parliament might well consider the justification and sense, at the present day, of the considerable distinction between the two Schedules in the matter of deductions and allowances. Added force is lent (as I hope) to my inquiry by the circumstances of the present cases. If the Crown is right (as, for reasons later appearing, I think it is) on the first question already posed, then it follows that persons in the position of the taxpayer must for the purposes of taxation have one essential part or function of their single calling severed from the rest, and must likewise, if the Crown is right on the second question which the answer to the first involves, have each item of their expenses similarly dissected and then apply (as I think somewhat artificially) a different standard of justification to each dissected part.

An example or two from the taxpayer's revenue account, exhibited to the Case Stated, will illustrate the point. In this account, the first item on the debit side is the salary (£2 per week) paid to the taxpayer's secretary. Another item is that of expenses in respect of his motor car. It was not suggested that either of these two items would have been disallowed as not having been wholly and exclusively expended for the purposes of the taxpayer's profession if he were taxable in respect of all his earnings under Sch. D. But, on the basis of his taxability in respect of his hospital appointment under Sch. E, it was said that some proportion of these items must be regarded as attributable to this appointment, and as such would then be likely to be disallowed as either not necessarily incurred or as not incurred in the (actual) performance of his hospital duties.

The difficulty of such analysis is enhanced when it is borne in mind that the taxpayer might well proceed on occasion from his consulting room to the hospital to attend both on private patients and on patients under his charge in pursuance of his duties under his hospital appointment—in both cases according to arrangements made by his secretary. Whether or not it was ever contemplated, when the conditions of the two Schedules were devised, that a taxpayer practising a single calling would be taxable for part of his single activity under one Schedule and for part under another, it is obvious that, if the Crown be right on both questions, the process of severing expenses wholly and exclusively incurred for the purposes of that activity and applying different tests of justification to the severed parts are not only, as I have thought, artificial, but also highly formidable. There is, I venture to think, an unreality and absence of common sense in the processes which has encouraged me to suggest that consideration should now be given to the incidence and characteristics of the two Schedules; and not the less so since it must be in the public interest that the incidence of taxation should generally be regarded as sensible and just. We were informed that the result of the present cases would similarly affect some 4,700 other medical practitioners, and it has seemed to me likely enough that men of other professions will be similarly affected.

For reasons later appearing, however, I think with my brethren that the appellant taxpayers succeed on the second main question raised; i.e., that, although they must be taxed in respect of their hospital appointments under Sch. E, nevertheless they may still bring into account by way of deduction in their Sch. D assessments sums shown to have been wholly and exclusively expended for the purposes of their single professions as consultants, even though referable to their hospital work, and even though not allowable in their Sch. E assessments. The result may be logically unsatisfactory, but, as later appears, is one from which the language of s. 137 (a) of the Act (which remained unaltered in spite of the transfer from Sch. D to Sch. E brought about in 1922, and now enshrined in the proviso to s. 122 (1)) leaves no escape in the circumstances of the present cases. Though therefore, if our conclusion on this matter is right, the complex processes above referred to will in the present cases at any rate be futile, the processes will still, so far as I can see, have to be undertaken: nor will they necessarily be futile in other but similar cases to which the commissioners' findings would not be applicable. The futility and illogicality in the present cases provide, therefore, I venture to think, no argument against a review of the Schedules by Parliament.

I return, however, to the first question for our determination, and the answer to it must depend on whether the taxpayer's hospital appointment constitutes an office or employment within the terms of s. 156, para. 2, of the Act of 1952 already referred to. It was the view of the Special Commissioners that the question should be answered affirmatively, but that nevertheless the taxpayer was not assessable in respect of the emoluments thereof under Sch. E. This conclusion they based on the premise of their finding (already quoted) that the appointments were mere incidents, and necessary incidents, of his profession as a consultant radiologist; founding themselves on the authority of *Davies* v. *Braithwaite* (1) and *Household* v. *Grimshaw* (2). Counsel for the taxpayer did not attempt to support the reasoning of the Special Commissioners: nor could he, with all respect to them, do so. It is now well established—e.g., by *Fry* v. *Salisbury House Estate, Ltd.* (3) in the House of Lords—that the various Schedules must be treated as distinct codes, of which Sch. D is, as it were, residuary in nature, applicable, if at all, to cases not falling within any of the other Schedules. It follows, therefore, that, if as regards his hospital appointment the taxpayer held an office or had an employment within s. 156, then, as regards the emoluments of that office or employment, he must be taxable under Sch. E.

But it was the submission of counsel for the taxpayer that, because the taxpayer's engagement by the hospital board was a mere incident of his professional activity, therefore he should not be regarded as holding an office or employment at all; and counsel cited *Davies* v. *Braithwaite* (1) to support that argument. The cited case related to the professional activities as an actress of Miss Lilian Braithwaite, and it was proved that, in the ordinary course of those activities, Miss Braithwaite entered into contracts of " employment " with theatre managers and other persons. In that case the Crown (be it observed) was contending for the applicability not of Sch. E but of Sch. D; and the Crown's contention succeeded on the ground, putting it briefly but sufficiently, that such contracts which did not involve in any true sense the relation of master and servant were not in truth contracts of employment at all, or at least not " employments " within the purview of Sch. E.

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(1) [1931] All E.R. Rep. 792; **18 Tax Cas. 198.**
(2) [1953] 2 All E.R. 12; **34 Tax Cas. 366.**
(3) [1930] All E.R. Rep. 539; **15 Tax Cas. 266.**

In my judgment, the case of *Davies* v. *Braithwaite* (4) is on its facts far removed from the present case. I agree, as I have already indicated, with UPJOHN, J., that the conclusion that the taxpayer's engagement with the Birmingham Regional Hospital Board constituted an " office " within the section is inescapable; though I prefer to express no view (and we were not invited to do so by counsel for the Crown) whether it was or was not a " public " office.

The contract of engagement forms exhibit B to the Case Stated. It is headed " National Health Service Act, 1946 ", followed by the name and address of the regional board. It is in the form of a letter under the heading " Appointment of consultant (part-time) " addressed to the taxpayer and signed by the secretary to the board, having attached to it a form of acceptance signed by the taxpayer. " The duties attaching to the appointment " were expressed to be, inter alia, such as might be assigned by the regional board for the purpose of providing hospital and specialist services under s. 3 of the National Health Service Act, 1946, at the hospitals indicated—though, as the learned judge pointed out, it naturally followed from the nature of the taxpayer's professional status as a specialist that he was not placed under any direction how he would carry out his treatment of patients. The letter stated the number of hours the taxpayer was expected to work. It contained certain provisions in regard to his place of residence if more than a certain distance from the hospitals where he was required to serve; it required the taxpayer to notify the board in regard to his taking of " leave "; it provided that the appointment carried the right to a pension. There was no statement of the period of service, but it is not in doubt that there was a fixed retiring age and that the appointment was only terminable by the taxpayer on reasonable notice to the board. The form of acceptance signed by the taxpayer was in the following terms: " I hereby accept the appointment and the terms and conditions of service described above ". It is convenient here to add that the taxpayer also signed on the same document an agreement " in addition to the above named duties " to undertake domiciliary consultations in accordance with the terms and conditions stated in a document issued in 1949 by the Ministry of Health.

In my judgment the document which I have recited and which constituted the contract between the Birmingham Regional Hospital Board and the taxpayer makes clear on the face of it that the taxpayer's appointment thereunder as a part-time consultant was, according to the ordinary understanding of its language and effect, an appointment to an " office ", to what the commissioners referred to as a " post ". Nor does the matter end there. The appointment was made by the regional board under the powers delegated to them under the Act by the Minister, whose duty it was, by s. 3 (1) (c), to provide the services of specialists at hospitals. By s. 14 (1) of the Act—to which section I also referred at the beginning of this judgment—it is provided (inter alia) that part-time specialists, appointed as the taxpayer was appointed, should be " officers " of the relevant regional boards; and the regulations made under that section likewise (and, as I think, naturally) refer to such specialists as " officers " (see S.I. 1948 No. 1416, para. 3).

The words " office " and " employment " as used in s. 122 and s. 156 of the Income Tax Act, 1952, have been the subject of judicial consideration. Thus, in *Great Western Ry. Co.* v. *Bater* (5) (the decision in which by the House of Lords was the occasion for the transfer from Sch. D to Sch. E in 1922) ROWLATT, J. (6), used the language

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(4) [1931] All E.R. Rep. 792; 18 Tax Cas. 198.
(5) [1922] 2 A.C. 1; 8 Tax Cas. 231.
(6) [1920] 3 K.B. at p. 274; 8 Tax Cas. at p. 235.

> "... an office or employment which was a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, and which went on and was filled in succession by successive holders ...";

language which was accepted as generally sufficient by LORD ATKIN and LORD WRIGHT in *McMillan* v. *Guest* (7). LORD WRIGHT, in the latter case, also referred (8) to the NEW ENGLISH DICTIONARY meaning of "office" as "a position or place to which certain duties are attached, especially one of a more or less public character". In my judgment the taxpayer's appointment clearly satisfied the tests indicated by these citations, and I have therefore, for myself, no doubt on authority and common sense that it was an "office" within the meaning of the relevant section of the Income Tax Act.

It will be convenient to deal here with two subsidiary points. First, I have equally no doubt that the domiciliary consultations which the taxpayer undertook to do formed part of the duties of his "office". Domiciliary consultations (as the words imply) involve calls by the specialist at the homes of National Health patients; and the specialist making them is entitled to receive from public funds a fee of so much per visit, subject to a maximum. The taxpayer was not bound to undertake this duty as an essential part of the hospital appointment, but in fact he agreed to do so. The obligation to make the visits was therefore a part of the duties of his "office".

The question of undertaking the duties of a locum tenens during the temporary absence of a part-time consultant is perhaps more difficult. (The question arises, in fact, in relation to another of the appellants than the taxpayer.) I agree, however, with UPJOHN, J., that the duties involved are also those of an "office". The arrangements made were no doubt somewhat informal; but, as appears from the document of 1949 issued by the Ministry of Health (to which I referred earlier), the engagement of a locum is made by the regional board (see para. 7 (2) of, and exhibits A and C to, the Cases of Dr. Tarnesby and Mr. Drew). In my judgment therefore, the duties owed to the board are essentially in pari materia with those of an appointment of a consultant: they are the duties of an "office".

I turn now to the second main question involved, which I formulate thus: Are the sums which the taxpayer may deduct for the purposes of his Sch. D assessment limited to sums wholly and exclusively expended by him for the purpose of his private practice, or may he deduct all expenses so incurred for the purposes of his single calling of a consultant radiologist even though such expenditure related to his hospital appointment and could not be allowed for the purposes of his Sch. E assessment in respect thereof? I have earlier anticipated my answer to this question, and I have on it had the advantage of reading in advance the judgments to be delivered by my brethren. With those judgments and with their reasoning I am in entire accord. I confine myself therefore to a brief statement of my conclusion, which I only add out of respect for the view of the learned judge, from which, on this matter, we are differing.

The relevant terms of s. 122 and s. 156 are set out in the judgment of PEARCE, L.J., and I do not repeat them, noting only that they do not entirely correspond. The question turns on the meaning in its present context of the language of s. 137, which is:

> "Subject to the provisions of this Act, in computing the amount of the profits or gains to be charged under Case I or Case II of Sch. D, no sum shall be deducted in respect of—(a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession or vocation ..."

It was, and was necessarily, of the essence of the argument of the Crown that, having regard to the present context of the paragraph, the word " profession " must be limited so as to be confined to that " profession " or part of the profession the profits or gains arising from which are taxable under Sch. D. In my judgment, the language of the paragraph is too clear and unambiguous to admit of such a limitation in a case such as the present, where, according to the findings of the commissioners, the taxpayer's calling or " job in life "—i.e., his " profession "—is the single profession of a consultant radiologist. If that is in truth his profession, as has been found and as we must, in my view, clearly hold, then sums in fact wholly and exclusively expended for the purposes of that profession are deductible in his Sch. D assessment, and none the less so because they may have been attributable to his hospital appointment and cannot, wholly or partly, be allowed in the assessment of the emoluments of that appointment under Sch. E. If it had been intended to make clear that the terms of para. (a) of s. 137 were limited as the Crown suggests, it would have been easy so to express the paragraph. Its terms, however, appear to have remained and been re-enacted without alteration after the passing of s. 18 of the Finance Act, 1922, and notwithstanding the insertion of the proviso to s. 122 (1) in the consolidating Act of 1952. In my judgment, the words mean what they appear to me clearly to say. The Crown's argument requires that some gloss should be added to the statutory language, and I do not see any justification for making the gloss.

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(7) [1942] 1 All E.R. 606; 24 Tax Cas. 190.

(8) [1942] 1 All E.R. at p. 608; 24 Tax Cas. at p. 202.

The result is that the appeal must be allowed. We will discuss the form of order appropriate to be made when my brethren have delivered their judgments.

PEARCE, L.J.: I agree. It is clear that the hospital appointment is an office. But the taxpayer contends that, even though it be an office, he is entitled to include its expenses among the other expenses of his profession deductible under Sch. D. The commissioners have found that at all material times the taxpayer exercised the profession of consultant radiologist, his part-time hospital appointment being a necessary part of the exercise of that profession by him and merely incidental thereto, notwithstanding that a great deal of his time was thereby taken up. These are findings of fact, and have not been challenged.

One would think, therefore, at first sight, that expenses wholly and exclusively expended for the purposes of his hospital appointment should be regarded as wholly and exclusively expended for the purpose of his profession. The Crown argue that they cannot be so regarded for the following reason. Section 122 of the Income Tax Act, 1952 (which is Sch. D) says that tax under that Schedule shall be charged in respect of the annual gains arising or accruing to any person residing in the United Kingdom from any trade, profession or vocation. The taxpayer's professional profits therefore fall to be taxed under Sch. D. But the proviso to para. 1 of Sch. D says that profits or gains arising or accruing to any person from an office shall not by virtue of that paragraph be chargeable to tax under Sch. D except in certain circumstances which are inapplicable. Section 156 of the Act (which is Sch. E) says in para. 2:

> " Tax under this Schedule shall also be charged in respect of any office . . . the profits or gains arising or accruing from which would be chargeable to tax under Sch. D but for the proviso to para. 1 of that Schedule."

The hospital appointment therefore must be taxed as an office under Sch. E, and any expenses of it can, it is said, only be deducted under Sch. E. In respect of an office there can only be deducted under Sch. E (Sch. 9, para. 7) money wholly and exclusively and necessarily expended in the performance of the duties, whereas in respect of a profession there can be deducted under Sch. D (s. 137 (a)) disbursements or expenses wholly and exclusively laid out or expended for the purposes of the profession. The Crown therefore seek to disallow certain expenses of the hospital appointment which are not within the narrower limit imposed by Sch. E, although they are within the broader limit imposed by Sch. D.

The Income Tax Act, 1952, it is argued, is divided into self-contained Schedules, and one cannot set against the Sch. D profits of a profession any expenses attributable to a part of that profession that has been caught by Sch. E. It would, it is said, be absurd and disruptive of the present methods of taxation to allow the taxpayer to recover, as part of the Sch. D expenses attributable to his profession, expenses which are attributable to the hospital appointment taxed under Sch. E but which are not allowable under Sch. E. I do not see any absurdity in such a situation. In the infrequent cases where an office is found to be a necessary part of the exercise of a profession and to be merely incidental to it, I see nothing absurd in treating the expenses of the office as part of the expenses of the profession. Nor do I think that it will cause a general disruption of the present method. It is more reasonable than notionally dividing in half a profession which has been found to be one entity, producing an artificial allocation of expenses between the two halves, and then allowing the expenses of one half and disallowing those of the other.

The argument of the Crown, therefore, can derive no aid from any argument based on merits. It must stand or fall on the wording of the Act. LORD SIMONDS observed in *St. Aubyn* v. *A.-G.* (9):

> " The question is not at what transaction the section is according to some alleged general purpose aimed, but what transaction its language according to its natural meaning fairly and squarely hits."

Only two cases are relevant. *Fry* v. *Salisbury House Estate, Ltd.* (10), decided that rents were profits arising to a company from the ownership of land and that the Sch. A assessment was exhaustive in respect of them so that they could not be included in an assessment under Sch. D as trade receipts of the company. LORD ATKIN there said (11):

> " Believing as I do that the specific Schedules A, B, C, and E, and the rules thereunder contain definite codes applying exclusively to their respective defined subject-matters I find no ground for assessing the taxpayer under Sch. D for any property or gains which are the subject-matter of the other specific Schedules. In the present case the income from the offices should be and has been assessed under Sch. A on the annual value as prescribed by statute. It therefore is not the subject-matter of assessment under Sch. D."

That case is relied on by the Crown as showing that, once the hospital appointments have been excised from the profession and put into Sch. E, that part of the profession which is left in Sch. D cannot have any regard to the hospital appointment or claim any of its expenses. But, in so far as any inferences favourable to the Crown can be drawn from dicta in *Fry* v. *Salisbury House Estate, Ltd.* (10), they are negatived by what was said in *Hughes* v. *Bank of New Zealand* (12) decided seven years later by the House of Lords. In that case the bank made substantial profits in dealing with government securities which came within Sch. C, and which by their terms of issue were exempted from taxation. It was held that those profits, since they were exempt from taxation and came within Sch. C, were not to be included in the trading profits under Sch. D, but that the expenses attributable to them could be included in the general trading expenses under Sch. D and deducted from the profits under Sch. D. It was there said by LORD WRIGHT, M.R. (13):

> " The result seems to be that the legislature in the Income Tax Acts has expressly provided for certain exemptions and exclusions which will operate when the profits of the trade are being dealt with under Sch. D,

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(9) [1951] 2 All E.R. at p. 485; [1952] A.C. at p. 32.
(10) [1930] All E.R. Rep. 539; 15 Tax Cas. 266.
(11) [1930] All E.R. Rep. at p. 552; 15 Tax Cas. at p. 320.
(12) [1938] 1 All E.R. 778; 21 Tax Cas. 472.
(13) [1936] 3 All E.R. at p. 998; 21 Tax Cas. at p. 508.

> Case I, and has, either inadvertently or by design . . . omitted to make any corresponding provision in respect of any allocation or apportionment of the expenses of the trade."

In the House of Lords, LORD THANKERTON said (14):

> " It is perhaps enough to say that the Crown are unable to point to any statutory provision in support of their contention, whereas the respondents find full justification for their resistance in the provisions of Sch. D, Cases I and II, r. 3, which is as follows: ' 3. In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—(a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment or vocation '. In order to ascertain the authorised deductions, it is right to turn this into positive form. In this view, it seems to me to be incontrovertible that, in the present case, the investments in question were part of the business of the respondents' trade, and that the expense connected with them was wholly and exclusively laid out for the purposes of the trade. Expenditure in course of the trade which is unremunerative is none the less a proper deduction, if wholly and exclusively made for the purpose of the trade. It does not require the presence of a receipt on the credit side to justify the deduction of an expense."

It is clear from that case that there is no absolute rule that when part of the profits under Sch. D are transferred to another Schedule (in that case Sch. C) the expenses attributable to the part transferred cannot remain to be dealt with under Sch. D. It is true that Sch. C had no provision for deduction of expenses: but that does not to my mind affect the principle. I find no authority for reading into the Act a rule that, where part of the profits under Sch. D are transferred to another Schedule, then, if (and only if) such other Schedule has a provision for deductions, the expenses attributable to the part transferred cannot be dealt with under Sch. D. In this case, therefore, there is no constraint by authority or reason or manifest general intention to do other than follow the literal wording of the Act.

It is clear that this particular problem was not in the mind of the draftsman of the relevant sections. No doubt it never occurred to him that a taxpayer carrying on the profession of a consultant radiologist, whose hospital appointment was a necessary part of his profession and was in fact inextricably mixed up with it, would be divided by theoretical binary fission into two halves having unequal rights to expenses laid out in the exercise of that profession. If it did occur to him, he was not very fortunate in his choice of words.

Section 137 reads as follows:

> " Subject to the provisions of this Act, in computing the amount of the profits or gains to be charged under Case I or Case II of Sch. D, no sum shall be deducted in respect of—(a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession or vocation . . ."

In neither that nor the following subsections (in six of which the words " trade, profession or vocation " occur) is there any suggestion that the trade, profession or vocation referred to might not be the actual physical trade, profession or vocation, but might be the metaphysical residue of that trade, profession or vocation after it has been notionally denuded of some part that has been taken over by some other Schedule.

It is argued by the Crown that the words

> " in computing the amount of the profits or gains to be charged under Case I or Case II of Sch. D, no sum shall be deducted,"

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(14) [1938] 1 All E.R. at p. 784; 21 Tax Cas. at p. 523.

and so forth, show that the deductions must be only those which are referable to the profits and gains to be charged under Sch. D. But, although in general one expects only expenses referable to the gains and profits that they produce, it is not always so. Many things that produce no gross profits are "proper" expenses of a business, things that have been intended to help the business, and may have done so. As Lord Thankerton said (15): "It does not require the presence of a receipt on the credit side to justify the deduction of an expense".

The test laid down in s. 137 is whether the expenses have been wholly and exclusively laid out or expended for the purposes of such trade, profession or vocation. Here, the sums in question have been laid out or expended for the purposes of the taxpayer's profession, as found by the commissioners. If it had been desired to exclude the expenses of a part of the profession transferred to Sch. E, it would have been easy to say so. I decline to read that gloss into the plain words of s. 137 (a), or to import into this consolidation Act implications which could have been easily and clearly expressed.

The Crown argument seems to me to be covered by the words of Lawrence, J., in *Hughes* v. *Bank of New Zealand* (16):

> ". . . I am of opinion that there is no ground for excluding those expenses merely because some part of the profits which those expenses had been incurred to earn are exempt from income tax. The contention of the Crown is based upon reading r. 3 of the Rules applicable to Cases I and II, as though it read: 'Any disbursements or expenses not being money wholly or exclusively laid out or expended for the purposes of earning profits brought into charge', but that is not what the rule says, and again the words of the rule must be strictly adhered to. The expenses may be laid out for the purposes of trade, and undoubtedly were apparently in this case laid out for the purposes of the trade, although they earned profits which, by reason of exemption, are not brought into charge."

There is no hardship or unfairness in such a refusal to read into the Act dubious implications that could easily have been expressed: for the Crown are always in a favourable position to clarify any matter by amendment, and to put their rights against the taxpayer beyond any doubt. For these reasons I would allow the appeal.

HARMAN, L.J.: Two questions arise here. First, whether the activities of the doctor under the National Health Service Act, 1946, constituted the holding of an office of profit within the meaning of Sch. E, s. 156 (1) or (2), of the Income Tax Act, 1952, or whether these activities were merely one of the engagements entered into by the doctor in the course of the practice of his profession. This is not a matter patient of much discussion. The commissioners and the judge below agreed that this is an office, and I too agree. It cannot in my judgment properly be described as merely an engagement, as were the various activities of Miss Lilian Braithwaite in the course of the exercise of her profession as an actress, illustrated in *Davies* v. *Braithwaite* (17). The appointment of a consulting radiologist by the agent of the Minister of Health in pursuance of his duty of maintaining a National Health Service (see National Health Service Act, 1946, s. 12 (1)) is plainly, in my judgment, the constitution of an office and the appointment of an officer to hold it. An office is a position or post which goes on without regard to the identity of the holder of it from time to time, as was said, in effect, by Rowlatt, J., in *Great Western Ry. Co.* v. *Bater* (18), and approved by Lord Atkin in *McMillan* v. *Guest* (19). Coming to this conclusion, I need not consider whether this is not also an employment within

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(15) [1938] 1 All E.R. at p. 785; 21 Tax Cas. at p. 524.
(16) [1936] 2 All E.R. at p. 132; 21 Tax Cas. at p. 486.
(17) [1931] All E.R. Rep. 792; 18 Tax Cas. 198.
(18) [1920] 3 K.B. at p. 274; 8 Tax Cas. at p. 235.
(19) [1942] 1 All E.R. 606; 24 Tax Cas. 190.

A Sch. E, nor whether the office is a public one. I should incline to answer both these questions in the affirmative if necessary.

It seems to me to follow inevitably—and, though the commissioners thought otherwise, it was accepted by the learned judge, and not contested here—that the emoluments of the office come into charge to tax under Sch. E. So also, in my judgment, do the doctor's activities in the sphere of domiciliary visits to B patients by arrangement with general practitioners in the area covered by the office. These seem to me on the facts stated to be perquisites of the office. It is true that they arise out of a separate agreement, and that the taxpayer need not assume the obligation to make such visits even though he holds the office, but the opportunity to make the contract is offered to him as being the consultant radiologist in the area, and profits from it are, it seems to C me, perquisites of the office.

The second point was not, as I understand it, discussed at great length before the learned judge, who dealt with it in one sentence (20), concluding in accordance with the decision in *Fry* v. *Salisbury House Estate, Ltd.* (21) that the Schedules were exclusive and that therefore the expenses incurred by the taxpayer must be divided and attributed in part to one set of activities—viz., the treatment of D private patients—and in part to the other—the performance of the duties of his office. This, in my judgment, brushes aside with too little attention the special feature of this case—viz., the finding by the commissioners in these words in para. 7 (2) of the Case Stated [in the case of Dr. Ross]:

> "His private practice which he commenced on Mar. 1, 1950, was carried on at an address in Rugby which was also his home, and as a necessary part E of the exercise of that profession he had accepted and still held part-time appointments as consultant radiologist to each of several hospitals";

and this conclusion at the end of para. 7 (4):

> "We also find that at all material times [the taxpayer] exercised the profession of consultant radiologist, his part-time hospital appointments F being a necessary part of the exercise of that profession and merely incidental thereto, notwithstanding that a great deal of his time was thereby taken up."

I do not think that these are conclusions of fact so as to be binding on the court, but they are in my judgment conclusions of mixed fact and law dependent on the testimony of witnesses whom the commissioners heard and we have not; nor have we any note of it, and I do not think that these conclusions can possibly G be disregarded. It follows that the taxpayer did not carry on two professions, nor engage in two sets of activities, but one. Whether he was attending his National Health patients or his paying patients, he was following the same vocation, the practice of a radiologist. It is true that in order to succeed in this profession he found himself, professionally speaking, obliged to serve part-time as an officer of the National Health Service. We have concluded that he H thus brought himself within Sch. E.

Now this is an historical accident. Until 1922 tax was levied under Sch. D on the annual profits accruing to any person residing in the United Kingdom from any trade, profession, employment or vocation (see the Income Tax Act, 1918, Sch. D (1) (A) (ii)). Under Sch. E were taxed "every public office or employment of profit" (see the Income Tax Act, 1918, Sch. E). Under this I latter Schedule, the tax was paid by deduction and it was used, because it was convenient, for many cases which did not fall within the Schedule at all. The House of Lords in *Great Western Ry. Co.* v. *Bater* (22) pointed this out. Bater was a ticket clerk on the Great Western Railway, certainly not holding a public office, nor indeed an office at all. One of their Lordships remarked that he did not hold an office but merely sat in one. This decision was an administrative inconvenience, and the law was altered by the Finance Act, 1922, s. 18, whereby profits accruing from an office or employment under the Act of 1918 chargeable under Sch. D ceased to be chargeable under that Schedule and were made chargeable under Sch. E; and the section adds these words: " the rules applicable to that Schedule shall apply accordingly".

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(20) [1959] 3 All E.R. at p. 349.
(21) [1930] All E.R. Rep. 539; 15 Tax Cas. 266.
(22) [1922] 2 A.C. 1; 8 Tax Cas. 231.

Now it is notorious—and is, indeed, a long-standing injustice—that the taxpayer's allowances under Sch. E are on an altogether more niggardly and restricted scale than under Sch. D. Indeed, it has been said that the pleasure of life depends nowadays on the Schedule under which a man lives. When you turn to the Act of 1952, you will accordingly find in s. 122 included under Sch. D profits arising from any profession, employment or vocation, with the proviso that profits accruing from an office or employment shall not be chargeable under the Schedule (with exceptions here immaterial). Section 137, as inverted in accordance with the true interpretation of it, allows the deduction of disbursements or expenses wholly and exclusively laid out for the purposes of the trade, profession or vocation. Under s. 156, para. 2, Sch. E is to include tax in respect of any office or employment the profit accruing from which would be chargeable to tax under Sch. D but for the proviso to para. 1 of that Schedule. For the expenses which may be deducted under this Schedule one must turn to Sch. 9 to the Act of 1952, para. 7, which limits the deductions to expenses incurred (a) in travelling, (b) in keeping a horse, or (c) any expenses wholly, exclusively and necessarily laid out in the performance of the duties of the office.

It is the object of the Crown, therefore, to split the doctor in two and to treat him as if he was in the enjoyment of two sorts of profit, one arising under Sch. D and one under Sch. E, to oblige him to make two returns, and to attribute to each activity the expenses exclusively incurred in the course of it. The result will be that such of the expenses as fall under a Sch. E activity will be disallowed unless they are necessary, whereas of the expenses attributed to the Sch. D activity expenses in fact incurred " for the purposes of the profession " may be deducted. This, as it seems to me, is a conclusion contrary to common sense and to the facts. As I have earlier said, the taxpayer must be taken to have been carrying on one profession of which the services to the National Health Scheme are part. I do not think that he has two sources of profit. All his income is the result of the practice of his profession. There must be many occasions when it cannot be said which activity is being pursued, and when the proposed division of activities cannot be made except on a purely arbitrary basis. Many absurd results follow. For instance, a general practitioner is taxed under Sch. D (Case Stated, para. 3, 45) notwithstanding the fact that he has entered into a contract with the agent of the Minister, here the executive council (Case Stated, para. 3, 40). When he calls in a consultant, both will attend the patient, but the expenses attendant on each will rank under different Schedules though both are doing the same work.

In my judgment, the taxpayer's accounts in this case can properly be made up only by setting all the professional remuneration on one side and all the expenses incurred " for the purpose of the profession " on the other, as shown in exhibit C. Having done this, the proviso to s. 122 obliges you to take out of the account the profits or gains accruing from the office. In my judgment you must, when transferring these to Sch. E, make such deductions as that Schedule allows. You will then have the taxable sum under Sch. E. To ascertain the taxable sum under Sch. D, you will deduct from the professional receipts which remain the expenses incurred for the purpose of the whole profession after deducting such (if any there be) as have already been allowed against the Sch. E total as having been necessarily expended on a horse or what-not. This seems to me to be the best that can be done. It is said that this does violence to the policy of the Act because expenses appropriate to the Sch. D activity should be deducted from the Sch. D profits. I agree that this would be what one might expect to find, but I cannot find it stated in the Act.

The learned judge considered that *Fry* v. *Salisbury House Estate, Ltd.* (23) obliged him to treat the two Schedules as mutually exclusive, but it has been pointed out to us that this is not by any means always so, notably in *Hughes* v. *Bank of New Zealand* (24), where profits which would have been chargeable under Sch. C were excluded because they were exempt from tax and so taken out of the credit side of the account, but expenses incurred in the making of those profits were nevertheless held properly to remain on the debit side. LORD THANKERTON forcibly pointed out that an expense was nevertheless a proper charge although profits did not accrue from it. This seems to me a good analogy for the method of assessing the tax here which I have above proposed.

I add that this result will only follow in the special and peculiar situation resulting from what I have called the special findings of the commissioners—viz., that only one profession is being followed and that the office is held merely as an incident of it and because without it the whole profession cannot in practice be carried on. I would therefore allow the appeal on this point.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Hempsons* (for the taxpayers); *Solicitor of Inland Revenue.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

MESURE *v.* MESURE (by her Guardian).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lloyd-Jones, J.), March 28, April 1, 1960.]

Divorce—Insanity—Incurable unsoundness of mind—Care and treatment for five years—Absence from mental hospital for more than twenty-eight days to undergo treatment for tuberculosis in sanatorium—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 1 (1) (*d*)*—Divorce* (*Insanity and Desertion*) *Act,* 1958 (6 *&* 7 *Eliz.* 2 *c.* 54), *s.* 1 (1) (*a*).

In November, 1952, the wife was admitted as a voluntary patient to a mental hospital. She remained there until May, 1955, when she was admitted to a sanatorium for treatment for pulmonary tuberculosis. The sanatorium was used solely for the reception and treatment of tuberculosis patients. She ceased to be a patient of the mental hospital and was no longer " on the books " of that hospital. She remained in the sanatorium for eleven weeks, when her mental condition having deteriorated, she was re-admitted to the same mental hospital. She had remained there ever since. On June 15, 1959, her husband presented a petition for divorce under s. 1 (1) (d)* of the Matrimonial Causes Act, 1950, on the ground that she was incurably of unsound mind and had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. Under s. 1 (1) (a)† of the Divorce (Insanity and Desertion) Act, 1958, a person was deemed to be under care and treatment at any time while receiving treatment for mental illness in any hospital or institution provided or approved etc. as therein mentioned.

Held: (i) it had not been established that the wife had been incurably of unsound mind or had been continuously under care and treatment for a period of five years immediately preceding the presentation of the petition, because at the date of the wife's admission to the sanatorium it was on the evidence an open question whether she was incurably of unsound mind, A and because during the period of eleven weeks while she was at the sanatorium she was not receiving mental treatment; accordingly a decree nisi would not be granted.

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(23) [1930] All E.R. Rep. 539; 15 Tax Cas. 266.

(24) [1938] 1 All E.R. 778; 21 Tax Cas. 472.

* The terms of s. 1 (1) (d) are printed at p. 236, letter C, post.

† The relevant terms of s. 1 (1) of the Divorce (Insanity and Desertion) Act, 1958, are printed at p. 236, letter E, post.

Swymer v. *Swymer* ([1954] 3 All E.R. 502) distinguished on the facts.

(ii) on the true construction of s. 1 (1) of the Divorce (Insanity and Desertion) Act, 1958, the type of institution referred to in s. 1 (1) (a) was an B institution provided for the purpose of giving mental treatment; the sanatorium, therefore, was not an institution to which s. 1 (1) (a) referred, and for this reason also the wife's period of treatment in it did not rank as a period of care and treatment for the purposes of s. 1 (1) (d) of the Act of 1950 (see p. 237, letter G, post).

[As to divorce for incurable unsoundness of mind, see 12 HALSBURY'S LAWS C (3rd Edn.) 278-280, paras. 536-538 and SUPPLEMENT; and for cases on the subject, see 27 DIGEST (Repl.) 369-371, *3057-3059*, *3063-3068* and 3rd DIGEST Supp.

For the Matrimonial Causes Act, 1950, s. 1, see 29 HALSBURY'S STATUTES (2nd Edn.) 389; and for the Divorce (Insanity and Desertion) Act, 1958, s. 1, D see 38 HALSBURY'S STATUTES (2nd Edn.) 484.]

Cases referred to:

Swymer v. *Swymer*, [1954] 3 All E.R. 502; [1955] P. 11; [1954] 3 W.L.R. 803; 3rd Digest Supp.

Whysall v. *Whysall*, [1959] 3 All E.R. 389; [1959] 3 W.L.R. 592.

Petition. E

By petition dated June 16, 1959, the husband, Robert Charles Mesure, petitioned for the dissolution of his marriage, solemnised on July 31, 1948, to the respondent, Mary Louisa Mesure, on the ground (Matrimonial Causes Act, 1950, s. 1 (1) (d)) that she was incurably of unsound mind and had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. There were two children of the F marriage, both girls, who lived with the husband. The wife filed an answer on Oct. 21, 1959, by the Official Solicitor as guardian ad litem, denying that she was incurably of unsound mind and that she had been continuously under care and treatment as alleged. The facts appear in the judgment.

G. H. Crispin for the husband.

Bruce Holroyd Pearce and *N. A. Medawar* for the Official Solicitor, as guardian G ad litem for the wife.

Cur. adv. vult.

Apr. 1. **LLOYD-JONES, J.**, gave the following judgment: By a petition dated June 16, 1959, the husband, Robert Charles Mesure, seeks a dissolution of his marriage to the wife on the ground that the wife is incurably of unsound H mind, having been continuously under care and treatment for mental illness at St. Ebba's Hospital, Epsom, in the county of Surrey, from November, 1952, to the date of the petition, save for the period during the summer of 1955 when she was transferred to Cheam Sanatorium for the treatment of pulmonary tuberculosis.

The material facts are that after treatment at various hospitals for pulmonary I tuberculosis the wife was admitted to St. Ebba's Hospital on Nov. 18, 1952. St. Ebba's, on the evidence, is a hospital provided by the Minister of Health for the care and treatment of mental illness. Dr. Batt, who has been attached to that hospital since 1936, and in the last four years has been its physician superintendent, has known and attended to the wife since her first admission. The wife, according to Dr. Batt, was treated with insulin and various drugs, including Largactil, down to January, 1955, without any satisfactory result. On Jan. 22, 1955, a bilateral rostral leucotomy was performed on her which resulted in a marked improvement. Dr. Batt was not able to produce any record of any further treatment by insulin or drugs or operation after January and before May 12, 1955. On that date the wife was admitted to the Cheam Sanatorium, Surrey, for special treatment for her pulmonary tuberculosis; but it appears that occupational therapy in the form of handicrafts was continued as part of the care and treatment down to the date of her transfer to the Cheam Sanatorium. According to Dr. Batt, the wife discharged herself under medical direction from St. Ebba's Hospital, it being in his opinion essential that she should take this step as a preliminary to her being transferred to the Cheam Sanatorium. Whether his opinion was well founded in law or not was in issue; but the undoubted fact is that she ceased to remain as a patient at St. Ebba's and was no longer, to use an expression taken from *Swymer* v. *Swymer* (1), " on the books of " that hospital. The only document which accompanied her on her admission to the Cheam Sanatorium was a letter dated May 11, 1955, signed by a Dr. Irwin (whom I was told was a physician on the staff of St. Ebba's) which gave an outline of the wife's medical history since the date of her admission to that hospital. The letter deals primarily with the history of the patient's tuberculosis; but it contains incidental references to her mental state and the treatment given in relation to it and the results achieved.

The wife's guardian ad litem called as a witness a Dr. Hanneson, who has been the superintendent at Cheam since 1946, who personally remembered the admission of the wife to his hospital on May 12, 1955, and was able to state that, apart from Dr. Irwin's letter there were no other documents or reports or notes concerning the wife transmitted to Cheam Sanatorium. There were no directions in regard to treatment of her mental condition and no requests for reports, nor were any in fact made to St. Ebba's concerning her. Dr. Hanneson testified that the Cheam Sanatorium is a hospital provided by the Minister of Health for the treatment exclusively of pulmonary tuberculosis and had no means or equipment for the treatment of mental illness. At the Cheam Sanatorium the wife received routine treatment for pulmonary tuberculosis only. A normal part of that routine treatment of pulmonary tuberculosis is occupational therapy by means of handicrafts; and in this respect the wife in fact continued to occupy herself in the same way as she had been in the habit of doing at St. Ebba's before her discharge from there and her transfer to Cheam Sanatorium. Dr. Hanneson made it plain that she, like all other patients at the sanatorium undergoing treatment for pulmonary tuberculosis, would have been required in any event to undertake this form of occupational therapy, and that her having done so at Cheam was in no way related to treatment for mental illness or other than to her tubercular condition. According to Dr. Hanneson there was a sudden deterioration in the wife's mental condition in July, 1955, which caused him on his own initiative to get into communication with St. Ebba's; and in fact the wife was readmitted to St. Ebba's as a voluntary patient on July 18, 1955. Dr. Batt, the only medical witness called for the husband, was unable to give any reason of his own knowledge for the readmission of the wife to his hospital.

It would appear to be plain from the letter dated May 11, 1955, from Dr. Irwin, which accompanied the wife on her transfer to the sanatorium, that the wife had made marked progress in her recovery of mental health at that stage, and it is in my view implicit in the terms of that letter that she was regarded as a person who might, after treatment at the sanatorium, in due course have returned to her home, and certainly as one who would not automatically or inevitably have returned to St. Ebba's. On the contrary, however, Dr. Batt, while not able to speak directly to her mental condition on her readmission, stated that she had remained, and was still two days before the hearing of this suit, a person who would not be able to look after her children or completely manage her own affairs or look after herself; and that in spite of the beneficial effect of treatment no further improvement was to be expected and there was no real chance of her being able to resume her duties as a wife and mother in the normal way. In his view she was now, according to the statute, and on the authority of the decision of PHILLIMORE, J., in *Whysall* v. *Whysall* (2) a person of incurably unsound mind.

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(1) [1954] 3 All E.R. 502 at p. 504; [1955] P. 11 at p. 17.

It is common ground that under the provisions of s. 1 (1) (d) of the Matrimonial Causes Act, 1950, unless there was a certification at the commencement of the period of five years provided by that subsection, the subsection had no application. It is further common ground that by s. 1 of the Divorce (Insanity and Desertion) Act, 1958, an amending Act, the requisite of initial certification is no longer necessary, and it is now sufficient to prove that the wife was a voluntary patient at such an institution as is referred to in s. 1 (1) (a) of the Act of 1958. I ought to read the provisions of the Matrimonial Causes Act, 1950, and of the Act of 1958 which are relevant. Section 1 (1) of the Matrimonial Causes Act, 1950, reads:

> " Subject to the provisions of the next following section, a petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent . . . (d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition . . ."

Section 1 (2) proceeds to give further indications of what conditions must be satisfied for the purposes of a person of unsound mind being deemed to be under care and treatment, but I do not think that, for present purposes, I need read any further parts of that subsection. The Divorce (Insanity and Desertion) Act, 1958, s. 1 (1), so far as relevant, reads as follows:

> " Notwithstanding anything in s. 1 (2) of the Matrimonial Causes Act, 1950 . . . a person shall be deemed to be under care and treatment for the purposes of the said s. 1 . . . at any time when he is receiving treatment for mental illness—(a) as a resident in a hospital or other institution provided, approved, licensed, registered or exempted from registration by any Minister or other authority in the United Kingdom, the Isle of Man or the Channel Islands; or (b) as a resident in a hospital or other institution in any other country, being a hospital or institution in which his treatment is comparable with the treatment provided in any such hospital or institution as is mentioned in para. (a) of this subsection."

Section 1 (3) reads:

> " In determining for the purposes of the said s. 1 . . . whether any period of care and treatment has been continuous, any interruption of such a period for twenty-eight days or less shall be disregarded."

Counsel for the wife submitted (i) that the husband had not succeeded in establishing that the wife was incurably of unsound mind during the material five years referred to in the Act of 1950; (ii) that in any event the wife had not been under continuous care and treatment for the period of five years provided by s. 1 (1) (d) of the Matrimonial Causes Act, 1950, since the period of eleven weeks at the Cheam Sanatorium had interrupted the continuity for more than the period of twenty-eight days which is provided for by s. 1 (3) of the Act of 1958 (that is the period of twenty-eight days which according to the statute is to be disregarded); (iii) that in order to bring a case within s. 1 (1) of the Act of 1958 it was necessary as a matter of construction, and in order to make sense of s. 1 (1) (a), that the hospital envisaged should be one provided for the purpose of the treatment of mental illness and that such words must be read into s. 1 (1) (a) of that Act, and that on the evidence the Cheam Sanatorium was not such a hospital. It was urged that the language of s. 1 (1) (b) supported and confirmed this as the proper construction of s. 1 (1) (a). The importance of this submission is that it is said that the widening of the provision by the amending Act of 1958 of s. 1 (2) of the Act of 1950, so as to make treatment as a voluntary patient a

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(2) [1959] 3 All E.R. 389.

A sufficient commencement of the statutory five-year period, still makes it necessary that the treatment for mental illness should be given to a person who is resident at a hospital which is in fact provided specifically for such a service.

In my judgment it is so much open to question whether at the date of her transfer to Cheam the wife could or would have been found to be incurably of unsound mind, that, I think, for this reason alone the husband has not estab-B lished his case. In the absence of any other evidence I think that the letter signed by Dr. Irwin is at least equally consistent with the view that the patient was, subject to treatment for her tubercular condition, fit to return to normal life as with the contrary view. Indeed, I can see no purpose in the literal citation of the chest physician's opinion at the end of that letter unless it was intended to convey the view that the only remaining problem was where the patient should C go for convalescence after treatment for that condition. In this context it is significant that Dr. Hanneson contemplated that the wife might have stayed on at Cheam for a possible further two or three months had it not been for the sudden deterioration in her mental condition.

If I should be wrong in this view I must state my agreement with the submission that the wife, for a period of eleven weeks while at the Cheam Sanatorium, D was not receiving treatment for her mental condition or mental illness; and I do not think that the coincidence that treatment for pulmonary tuberculosis and for mental illness both include occupational therapy is a sufficient reason for holding that she was receiving treatment for mental illness at the Cheam Sanatorium. There was, therefore, an interruption of considerably more than the twenty-eight days in her treatment for mental illness. She was transferred purely E for treatment of a tubercular condition; she was discharged and no longer " on the books " of St. Ebba's; she might, as I understand the evidence, never have returned there; and in these circumstances her case is wholly distinguishable in my judgment from *Swymer* v. *Swymer* (3) to which I have already made allusion. I have the judgments in that case well in mind and I fully appreciate the injunction that the term " continuous " is not to be interpreted narrowly F or strictly. The ratio decidendi of that case is none the less in my view based on the fact that the wife in that case remained on the register of the Bexley Mental Hospital or, to use the more popular expression, " on its books "; and that hospital continued to require and to receive reports concerning the wife in that case. There is no such evidence, but indeed the contrary, in the present case.

Finally I must express my agreement with the submission that a proper G construction of s. 1 (1) (a) of the Act of 1958 requires that the voluntary patient should be receiving treatment for mental illness as a resident in a hospital or other institution of the kind referred to in that subsection, and therefore a hospital or institution provided for the purpose of giving mental treatment. In my view the reliance in support of this construction placed on s. 1 (1) (b) is fully warranted and it is only in this way that a proper meaning can be given to this amending H section.

For the husband it was contended that it was not necessary to construe s. 1 (1) (a) by reference to s. 1 (1) (b); and that residence at any hospital that fell within the limits of s. 1 (1) (a) was sufficient. It was further contended that as the wife in fact received treatment in the form of occupational therapy which she had previously received at St. Ebba's, such treatment, though not prescribed I or designed as treatment for mental illness, was none the less in fact treatment for mental illness. For the reasons I have already indicated I am unable to accept these submissions; and the prayer in the petition is accordingly rejected.

Petition dismissed.

Solicitors: *Culross & Co.* (for the husband); *Official Solicitor.*

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(3) [1954] 3 All E.R. 502; [1955] P. 11.

PRACTICE NOTE.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

Divorce—Petition—Residence of petitioner—Omission of statement of residence—Form of registrar's order—Notice to respondent of allegations in affidavit if not referable to any specific allegations in petition—Matrimonial Causes Rules, 1957 (*S.I.* 1957 *No.* 619), *r.* 4 (1) (*d*).

Where a registrar orders, under r. 4 (1) (d)*, that the residence of a petitioner be omitted from the petition the registrar's order will contain, in addition to the directions specified in the Practice Note dated Mar. 5, 1957†, a direction that the petitioner's solicitors shall, on the request of the respondent's solicitors (or the respondent if he is acting in person), give notice in writing to him of any allegations contained in the affidavit in support of the application which are not referable to any specific allegations in the petition.

B. LONG,
Senior Registrar.

Apr. 27, 1960.

PRACTICE NOTE.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

Magistrates—Husband and wife—Maintenance order—Registered order—Variation—Appeal—High Court procedure—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 19 *to s.* 27—*Maintenance Orders Act,* 1958 (6 *&* 7 *Eliz.* 2 *c.* 39)—*R.S.C., Ord.* 41D, *r.* 3 (3).

Divorce—Maintenance—Order registered in magistrates' court—Variation—Appeal—High Court procedure.

An appeal made under Ord. 41D, r. 3 (3)‡, of the Rules of the Supreme Court to a judge of the Probate, Divorce and Admiralty Division from an order of a magistrates' court varying or refusing to vary an order of the High Court made under s. 19 to s. 27 of the Matrimonial Causes Act, 1950§, and registered in the magistrates' court under the Maintenance Orders Act, 1958¶, shall be by summons to a judge, in chambers in the first instance, issued within fourteen days of the order appealed from.

The summons shall set out the terms of the magistrates' court order, the terms of the order asked for and the grounds of the appeal.

The appeal shall not, unless otherwise ordered, act as a stay of the order appealed from.

B. LONG,
Senior Registrar.

Apr. 27, 1960.

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* Rule 4 (1) (d) of the Matrimonial Causes Rules, 1957; 10 HALSBURY'S STATUTORY INSTRUMENTS (First Re-issue) 220.

† See *Practice Notes*, [1957] 1 All E.R. 860.

‡ For R.S.C., Ord. 41D, r. 3 (3), see the ANNUAL PRACTICE, 1960, p. 987.

§ For the Matrimonial Causes Act, 1950, s. 19 to s. 27, see 29 HALSBURY'S STATUTES (2nd Edn.) 407 to 414.

¶ See, as to variation, s. 4 of the Maintenance Orders Act, 1958; 38 HALSBURY'S STATUTES (2nd Edn.) 458. As to what orders may be registered, see ibid., s. 1 and s. 21 (1) (definition of "maintenance order"), 38 HALSBURY'S STATUTES (2nd Edn.) 454, 473.

A SHINDLER v. NORTHERN RAINCOAT CO., LTD.

[MANCHESTER ASSIZES (Diplock, J.), March 9, 10, 11, 1960.]

Company—Director—Managing director—Contract appointing managing director for term of ten years—Article 68 of Companies Act, 1929 (19 & 20 Geo. 5 c. 23), Sch. 1, Table A, included in company's articles—Resolution of B *company removing managing director from directorship and terminating contract—Whether breach of contract—Damages.*

Damages—Mitigation—Wrongful dismissal—Director—Managing director of subsidiary company—Control of subsidiary company acquired by another company—Offers of employment made by former parent company, both before and after wrongful dismissal—Whether duty of plaintiff to accept C *such offers of other employment.*

From 1946 until April, 1953, the plaintiff carried on business as a retailer in raincoats through the defendant company, which was incorporated in 1946 under the Companies Act, 1929, and which included among its articles of association art. 68* of Table A of the Act of 1929, relating to managing directors. In 1953 the plaintiff and his wife sold their shares in the company D to a large public company, the L. company, for £21,000, and, by an agreement dated Apr. 8, 1953, the plaintiff was appointed managing director of the defendant company for ten years from that date at a salary of £3,000 a year and certain commission on the profits of the defendant company. On Aug. 12, 1958, the L. company accepted an offer of £65,000 from the M. company for the shares of the defendant company. The M. company did not E wish to retain the services of the plaintiff and on Aug. 14, before the L. company accepted the offer, S., the treasurer of the L. company, informed the plaintiff of the offer and told him that, if the deal went through, his contract with the defendant company would be terminated at a date not later than Nov. 30, 1958, and that after it was terminated the L. company wanted to employ the plaintiff on a ten year agreement with the same salary as that F which he had received from the defendant company. The plaintiff at first inclined towards accepting the offer, but there was no concluded agreement as to what post he would be given. On the following day, however, he asked for a share of the profits on the deal between the L. company and the M. company; this led to a stormy interview between the plaintiff and the treasurer and accountant of the L. company at which the request was refused. G In September, he rejected a draft service agreement offering him the post of shops controller with the L. company, but, later in the month, he stated that he was not unwilling to consider another post offered to him by the L. company, provided that his acceptance of the post did not in any way prejudice his claims arising out of the breach of his contract. The proviso was refused. At an extraordinary general meeting of the defendant company held on H Nov. 21, 1958, resolutions were passed removing the plaintiff from his office as a director and terminating forthwith the service agreement of Apr. 8, 1953, if and so far as it might still be subsisting. On Dec. 12, 1958, the plaintiff commenced an action against the defendant company for damages for wrongful dismissal. In February, and March, 1959, the L. company again offered him a post at a salary of £3,000 a year, but he refused the offer.

I **Held:** (i) the plaintiff was wrongfully dismissed, because it was an implied term of the plaintiff's service agreement of Apr. 8, 1953, with the defendant company that it would not remove him from his office as a director and would not pass a resolution terminating his post as managing director.

Southern Foundries (1926), Ltd. v. Shirlaw [1940] 2 All E.R. 445 and dictum of COCKBURN, C.J., in *Stirling v. Maitland* (1864), 5 B. & S. at p. 852 applied.

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* The terms of art. 68 are printed at p. 243, letter I, post.

Decision of HARMAN, J., in *Read* v. *Astoria Garage (Streatham), Ltd.* ([1952] 1 All E.R. 922) not followed.

(ii) as regards damages—

(a) although the plaintiff had the option in September, 1958, of accepting a repudiation as breach of his contract of service, he had elected to continue as managing director; there was, therefore, no breach of his contract until his office as director was terminated on Nov. 21, 1958, and at the times when offers of employment had been made before then the plaintiff had been under no duty in law to mitigate his damages by accepting them.

(b) moreover, since the offer of employment in September, 1958, was in fact made on terms that he abandoned any legal rights which he might have against the defendant company for breach of contract, it was not one that he could reasonably be required to accept.

(c) in the circumstances subsisting when the offers of February and March, 1959, were made and though they were in fact genuine offers it was not unreasonable for the plaintiff to have rejected them.

[As to managing directors, see 6 HALSBURY'S LAWS (3rd Edn.) 297, para. 601; and for cases on the subject, see 9 DIGEST (Repl.) 556-558, *3685-3690*.

As to duty of plaintiff to mitigate loss, see 11 HALSBURY'S LAWS (3rd Edn.) 289, para. 476; and for cases on the subject, see 17 DIGEST (Repl.) 108-111, *224-247*.]

Cases referred to:

Bluett v. *Stutchbury's, Ltd.*, (1908), 24 T.L.R. 469; 9 Digest (Repl.) 557, *3686*.

British Transport Commission v. *Gourley*, [1955] 3 All E.R. 796; [1956] A.C. 185; [1956] 2 W.L.R. 41; 3rd Digest Supp.

Nelson v. *Nelson (James) & Sons, Ltd.*, [1914] 2 K.B. 770; 83 L.J.K.B. 823; 110 L.T. 888; 9 Digest (Repl.) 557, *3688*.

Read v. *Astoria Garage (Streatham), Ltd.*, [1952] 1 All E.R. 922; *aff'd.*, C.A., [1952] 2 All E.R. 292; [1952] Ch. 637; 9 Digest (Repl.) 558, *3690*.

Southern Foundries (1926), Ltd. v. *Shirlaw*, [1940] 2 All E.R. 445; [1940] A.C. 701; 109 L.J.K.B. 461; 164 L.T. 251; 9 Digest (Repl.) 557, *3689*.

Stirling v. *Maitland*, (1864), 5 B. & S. 841; 34 L.J.Q.B. 1; 11 L.T. 337; 29 J.P. 115; 122 E.R. 1043; 12 Digest (Repl.) 693, *5322*.

Action.

The plaintiff, Israel Shindler, brought this action against the defendant company, Northern Raincoat Co., Ltd., for damages for wrongful dismissal from his employment as managing director of the company for a term of ten years from Apr. 8, 1958, under a written agreement of that date. Under the terms of the agreement the plaintiff was employed at a salary of £3,000 a year, plus ten per cent. commission on the profits of the business over the sum of £15,000 a year.

From 1946 until Apr. 8, 1958, the plaintiff had carried on the business of a retailer in rainwear through the defendant company, which was formed in 1946 under the Companies Act, 1929. Article 68 of Table A of the Act of 1929, dealing with managing directors, was incorporated in the defendant company's articles of association. In 1957 the defendant company had twenty-two shops. After negotiations during the latter half of 1957 between the plaintiff and Loyds Retailers, Ltd. (referred to hereinafter as "Loyds"), a large public company having about 130 shops and a mail-order business, it was agreed that Loyds should purchase for £25,000 the £2,000 share capital of the defendant company held by the plaintiff and his wife and that the defendant company would enter into a service agreement with the plaintiff, who was to be managing director of the company. The relevant terms of the service agreement of Apr. 8, 1958, were as follows:

> "1. The company shall employ the managing director and the managing director shall serve the company as managing director for ten years from Apr. 8, 1958.

> "2. The managing director shall exercise and perform such powers and duties as the board of directors of the company shall from time to time determine and subject to any directions and restrictions from time to time given and imposed by them shall have the general control of the business of the company with power to appoint and dismiss clerks and servants of the company and subject as aforesaid to do and perform all acts and things which in the ordinary course of business he may consider necessary or proper in the interests of the company.
>
> "3. The managing director shall devote his full time and attention to the business of the company and shall do all in his power to promote develop and extend the business of the company.
>
> "4. The managing director shall be entitled to the following remuneration and payments namely: (a) A fixed salary of £3,000 per annum . . . (b) Travelling and incidental expenses properly incurred by him in and about the company's business and in carrying out his duties under and by virtue of this agreement. (c) A commission of ten per cent. on the audited net profits of the company before tax over the sum of £15,000 per annum."

Clause 5 provided that the company should provide the plaintiff with a car. Clause 8 was as follows:

> "The managing director's employment hereunder may be determined upon the happening of the following events that is to say if the managing director shall be adjudicated bankrupt or be guilty of any gross default or misconduct or breach of any of the stipulations herein contained."

From April until August, 1958, the business of the defendant company was carried on by the plaintiff under the directions and the control of Loyds exercised through Mr. Amelan, the managing director of Loyds, and Mr. Symons, the treasurer and accountant of Loyds. They regarded the plaintiff as having a flair for the retail trade, opening shops, engaging employees and the like, and the control which they exercised was largely on the policy and the financial side. In August, 1958, while the plaintiff was on holiday, Loyds received an offer for the shares in the defendant company from J. Mandleberg & Co. (Holdings), Ltd. (referred to hereinafter as Mandleberg). Mandleberg were prepared to offer £65,000 for the shares, but did not require the plaintiff's services. Loyds, on the other hand, wished to retain the plaintiff's services. On Aug. 18, 1958, Mr. Symons informed the plaintiff of Mandleberg's offer for the shares of the defendant company and made it quite plain to the plaintiff that, if the deal went through, the plaintiff's contract with the defendant company would be terminated not later than Nov. 30, 1958, although he would be required to assist in the hand-over in the immediate future. Mr. Symons also told the plaintiff that, on the termination of the plaintiff's agreement with the defendant company, Loyds would be prepared to employ the plaintiff on a ten-year agreement at £3,000 a year, with a car and expenses, as in his previous agreement. The plaintiff at this stage was quite willing to fit in with a proposal of this kind, but there was no concluded agreement as to the particular post which the plaintiff would be given. That was to be left for further discussion, but, on that date, both the plaintiff and Mr. Symons had little doubt that the negotiations between them in regard to the plaintiff's future employment would result in an agreement satisfactory to them both.

On the afternoon of the same day, the plaintiff saw the managing director of Mandleberg and told him that he (the plaintiff) would be joining Loyds when Mandleberg were ready to release him from his service agreement with the defendant company. On the same day the agreement between Loyds and Mandleberg was concluded. In the afternoon of Aug. 19, the plaintiff, at his own request, had another interview with Mr. Symons, with the object of obtaining a share of the profits on the deal between Loyds and Mandleberg. The interview was a stormy one, Mr. Symons accused the plaintiff of blackmail, and they parted on bad terms, although they had both calmed down by the end of the interview. On Aug. 20 the plaintiff's solicitors wrote a letter to Loyds' solicitors, saying:

> "Yesterday, [the plaintiff] spoke to Mr. Symons and asked him what suggestion Mr. Symons had to make to compensate him for the loss and damage which would fall on [the plaintiff] on the termination of his agreement. On behalf of [the plaintiff], we shall be obliged if you would please elucidate the present position. Will you please inform us when [the plaintiff's] employment with the [defendant company] is to terminate and perhaps, at the same time, you will be good enough to let us know what proposals you care to put forward for the compensation of our client for the breach of the agreement."

A reply to that letter was sent on Aug. 22 and it contained Mr. Symons' account of what occurred at the interview of Aug. 18:

> "... Mr. Symons told [the plaintiff] that, as [the plaintiff] was aware, the Loyds group of companies controlled about 130 shops retailing furniture and television, etc., on credit terms and that [the plaintiff's] services would be required by the parent company—co-operating with Mr. Symons and Mr. Hutchin (the general manager of the shops group) in improving and extending that branch of the business. His position would be that of a top class executive and he would receive a salary of £3,000 per annum, plus expenses, plus the use of a car, on a ten-year service contract with Loyds. [The plaintiff] was also reminded of the other business of the companies on its mail order side and credit business in connexion with which businesses his co-operation at top level would be welcomed. After a two hour full and amicable discussion, [the plaintiff] agreed wholeheartedly to accept a position with the parent company in which his prospects as regards earning power and position would be greater than he could ever have attained with the subsidiary ... You ask us to elucidate the present position. It is quite simple. [The plaintiff] is still employed by [the defendant company] under the terms of his contract. The offers made to [the plaintiff] by Mr. Symons on behalf of the parent company still stand namely: (a) A ten year contract on the catalogue side of the Loyds group at a salary of £3,000 per annum plus expenses plus car, *or* (b) A like contract on the shops side of the group, *or* (c) A like contract on the credit trading side. [The plaintiff] has been informed of the possibility of the establishment of a clothing shops group of which he would be in charge. Having regard to these alternative suggestions made on behalf of the parent company to an officer of the subsidiary company, we fail to see what compensation your client is purporting to claim."

Neither that letter nor any subsequent letter referred to a concluded agreement. On Aug. 25, the plaintiff's solicitors wrote again saying:

> "We do not agree that any of the three alternatives which you put forward are adequate substitutes, from [the plaintiff's] point of view, for the agreement which he holds with [the defendant company]. The two vital differences are: (a) The question of status, and, (b) The share of profits to which our client is entitled. So far as (a) is concerned, [the plaintiff] is at present the managing director of the business which he has built up as a result of his own efforts over a number of years. The alternatives which you suggest would make him merely one amongst a number of employees in a comparatively large public company."

On or about Sept. 10, a draft service agreement, between Loyds and the plaintiff, was sent to the plaintiff, offering him the post of shops controller. It was thereby provided that he should

> "... exercise and perform such powers and duties as the board of directors of the company shall from time to time determine and subject to any

> directions and restrictions from time to time given and imposed by them shall have the general supervision of the personnel of the company's retail shops and subject as aforesaid to do and perform all acts and things which in the ordinary course of business are reasonably necessary or proper in the interests of the company."

That was rejected by the plaintiff. It was re-offered on a number of occasions. In a letter dated Sept. 27, 1958, the plaintiff's solicitors said:

> " [The plaintiff] is not unwilling to accept the alternative position offered by [Loyds] provided (a) his functions and rights are clearly defined and (b) the acceptance is on the strict understanding that in so doing he does not in any way prejudice his claims arising out of the breach of his contract or otherwise and that he reserves his rights."

In reply to that letter, the solicitors for Loyds, who were also the solicitors for the defendant company, said:

> " We regret that despite all our letters to you and our conversations on the telephone with you when we made it perfectly clear that to specify [the plaintiff's] duties any clearer than in the draft service agreement was not practicable, [the plaintiff] considers that the position offered to him was not sufficiently defined. Proviso (b) mentioned in your letter is, of course, not acceptable to our clients and, as it seems that agreement is not likely to be reached, we are instructed to inform you that the offer made by [Loyds] to [the plaintiff] is now withdrawn."

Certain difficulties then arose as to the dismissal of the plaintiff by the defendant company. As a result of proceedings in the Chancery Division, an extraordinary general meeting of the defendant company was held on Nov. 21, 1958, at which resolutions were passed whereby (a) the plaintiff was removed from office as a director of the defendant company, and (b) the service agreement of Apr. 8, 1958, between the defendant company and the plaintiff was terminated forthwith, if and so far as the same might still be subsisting.

On Dec. 12, 1958, the writ in this action was issued and by his statement of claim, dated Dec. 15, the plaintiff claimed damages of £28,126 for loss of salary and £5,000 for estimated loss of commission. The defendant company, by its defence, alleged that the agreement had been rescinded by mutual consent on Aug. 18, and also pleaded that, as a matter of law, the plaintiff had not been wrongfully dismissed.

At the trial before Diplock, J., His Lordship held, on the facts, that there had been no rescission of the agreement. The report is confined to the question whether the plaintiff was wrongfully dismissed and the question of damages.

D. J. Brabin, Q.C., and *C. N. Glidewell* for the plaintiff.

Fenton Atkinson, Q.C., and *L. A. Cohen* for the defendant company.

DIPLOCK, J., stated the facts, and, having held that the agreement of Apr. 8, 1958, had not been rescinded by mutual consent on Aug. 18, 1958, continued: I must now deal with a question of law raised by the defence. Article 1 of the defendant company's articles of association incorporated certain articles set out in Table A of the Companies Act, 1929, including art. 68 about managing directors (1) which is in the following terms:

> " The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term and at such remuneration (whether by way of salary, or commission, or participation in profits, or partly in one way and partly in another) as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the rotation

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(1) The corresponding articles in Table A of the Companies Act, 1948, are art. 107, art. 108 and art. 109: see 3 Halsbury's Statutes (2nd Edn.) 817.

> or retirement of directors; but his appointment shall be subject to determination ipso facto if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined."

Since on Nov. 21, 1958, the plaintiff was removed from office as a director and thus ipso facto ceased to be managing director and his tenure of office was determined by the defendant company in general meeting, it was contended on behalf of the defendant company that, as a matter of law, he was not wrongfully dismissed. In support of that contention, counsel for the defendant company relied on a number of cases, of which the most important are *Bluett* v. *Stutchbury's, Ltd.* (2) and the decision of HARMAN, J., in *Read* v. *Astoria Garage (Streatham), Ltd.* (3).

The argument for the defendant company on this matter derives some support from the cases referred to and from another case, *Nelson* v. *James Nelson & Sons, Ltd.* (4). The argument is put thus—where a company's articles of association include art. 68, the directors have no power to appoint a managing director on terms which purport to exclude the company's right to terminate his appointment ipso facto on either his ceasing to be a director or if the company shall by resolution in general meeting resolve that his tenure of office as managing director be determined. That argument can be put in alternative ways, either that the agreement for a fixed term which does not incorporate the right of the company set out in art. 68 is ultra vires, or else that the agreement for a fixed period of employment must be subject to the implied term that it is determinable in either of the circumstances set out at the end of art. 68.

It seems to me that this point is concluded against the defendant company by the decision of the House of Lords in *Southern Foundries (1926), Ltd.* v. *Shirlaw* (5). That case was somewhat complicated and gave rise to a division of opinion in the House of Lords. Two of their Lordships (VISCOUNT MAUGHAM and LORD ROMER) who were most familiar with the Chancery side came to one conclusion and three of their Lordships (LORD ATKIN, LORD WRIGHT and LORD PORTER) who were perhaps more familiar with the common law side, came to another. There are some references in subsequent cases in the Chancery Division which suggest that it is difficult to ascertain what *Southern Foundries (1926), Ltd.* v. *Shirlaw* (5) determined. It does, however, seem to me that all five of their Lordships in the *Southern Foundries* case (5) were agreed on one principle of law which is vital to the defendant company's contention in the present case. That principle of law is that laid down in *Stirling* v. *Maitland* (6), where COCKBURN, C.J., said:

> " . . . if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative."

Applying that respectable principle to the present case, there is an implied engagement on the part of the defendant company that it will do nothing of its own motion to put an end to the state of circumstances which enables the plaintiff to continue as managing director. That is to say, there is an implied undertaking that it will not revoke his appointment as a director, and will not resolve that his tenure of office be determined.

It is necessary to say a word about the circumstances of the *Southern Foundries* case (5). Mr. Shirlaw, the plaintiff in that case, had a ten-year contract as managing director of Southern Foundries, Ltd. At the time when he was appointed, the articles of the company were not in the form of art. 68 of Table A of the Companies Act, 1929. The relevant articles were these:

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(2) (1908), 24 T. L. R. 469. (3) [1952] 1 All E.R. 922. (4) [1914] 2 K.B. 770.
(5) [1940] 2 All E.R. 445; [1940] A.C. 701. (6) (1864), 5 B. & S. at p. 852.

> "90. The directors may from time to time appoint any one or more of their body to be managing director or managing directors for such period and upon such terms as they think fit . . .
>
> "91. A managing director shall not while he continues to hold that office be subject to retirement by rotation, and he shall not be taken into account in determining the rotation of retirement of directors, but he shall, subject to the provisions of any contract between him and the company, be subject to the same provisions as to resignation and removal as the other directors of the company, and if he ceases to hold the office of director he shall ipso facto and immediately cease to be a managing director."

Then art. 105 is important:

> "The company may by extraordinary resolution remove any ordinary director before the expiration of his period of office, and may, if thought fit, by ordinary resolution appoint another director in his stead . . ."

Thus there was in the articles in force at the time when the managing director's agreement was entered into, an article which enabled the company by extraordinary resolution to determine his appointment by removing him as a director. Subsequently, the articles were changed and an article was inserted which gave another company, Federated Foundries, Ltd., a stranger to the contract of employment, power at any time, by an instrument in writing, to remove from office any director of Southern Foundries, Ltd. The matter which gave rise to a dissension of opinion in the House of Lords was whether, when Federated Foundries, Ltd. exercised that power by removing Mr. Shirlaw, this constituted wrongful dismissal of Mr. Shirlaw. The majority of the House held that the fact that it was done by a third party, who was given power to do so under the new article, did not prevent this being wrongful dismissal although it was done by a stranger to the contract and might not, therefore, be said to come directly within the principle in *Stirling* v. *Maitland* (7). The minority took the view that it could not be brought within the principle in *Stirling* v. *Maitland* (7), because the articles were altered in good faith and the act was an act of a third party. They would have held that because of this there was no breach of contract. All of their Lordships made quite plain their view, that if the company itself had exercised the power under the original articles by removing the plaintiff as director by extraordinary resolution, that would have been a breach of the implied term laid down in *Stirling* v. *Maitland* (7) and would have given rise to the right for damages.

VISCOUNT MAUGHAM said (8):

> "In my opinion, it would have been a breach of the negative term, properly understood, for Southern to have removed the respondent under art. 105 from his position as director during the ten years. I am also of opinion, however, that it was not a breach of any implied term in the agreement for Southern to alter its articles as was done, and to include in the altered articles the new art. 8."

LORD ATKIN, after referring to *Stirling* v. *Maitland* (7) said (9):

> "I think it follows that, either if the company of its own motion removed the respondent from the office of director under art. 105, or if the respondent caused his office of director to be vacated by giving one month's notice of resignation under art. 89, either of them would have committed a breach of the agreement in question."

LORD WRIGHT, who was with the majority, came to the same conclusion. LORD ROMER, who was with the other member of the minority, said (10):

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(7) (1864), 5 B. & S. 841. (8) [1940] 2 All E.R. at p. 452; [1940] A.C. at p. 713.
(9) [1940] 2 All E.R. at p. 455; [1940] A.C. at p. 717.
(10) [1940] 2 All E.R. at p. 463; [1940] A.C. at p. 730.

> " However, the agreement by Southern to employ the respondent, or his agreement to serve them, could only take effect for the full ten years if the respondent continued to be a director during that period. In these circumstances, there was, in my opinion, an implied engagement on the part of Southern that they would not during that period exercise their power of removing him from his directorship under art. 105, and an implied obligation on his part that he would not, during that period, serve notice of resignation under art. 89 (F)."

He then referred to *Stirling* v. *Maitland* (11).

It seems to me, therefore, that the decision of their Lordships in *Southern Foundries* (*1926*), *Ltd.* v. *Shirlaw* (12) which is, of course, binding on me, is conclusive in the plaintiff's favour and that this defence fails. I should, however, be doing an injustice to the argument of counsel for the defendant company if I did not refer to the cases on which he relies and, in particular, to *Read* v. *Astoria Garage* (*Streatham*), *Ltd.* (13) which came, in the first instance, before Harman, J. In that case the company's articles included art. 68 of Table A of the Companies Act, 1929. The directors had, by resolution, appointed the plaintiff to be managing director of the company at a salary of £7 a week from Monday, Feb. 1, 1932. On Sept. 28, 1949, an extraordinary general meeting of the company passed a resolution dismissing him and resolving that his tenure of office be terminated. In these circumstances, he brought an action for breach of contract, alleging that he was entitled, as servants normally are, to reasonable notice. Harman, J., held that the action failed, and I think that it is plain on a ratio decidendi that, if it could be reconciled with *Southern Foundries* (*1926*), *Ltd.* v. *Shirlaw* (12), and I followed it, it would result in my judgment in this case being in favour of the defendant company. Harman, J., said (14):

> " It is difficult to find any direct authority for this matter. The nearest case, I think, is *Nelson* v. *Nelson* (*James*) *& Sons, Ltd.* (15) where the facts were quite different because, for one thing, there was a special article expressly empowering the board to revoke a managing director's appointment and not a Table ' A ' article, and for another thing (to quote the headnote) ' The board appointed the plaintiff to be managing director upon the terms of an agreement which provided that he should hold the office so long as he should remain a director of the company and retain his due qualification and efficiently perform the duties of the office.' The board subsequently revoked that appointment, relying on their express power to revoke. Lord Reading, C.J., said (16) that one must read that power to revoke as subject to the contract which had been made, and the contract, he said, was for a term of years, and the power to revoke only gave the directors ' power to take away that which they have given provided that they have not bound themselves to give it for any period of time.' He said that that was an appointment for a period of time and could not by the exercise of a power of revocation be altered. Swinfen Eady, L.J., however, does deal with Table ' A '. He says (17): ' The articles may give a power to the directors to appoint one of their number to be managing director, but no power to revoke or cancel the appointment. The company may keep that power in its own hands to be exercised in general meeting '. That is the position under Table ' A ' in the Companies Act, 1908, which is the same for this purpose as the Act of 1929. He goes on (17): ' With an article in that form it is manifest that the directors can only appoint a managing director subject to the right of the company in general meeting to resolve at any time that his tenure of the office of managing director

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(11) (1864), 5 B. & S. 841.
(12) [1940] 2 All E.R. 445; [1940] A.C. 701.
(13) [1952] 1 All E.R. 922.
(14) [1952] 1 All E.R. at p. 924.
(15) [1914] 2 K.B. 770.
(16) [1914] 2 K.B. at p. 776.
(17) [1914] 2 K.B. at p. 779.

> A is to be determined.' These observations are obiter, but, nevertheless, they are germane to the matter in question.
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> "In *Southern Foundries* (*1926*), *Ltd.* v. *Shirlaw* (18) there was a division both in the House of Lords and in the Court of Appeal. The majority held that there was a breach of contract if a company which had appointed a managing director for ten years allowed its articles to be so altered that a B power to remove was imported. I do not think, in view of the unfortunate differences of opinion which made themselves plain, that that case helps very much.
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> "It seems to me that I ought to apply the observations of SWINFEN EADY, L.J., in the *Nelson* case (19). The article does, after all, say quite clearly that the appointment is 'subject to determination ipso facto if the C company resolve' that that be so. So, everybody who becomes a managing director of this company which has adopted Table 'A' knows that he has certain rights, and that the board cannot alter them. It may be that the company cannot, by altering its articles, give them power to do that. That would seem to be so from the majority decision in the House of Lords in *Southern Foundries* (*1926*), *Ltd.* v. *Shirlaw* (18). But that does not, D it seems to me, forbid, as being a breach of contract, the company itself (having power to dismiss) to exercise that power, because every contract which is entered into with the company must on the face of it be subject to that chance."

There is no doubt that in that judgment the ratio decidendi is in the defendant company's favour, although it seems to me, with the greatest respect, that it E cannot be reconciled with the opinions of their Lordships in *Southern Foundries* (*1926*), *Ltd.* v. *Shirlaw* (18). *Read* v. *Astoria Garage* (*Streatham*), *Ltd.* (20) went, however, to the Court of Appeal (21) where the decision was upheld, but the Court of Appeal did not, as I read it, adopt the ratio decidendi of the learned judge. JENKINS, L.J., said (22):

> F "The learned judge referred in the course of his judgment (23) to a passage in the judgment of SWINFEN EADY, L.J., in the *Nelson* case (19), in which the learned lord justice drew a distinction between a case like the one there under consideration, where the directors were seeking to exercise a power to revoke an appointment, and one where the managing director is, as in the present case, made subject to a power conferred on the company G to deal with the revocation of his appointment in general meeting. After referring to that kind of article, the learned lord justice continued (24): 'With an article in that form it is manifest that the directors can only appoint a managing director subject to the right of the company in general meeting to resolve at any time that his tenure of the office of managing director is to be determined. That, however, is not the article which we H have to construe.' It will be seen that SWINFEN EADY, L.J., there recognised that, where a company in general meeting reserves the right to determine the appointment of a managing director, the directors cannot, by the appointment of a managing director for some fixed term, override that power in the company. At all events, I think it is plain that, where there is an article in that form, a managing director, whose appointment is I determined by the company in general meeting in exercise of that power, cannot claim to have been wrongfully dismissed unless he can show that an agreement has been entered into between himself and the company, the terms of which are inconsistent with the exercise by the company of the power conferred on it by the article to determine a managing director's

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(18) [1940] 2 All E.R. 445; [1940] A.C. 701. (19) [1914] 2 K.B. 770.
(20) [1952] 1 All E.R. 922. (21) [1952] 2 All E.R. 292; [1952] Ch. 637.
(22) [1952] 2 All E.R. at p. 295; [1952] Ch. at p. 642. (23) [1952] 1 All E.R. at p. 924.
(24) [1914] 2 K.B. at p. 779.

> appointment in general meeting. In the present case, as I have said before, there is no evidence of the existence of any such contract."

It seems to me that JENKINS, L.J., did not accept the full ratio decidendi of HARMAN, J., and left open the question whether, where an agreement has been entered into between the managing director and the company, the terms of which are inconsistent with the exercise of the company's power to terminate his employment conferred on it by the articles, an action lies for wrongful dismissal in the event of the company's exercising that power.

That question I have now to decide. For the reasons which I have indicated and, in particular, those contained in the speeches in *Southern Foundries (1926), Ltd.* v. *Shirlaw* (25), I think that this defence fails.

That leads me to the last question which I have to determine and that is the matter of damages. It is a matter which has given me very great difficulty. The relevant facts are these. The plaintiff was dismissed on Nov. 21, 1958, in the circumstances which I have described (26). He advertised in December for employment, but without success and he answered a large number of advertisements in the Press. He has provided me with a schedule of advertisements offering his services for high executive posts. He was unsuccessful, he says, in obtaining any employment of that nature and it was not until Feb. 5, 1960, well over twelve months after his employment was terminated, that he got a job as salesman for Grose Business Machines, Ltd., at a salary of £9 a week, plus £5 expenses and commission on the amount of business which he obtained. That job he holds now. After the termination of his employment, however, and while he was seeking work, Mr. Symons on behalf of Loyds Retailers, Ltd., wrote him a letter, dated Feb. 11, 1959, in the following terms:

> " Dear Mr. Shindler,
>
> " I am writing to you as I understand that you have recently advertised for a position. As you know, this company was very interested in acquiring your services and, despite the events of the past months, we would still be interested in your joining us on the shops side, at a salary of £3,000 per annum, plus full time use of a car and expenses incurred. The position would of course be on a full time basis. I look forward to hearing from you.
>
> " Yours faithfully,
>
> (signed) L. Symons."

The plaintiff took no notice of that letter and on Mar. 2, a further letter was written by Mr. Symons, as follows:

> " Dear Mr. Shindler,
>
> " Would you please let me know whether or not you are interested in the offer made to you in my letter of [Feb. 11]. We desire to fill this position with all speed and as we feel that you suit our requirements I have left several other interviews pending waiting for your reply. Will you, therefore, please be good enough to get into touch with me as quickly as possible and if I do not hear from you within the course of the next week then I shall have to reluctantly assume that you are not interested. This would leave me with no alternative but to carry on with other interviews to fill the position as the matter to us is most urgent."

That drew a reply on Mar. 5 from the plaintiff, at great length, which I need not read. It was an abusive and bitter letter, turning down the offer.

I must first deal with two contentions made by the defendants. The first is that the plaintiff is under a duty to take reasonable steps to mitigate his damages, or perhaps a better way of putting it is that the true measure of damages is the loss which can reasonably be expected to result from the breach, and that assumes that the plaintiff will take reasonable steps to obtain other employment.

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(25) [1940] 2 All E.R. 445; [1940] A.C. 701.

(26) See p. 243, ante.

The contention of the defendants is that the plaintiff ought to have accepted the original offer of £3,000 a year, which was made in August and September, 1958. There seemed to me to be two objections to that: one of fact and one of law. I will deal with the objection in law first.

The position was that, on the correspondence, the defendant company had, by a letter dated Sept. 2, 1958, told the plaintiff that his services with the defendant company would terminate not later than Nov. 30, 1958. That was a wrongful repudiation of contract which the plaintiff had an option either to accept as an anticipatory breach rescinding the contract and thus entitling him to sue for damages forthwith, or to refuse and to continue to treat the contract as subsisting and to continue to serve as managing director. He elected to do the latter and there was, accordingly, no breach of the contract on which he could sue until his office as director was terminated on Nov. 21, and between Sept. 2 and Nov. 21, the defendant company had a locus penitentiae in which it could have changed its mind and decided to go on employing him. It seems to me that, as a matter of law, it cannot be said that there is any duty on the plaintiff to mitigate his damages before there had been any act which is either an actual breach or an act which he has elected to treat as an anticipatory breach.

The objection in fact seems to me to be this. In a letter dated Sept. 27, 1958, written by the plaintiff's solicitors, it was stated that the plaintiff

> " . . . is not unwilling to accept the alternative position offered by [Loyds] provided (a) his functions . . . are clearly defined and (b) the acceptance is on the strict understanding that in so doing he does not in any way prejudice his claims arising out of the breach of his contract . . ."

In a letter dated Oct. 1, 1958, the defendant company's solicitors, who were also the solicitors for Loyds Retailers, Ltd., replied that " Proviso (b) . . . is, of course, not acceptable to our clients . . ." Therefore, the only offer which was before the plaintiff at that moment was the offer of employment on terms that he abandoned such legal rights as he had for damages for breach of contract against the defendant company. It seems to me that it was not reasonable to require him to accept such an offer. That matter is self-evident.

The second contention of the defendant company is that, whatever may be said about the earlier offers, the offers of employment in February and March, 1959, after he had been dismissed, were offers which ought to have been accepted by the plaintiff if he were acting reasonably. The plaintiff invites me to say that these offers were not sincerely made. They were merely offers designed to reduce the possible damages in this litigation. Since that charge has been made, I think it right to say that Mr. Symons has satisfied me that these offers were genuine offers and that Loyds considered that the plaintiff was a man with a flair who could be useful to them in their business and they were prepared, despite what had gone before, to make use of his services. But the fact that I have found that the offers were genuine offers does not conclude the matter, because I have to consider whether it was reasonable for the plaintiff to refuse them. I have no great moral admiration for the attitude which the plaintiff has taken in this case; nevertheless I have to consider, using common sense, whether it was reasonable in all the circumstances to expect the plaintiff to accept the offer of employment from Loyds in February and March, 1959. The plaintiff said that he thought that the offers were not genuine and I have no doubt that he did so think.

It seems to me that in all the circumstances, having regard to the row which had taken place between the plaintiff and Mr. Symons at their last significant meeting, to the fact that there had already been litigation about the calling of the meeting to resolve on the dismissal of the plaintiff, to the fact that the litigation in this action had already reached the stage at which the pleadings were being delivered, and to the fact that the letter itself offering the employment was not sent, as it might well have been at that stage, through the solicitors;

and having regard especially to the fact that the employment was one of personnel A
manager where the plaintiff would have to act under the direction of Mr. Amelan
and Mr. Symons, I think, as a matter of common sense, that it would not be
right to say that the plaintiff was unreasonable in refusing the offer at that
time and in those circumstances. Those are the two contentions of the defen-
dants which go to the root of the question on the amount of damages.

I am in great difficulty in assessing the damages in this case. I am surprised B
that the plaintiff has failed to get any substantial employment, or, indeed, any
employment at all for some twelve months afterwards, and I feel a little dubious
whether he has tried as hard as he has sought to give the appearance of trying.
It would not, however, be right for me to say that I am satisfied that he could
have got other employment at a comparable salary, at £3,000 a year, during
the period which has elapsed until now, but, having seen him, I feel pretty C
confident that, once this action is over, he will overcome some of the difficulties
which have presented themselves until now in obtaining employment and I
do not doubt that during the course of the next eight years, and pretty soon,
he will find some employment in which his undoubted flair can be used at a
level more commensurate with it than that which he is accepting at the moment
with Grose Business Machines, Ltd. D

This is a case in which I have to take into consideration the principles laid down
in *British Transport Commission* v. *Gourley* (27), as to the incidence of taxation
and in which I have to make the best forecast I can as to the plaintiff's future
employment and to take into consideration what would be worth the ten per
cent. commission on profits over £15,000 a year, in the future under the manage-
ment of the defendant company by Mandleberg. Making the best estimate E
that I can and taking a more optimistic view than the plaintiff does as to the
prospects of his future employment, I think that a proper figure for damages
in this case is £7,500. The plaintiff is accordingly entitled to judgment for that
amount.

Judgment for the plaintiff.

Solicitors: *Linder, Myers & Pariser*, Manchester (for the plaintiff); *Amelan & Roth*, Manchester (for the defendant company).

[*Reported by* M. DENISE CHORLTON, *Barrister-at-Law.*]

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(27) [1955] 3 All E.R. 796; [1956] A.C. 185.

A. MARTIN FRENCH (a Firm) *v.* KINGSWOOD HILL, LTD.

[COURT OF APPEAL (Hodson, Willmer and Devlin, L.JJ.), March 23, 24, 25, April 5, 1960.]

Practice—Payment into court—Acceptance—Effect—Counterclaim and set-off—Acceptance by plaintiff of sum paid in by defendant as "enough to satisfy plaintiff's claim"—Whether defendant free to pursue counterclaim—R.S.C., Ord. 22, *r.* 1.

Defendants to a writ for the balance of an account filed a defence and counterclaim; the defence relied on the counterclaim for damages as an equitable set-off. Later the defendants paid a sum of money into court and in their notice of payment in stated, pursuant to R.S.C., Ord. 22, r. 1, that the sum paid in was "enough to satisfy the plaintiffs' claim". The plaintiffs took out of court the sum so paid into court.

Held: the cause of action on the counterclaim had not thereby been extinguished or satisfied, and the defendants were at liberty to pursue their counterclaim against the plaintiffs.

Appeal dismissed.

[As to the effect of acceptance of a sum paid into court, see 30 HALSBURY'S LAWS (3rd Edn.) 383, 384, para. 715, text and note (t).]

Cases referred to:

Coote v. *Ford*, [1899] 2 Ch. 93; 68 L.J.Ch. 508; 80 L.T. 697; 40 Digest (Repl.) 461, *473*.

Hanak v. *Green*, [1958] 2 All E.R. 141; [1958] 2 Q.B. 9; [1958] 2 W.L.R. 755; 3rd Digest Supp.

Interlocutory Appeal.

The plaintiffs appealed against the decision of His Honour W. K. CARTER, Q.C., Official Referee, on a preliminary point of law whether, having accepted the sums paid into court in satisfaction, as the plaintiffs alleged, of their claim subject to and reduced by the set-off, the cause of action relied on by way of set-off and counterclaim had been satisfied and extinguished. The facts are stated fully in the judgment.

Roy Wilson, Q.C., and *Adrian Hamilton* for the plaintiffs.

F. Hallis for the defendants.

Cur. adv. vult.

Apr. 5. **DEVLIN, L.J.**, read the following judgment of the court: This is an appeal from His Honour W. K. CARTER, Q.C., one of the official referees. On June 17, 1958, the plaintiffs issued a writ against the defendants claiming £1,320 12s. 8d., the balance of an account rendered to them for work done as surveyors and valuers. On July 30 the defendants filed a defence and counterclaim. By their defence they alleged that the fees claimed were unfair and unreasonable and that some of the disbursements had not been made; and by their counterclaim they sought to obtain damages, which they estimated at £2,960, for breach of duty by the plaintiffs. In their defence they relied on their counterclaim as an equitable set-off, as under the authority of *Hanak* v. *Green* (1) they are entitled to do. On Aug. 8, 1958, and Mar. 10, 1959, the defendants made payments into court which together totalled £927. On Mar. 23, 1959, the plaintiffs took these sums out of court and so undoubtedly disposed of their claim; their contention is that this disposed of the counterclaim also. So as to raise this point, they applied for leave to amend their defence to the counterclaim. By the amendment they alleged that, since they had accepted the sums paid into court in satisfaction of their claim subject to and reduced by the set-off, the cause of action relied on by way of set-off and counterclaim had been satisfied and extinguished. They were given leave to amend in these terms and it was ordered that the plea raised by the amendment should be tried as a preliminary issue. It was so tried; and the learned official referee gave judgment against the plaintiffs, holding that the cause of action in the counterclaim had not been extinguished or satisfied. It is from this judgment that the plaintiffs now appeal.

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(1) [1958] 2 All E.R. 141; [1958] 2 Q.B. 9.

It is, of course, clear that if judgment is delivered on a claim that is subject to a set-off, both the claim and the set-off are disposed of. The cause of action in the set-off cannot thereafter be raised in any new action; neither can it be raised by counterclaim, which is in substance a separate action. The matter is res judicata. However, the conclusion of an action by payment into court is something quite different from its conclusion by a judgment. In *Coote* v. *Ford* (2) STIRLING, J., clearly explained the effect on a cause of action of the taking out of money which has been paid in in respect of it. The payment in implies no admission about the merits of the cause of action; there has been no adjudication on it and therefore no estoppel is created. What has happened is simply that the claim arising out of the cause of action has been settled, just as it would have been settled by a payment under a compromise.

The plaintiffs accept this distinction and have proceeded accordingly. Contending as they do that an abandonment of the set-off was an essential part of the compromise effected by the payment in, they claim to treat the matter just as if the defendants' claim had been satisfied by a money payment; and so they rely on the compromise as an additional defence made available to them after action brought. Are the plaintiffs right in their contention that the payment in necessarily involves the extinction of the set-off? When a defendant who has pleaded a set-off pays money into court, does he pay in to satisfy the plaintiff's claim, ignoring the set-off? Or does he pay in to satisfy the claim less the set-off? If the latter, then if the offer is accepted and the money taken out, the set-off must be extinguished for it has been used as an alternative to money to pay off the plaintiff; and a counterclaim based on the same cause of action must perish with it. If the former, the set-off is unaffected and the claim embodied in it can be pursued by counterclaim or otherwise. Counsel for the plaintiffs contends that a payment in in these circumstances must inevitably have the effect of satisfying the claim less the set-off. A defendant, he says, is not obliged to use a cross-claim as a set-off: but if he elects to do so, it is impossible for him thereafter to deal with the claim otherwise than as a claim subject to a set-off.

We do not think that the answer is to be found by the application of a rigid principle of this sort. A payment into court is simply an offer to dispose of the claim on terms. If the defendant were free to formulate the terms himself, he could make his offer in whatever form he liked. He could offer either to settle the claim less the set-off, or he could offer to settle the claim by itself, leaving the set-off alive to form the subject of a counterclaim or another action. But if he seeks to effect his compromise under the rules which permit a payment into court, he must make his offer according to the rules. So the answer to the question must be sought by ascertaining and construing the terms of the rule under which the payment into court is made. That means construing R.S.C., Ord. 22, r. 1, for that rule (3) not only provides for payment in but also prescribes the form of words that must be used in the notice of payment in. The form of words used, and which had to be used, in this case is: The defendants " say that that sum . . .

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(2) [1899] 2 Ch. 93 at p. 99.

(3) R.S.C., Ord. 22, r. 1, provides, so far as is relevant: " (1) In any action for a debt or damages . . . the defendant may . . . pay into court a sum of money in satisfaction of the claim or (where several causes of action are joined in one action) in satisfaction of one or more of the causes of action . . .

" (3) The notice shall be in Form 3 in Part II of App. B . . . The notice may be modified . . . or delivered in an amended form by leave of the court or a judge upon such terms as may be just . . ."

The material part of Form 3 is " Take notice that the defendant — has paid into court £— and says that . . . that sum is enough to satisfy the plaintiff's claim."

is enough to satisfy the plaintiffs' claim ". Now, the plaintiffs' *claim* cannot be affected by the amount of the set-off. What they *recover* may be but not, unless they admit the set-off, what they claim. The defendants, when they pay into court in these terms, are not therefore paying in such sum as they think the plaintiffs may be likely to recover at the end of the day, but a sum to satisfy the plaintiffs' claim as it then stands. R.S.C., Ord. 22, r. 5, makes provision for the plaintiff paying in against the counterclaim, if he wants to, but there is no provision for balancing one against the other.

The natural meaning of the words used in the rule and in the notice served under it is therefore against the contention of counsel for the plaintiffs. If he is to succeed, he must show that the words in the rule " the plaintiff's claim " do not mean what they appear to mean, but ought to be construed as " the plaintiff's claim less the defendant's claim ". Alternatively, he must show that when the defendants say that " that sum is enough to satisfy the plaintiffs' claim ", they mean " that sum together with the value of the set-off ". Counsel for the plaintiffs submits that if one looks at the purpose of the rule, one ought to give it an interpretation of that sort. An offer of settlement can be made and accepted or refused without the assistance of any rule. The purpose of the rule is to enable the offer to be recorded in such a way that it can be used to affect the order for costs. So that he can save himself costs, the rules give a defendant the right to pay in; and a defendant has also under the rules a right of set-off. If he is not allowed to pay in a sum to satisfy a claim less set-off, he is, counsel for the plaintiffs argued, being deprived of the exercise of one or other of these rights. Suppose a plaintiff has a claim for £75,000 and the defendant a set-off for £70,000. The defendant believes that he will be able to knock £2,000 off the plaintiff's claim so that the plaintiff will on balance recover £3,000. The defendant ought, counsel for the plaintiffs says, to be able to pay into court £3,000. If, in order to get the benefit of payment in, he has to find £73,000, he is losing the benefit of his set-off.

This sort of situation can be made to sound more inconvenient than it really is. Payment into court is not the only method which a defendant may have to save himself costs, though it certainly is the most satisfactory. It is not a method that is always available; it cannot be used, for example, in arbitrations or appeals. A written offer, which the court can take into consideration after the hearing, has then to be made to serve the same purpose as nearly as may be. It is not a conclusive argument against a particular construction of a rule that under it the utility of the rule is less than it might be.

If matters of this sort are to be considered, arguments can be advanced on the other side which show that in certain circumstances counsel for the plaintiffs' construction is an inconvenient, if not an impossible, one. Suppose that a plaintiff has four separate causes of action, each leading to a separate money claim; and the defendant has, as here, a counterclaim, unconnected with any of the plaintiff's claims, which he uses as an equitable set-off. The defendant pays in, as he must do if he wishes to pay in at all, separate sums in respect of each cause of action. To which sum is the value of the set-off to be taken as a notional addition? Which of the four claims is it to be taken as diminishing? Or is it notionally divided among them all? If the plaintiff takes out one sum and not others, what is the effect on the set-off? Counsel for the plaintiffs' solution of this difficulty is to say that the whole value of the set-off must be deemed to be allocated to the cause of action in respect of which a sum is first taken out. We can see no warranty for this solution in preference to any other; but if it be correct, it makes the calculation of the sum to be paid in so difficult for the defendant as to make the procedure useless to him. He cannot tell in advance which sum the plaintiff will take out and which he will leave in. If the defendant underpays on claim A, hoping that the value of the set-off may be used to supplement it, and pays adequately on claim B, the plaintiff may take out the adequate sum on claim B and the set-off will be automatically extinguished with nothing to show for it;

the plaintiff can then proceed on claim A and the defendant will then have to make good the underpayment or risk losing the costs.

It seems to us that in the end we must come back to the plain meaning of the language used, and on that counsel for the plaintiffs fails. The rules as drafted do not permit a defendant to strike a balance between the plaintiff's claim on the one side and a set-off and counterclaim on the other, and to pay in to satisfy the balance. It might be a great convenience and advantage to litigants if they did; and we think that the Rules Committee might be invited to consider whether an amendment could not be made, giving the defendant an option under which he could, so to speak, offer up his cross-claim as well as a sum of money in settlement. But we have to apply the rules as they stand. Unfortunately, one or other of the parties has misconstrued them and must suffer accordingly. In our judgment it is the plaintiffs who have misunderstood the position and the effect of the payment in, and this appeal must be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Parker, Garrett & Co.* (for the plaintiffs); *Stanley & Co.*, agents for *C. W. Nelson & Co.*, Leeds (for the defendants).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

ACKROYD & SONS *v.* HASAN.

[COURT OF APPEAL (Sellers, Ormerod and Upjohn, L.JJ.), March 21, 22, 23, April 12, 1960.]

Estate Agent—Commission—Introduction of person " prepared to enter into a contract to purchase on terms to which the vendor may assent "—Construction.

Estate agents were instructed by a lessee in July, 1956, to find a purchaser of leasehold premises, the second floor of which was to be sub-let back to the vendors by the purchaser. By letter dated July 24, 1956, the estate agents confirmed the terms of their employment, stating that they were to become entitled to commission " in the event of our introduction of a party prepared to enter into a contract to purchase on [terms previously mentioned in the letter] or on such other terms to which [the vendors] may assent ". The vendors failed to explain to the estate agents that it would be necessary for the vendors to retain storage space on the first floor. In October, 1956, proposing purchasers agreed, subject to contract, to purchase the leasehold property, re-letting the second floor to the vendors. The terms so agreed differed from those mentioned by the estate agents in their letter of July 23. A draft contract, a draft mortgage and a draft lease were sent to the purchasers' solicitors by the vendors' solicitor, and on Jan. 10, 1957, the purchasers' part of the contract, duly signed, was sent to the vendors' solicitor. On Jan. 17, 1957, the position was that all matters appeared to be agreed between the solicitors of the parties, but on the vendors' solicitor taking the contract, which the vendors had not previously approved, to the vendors for signature it emerged for the first time that the vendors required the use of a store on the first floor. The purchasers did not agree to the retention of the store and the sale was not completed. The estate agents claimed commission from the vendors.

Held: the estate agents were not entitled to commission because although the purchasers' offer, originally made " subject to contract ", had by Jan. 17, 1957, become unconditional (and, accordingly, the estate agents had by that date introduced purchasers " prepared to enter into a contract to purchase "), yet the terms of the contract so proposed were not terms to which the vendors had in fact assented.

John E. Trinder & Partners v. *Haggis* ([1951] W.N. 416), *Graham & Scott (Southgate), Ltd.* v. *Oxlade* ([1950] 1 All E.R. 856) and dictum of BUCKNILL, L.J., in *Dennis Reed, Ltd.* v. *Goody* ([1950] 1 All E.R. at p. 922) applied.

Decision of WINN, J. ([1959] 2 All E.R. 370) affirmed, but on other grounds.

[As to estate agent's commission, see 1 HALSBURY'S LAWS (3rd Edn.) 198, para. 457; and for cases on the subject, see 1 DIGEST 488-493, *1664-1692*.]

Cases referred to:

Chillingworth v. *Esche*, [1924] 1 Ch. 97; 93 L.J.Ch. 129; 129 L.T. 808; 40 Digest (Repl.) 247, *2078*.

Eccles v. *Bryant & Pollock*, [1947] 2 All E.R. 865; [1948] 1 Ch. 93; [1948] L.J.R. 418; 12 Digest (Repl.) 70, *396*.

Graham & Scott (Southgate), Ltd. v. *Oxlade*, [1950] 1 All E.R. 856; [1950] 2 K.B. 257; 2nd Digest Supp.

Long (Peter) & Partners v. *Burns*, [1956] 2 All E.R. 25; *affd.* C.A., [1956] 3 All E.R. 207; [1956] 1 W.L.R. 413; 3rd Digest Supp.

Luxor (Eastbourne), Ltd. v. *Cooper*, [1941] 1 All E.R. 33; [1941] A.C. 108; 110 L.J.K.B. 131; 164 L.T. 313; 2nd Digest Supp.

Midgley Estates, Ltd. v. *Hand*, [1952] 1 All E.R. 1394; [1952] 2 Q.B. 432; 3rd Digest Supp.

Nelson (E. P.) & Co. v. *Rolfe*, [1949] 2 All E.R. 584; [1950] 1 K.B. 139; 2nd Digest Supp.

Reed (Dennis), Ltd. v. *Goody*, [1950] 1 All E.R. 919; [1950] 2 K.B. 277; 2nd Digest Supp.

Trinder (John E.) & Partners v. *Haggis*, [1951] W.N. 416; 2nd Digest Supp.

Appeal.

This was an appeal by the plaintiffs from an order of WINN, J., dated Apr. 24, 1959, reported [1959] 2 All E.R. 370, whereby he dismissed the plaintiffs' claim for £404 7s. 6d. being the amount of commission due under the terms of an agreement confirmed in writing on July 24, 1956. The defendant served a respondent's notice asking that the decision of WINN, J., should also be affirmed on the ground that a term relating to the taking over of stock at valuation was not agreed. The facts appear in the judgment of UPJOHN, L.J.

Harold Lightman, Q.C., and *E. A. Seeley* for the plaintiffs.

D. P. Croom-Johnson, Q.C., *P. H. Ripman* and *J. Hayman* for the defendant.

Cur. adv. vult.

Apr. 12. The following judgments were read.

UPJOHN, L.J., delivering, at the request of ORMEROD, L.J., the first judgment, said: I would dismiss this appeal as I agree with the decision of the learned judge in the court below that the plaintiffs had not made out their claim for a commission in this case, but I have the misfortune to differ from him to some extent in some of the reasons that he gave in coming to that conclusion.

It appears that in July, 1956, Mr. Smalley, a partner in the plaintiff firm of estate agents, approached the defendant, Mrs. Hasan, and her husband (who may be treated as one and for brevity described as "the vendors") with a view to introducing a purchaser of leasehold premises then having some six years to run known as No. 11, Wardour Street, belonging to Mrs. Hasan. The premises consisted of a ground floor and basement on which Mrs. Hasan carried on the business of a restaurant, her husband being the manager. On the second floor the husband carried on the business of a club with the help of Mrs. Hasan. The first floor over which the whole trouble arose was partly let off (nothing turns on that) and, as to the rest, was used as a store and office mainly for the restaurant, but partly also for the club under informal arrangements made between husband and wife.

The vendors gave some oral instructions to Mr. Smalley on July 23, 1956, and he confirmed them by letter next day in these terms:

> " Dear Sir,
>
> *re 11, Wardour Street, W.1.*
>
> Following our meeting of yesterday, we are pleased to confirm with thanks, receipt of your instructions to offer for sale your leasehold interest in the above property together with the business of the Stage Door Grill on the ground floor and basement, in the sum of £12,000 S.A.V., it being agreed that you shall take a tenancy of the second floor at a rent of £500 per annum. We are immediately placing particulars of this proposition before all likely applicants and assure you of our best and continued endeavours on your behalf. We would take this opportunity of confirming that in the event of our introduction of a party prepared to enter into a contract to purchase on the above terms or on such other terms to which you may assent you will allow us commission upon the scale of the Estate Agents Institute.
>
> Yours faithfully,
>
> ACKROYD & SONS."

The whole trouble arose because in giving their instructions to Messrs. Ackroyd & Sons the vendors never explained that it would be necessary to keep some storage space on the first floor for use by Mr. Hasan in connexion with the club that he was to continue carrying on on the second floor under the terms of the sub-lease which was to be granted to him as part of the bargain. Although the proposing purchasers (called in argument and in this judgment " the Chinese applicants ") were interested in the purchase of No. 11, Wardour Street, from a date early in August, negotiations took a long time to fructify and it was not until nearly the end of October of 1956 that the basic purchase price for the lease of the premises was agreed at the sum of £9,750 of which £6,000 was to remain on mortgage repayable over the term of the remaining six years of the lease and that the rent of the sub-lease to Mr. Hasan was agreed at £500 per annum. Solicitors were then instructed on behalf of the vendors and the Chinese applicants and each solicitor received a letter from Ackroyd & Sons dated Oct. 27, setting out the basic terms of the proposed contract as they were then understood by them. It was made quite clear in that letter that all negotiations were to be subject to contract.

The month of November seems to be taken up with the usual preliminaries, i.e., the vendors took up the Chinese applicants' references, and the Chinese applicants on their part had a surveyor's report. Ultimately Mr. Blum, the solicitor instructed by the vendors, sent a draft contract to Messrs. A. J. Young & Co., the solicitors instructed by the Chinese applicants on Nov. 30, 1956. It was agreed between these solicitors, very properly in the interests of their clients, that drafts of the mortgage and the sub-lease of the second floor should be annexed to the contract and drafts of those documents were sent on by Mr. Blum shortly afterwards. During the month of December the parties and their solicitors continued negotiating on minor details, e.g., obtaining draft consents by the head landlord to the assignment of the lease, to the transfer of liquor licences, and other details of that sort. On Dec. 28 Mr. Blum wrote an important letter to Young & Co. which was much relied on by counsel for the plaintiffs in this case for it started by saying:

> " I have now had an opportunity of considering the document in detail with my client [that must refer to the contract and the various documents annexed thereto] and the following points arise."

Then there was a paragraph which dealt with the underlease to Mr. Hasan and stated that his client felt that the user of the premises comprised in the underlease should not be restricted to that of a non-residential club but that he should also be entitled to use the premises for office purposes if required. The point made by counsel in his argument was that this showed that the vendors had seen and considered the draft sub-lease at this stage. I will assume that is so. This and many other matters of detail were satisfactorily settled and on Jan. 10, 1957, Young & Co. sent a letter in these terms:

> "We now enclose our client's part of the contract signed together with draft underlease approved. As you see we have retyped your original draft as the many amendments make it difficult to follow. Please let us have your client's part of the contract in exchange as soon as possible."

To that Mr. Blum replied that Young & Co. had not yet returned the draft mortgage which would require to be annexed to the contract and he asked for it to be sent on and there was also a point on the inventory. Both these matters were, however, cleared up satisfactorily. Further amendments were then made by Mr. Blum on behalf of his clients to the underlease of the second floor. Mr. Blum stated in his letter of Jan. 14, 1957, to Young & Co.:

> "I have forwarded the contract to my client for signature on the basis that you agree these amendments and will you please telephone me on receipt of my letter."

On Jan. 15 Young & Co. replied agreeing the further amendments to the draft underlease. A last minute point arose with regard to taking over the stock-in-trade, and that in fact formed the subject-matter of a respondent's notice in this court, but he did not pursue it before us, and I say no more about it therefore; the judge dismissed it rightly as of no importance.

The position therefore on Jan. 17, 1957, was that so far as the solicitors were concerned all matters were agreed and on that date Mr. Blum wrote to Young & Co.:

> "I refer to your letters of the 15th and 16th. I confirm that I have sent all the documents to my client and am waiting her instructions. I shall be telephoning her during the day to ascertain the position."

He also acknowledged the receipt of the cheque which represented the balance of the deposit, part of it having been paid some weeks earlier. It appears that Mr. Blum then went to see the vendors at their restaurant and he explained the documents to them, when (let it be said in fairness to Mr. Blum, Young & Co. and Ackroyd & Sons and, of course, the Chinese applicants) it emerged for the first time that the vendors apparently had it in mind that Mr. Hasan must have the use of a store on the first floor for his non-residential club in continuance of the existing arrangements between husband and wife. Counsel for the plaintiffs referred to that as a new point and to this extent he is correct because it was a new point to all concerned except the vendors. But it was fundamental to them, though they had omitted, as I have stated earlier, to give the proper instructions to Ackroyd & Sons. The vendors then put forward other proposals to meet this difficulty, but those proposals were not acceptable to the Chinese applicants and the whole contract went off. Those are briefly the relevant facts.

When an agent claims commission from a principal there are certain principles of law applicable which cannot be doubted. First: when an agent claims that he has earned the right to commission the test is whether on the proper interpretation of the contract between the principal and the agent the event has happened on which commission is to be paid. Secondly: there are no special principles of construction applicable to commission contracts with estate agents. Thirdly: contracts under which a principal is bound to pay commission for an introduction which does not result in a sale must be expressed in clear language.

Authority for these propositions is to be found in the well-known speech of LORD RUSSELL OF KILLOWEN in *Luxor (Eastbourne), Ltd.* v. *Cooper* (1), and put in more summary form by JENKINS, L.J., in *Midgley Estates, Ltd.* v. *Hand* (2), where he said this (3): A

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(1) [1941] 1 All E.R. 33 at p. 43; [1941] A.C. 108 at p. 124.

> " As has been pointed out over and over again in the reported cases, an agency contract of this sort, just like any other contract, must be construed according to its terms. One has to look at the contract and see whether, according to its terms, construed in accordance with the ordinary principles of construction, the event has happened in which the commission is expressed to be payable." B

Then after pointing out that prima facie the intention of the parties is likely to be that the commission stipulated for should only be payable in the event of an actual sale resulting, he continued (3):

> " That is the broad general principle in the light of which the question of construction should be approached, but this does not mean that the contract, if its terms are clear, should not have effect in accordance with those terms even if they do involve the result that the agent's commission is earned and becomes payable although the sale in respect of which it is claimed for some reason or another turns out to be abortive." C

The learned judge in the course of his judgment expressed certain views which in D my opinion run counter to the principles which I have just stated. He said that he felt constrained by the philosophy of the decisions in 1951 and 1952—though not by any express direction from the Court of Appeal—to regard the introduction into the definition of the operative event on which commission was to be earned of the phrase " prepared to enter into a contract " as a nullity. He construed those words as meaning a party who enters into a contract. With the utmost E respect for the learned judge that is altering the language which the parties have thought fit to employ in agreeing the contract for commission between themselves, and it seems to me to run entirely counter to the principles which I have already stated. There was no ambiguity or inconsistency of language which on the usual principles of construction would entitle the court to alter the language of the contract or to reject the words used and substitute others. The learned judge F was, I think, influenced by certain observations of DENNING, L.J., in *Dennis Reed, Ltd.* v. *Goody* (4), where the lord justice dealt with the construction of commission agreements dealing with those who introduce " purchasers ". DENNING, L.J., however, was careful to confine his observations to contracts employing the word " purchasers ". The moment you use the word " purchaser " that conjures up the idea that to earn the commission there must be a purchase, i.e., one G who actually buys the property. But DENNING, L.J., himself pointed out that he was not considering words like " prepared to enter into a contract ". He said (5):

> " He must introduce: ' . . . a person ready, able and willing to purchase the above property for the sum of £2,825 or such other price to which I shall assent'. These words do not mean a person ready, able and willing ' to make an offer ', or even ' to enter into a contract '. They mean a person ready, able and willing ' to purchase, ' i.e., to complete the purchase." H

The learned judge also derived assistance from the observations of LORD GODDARD, C.J., in *Peter Long & Partners* v. *Burns* (6). Valuable as the observations of the noble Lord always are, they do not seem to me to help in this case because I he had to consider a different point, i.e., whether the estate agent introduced " a person ready, willing and able to enter into a binding contract to purchase " by introducing a person who entered into a voidable contract.

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(2) [1952] 1 All E.R. 1394; [1952] 2 Q.B. 432.
(3) [1952] 1 All E.R. at p. 1396; [1952] 2 Q.B. at p. 435.
(4) [1950] 1 All E.R. 919; [1950] 2 K.B. 277.
(5) [1950] 1 All E.R. at p. 925; [1950] 2 K.B. at p. 287.
(6) [1956] 2 All E.R. 25.

Finally the learned judge came to the conclusion that the assent required under the terms of the commission agreement must be a legally binding assent. There again, as a matter of interpretation of this particular contract and for reasons which later appear, I regret that I am unable to agree with him.

I turn then to the consideration of the true interpretation of the commission contract between the plaintiffs and the defendant. It is in these terms:

> " We would take this opportunity of confirming that in the event of our introduction of a party prepared to enter into a contract to purchase on the above terms or on such other terms to which you may assent you will allow us commission upon the scale of the Estate Agents Institute."

It is clear that commission would become payable on one of two events. The first is the introduction of a party prepared to enter into a contract to purchase on the terms set out earlier in the letter. That did not happen and it is unnecessary to consider it further. The second alternative is that commission would be payable in the event of the introduction of a party prepared to enter into a contract to purchase on such terms as the vendors might assent. That is the event on which Ackroyd & Sons are entitled to their commission. While these terms are ultimately indivisible and require the consensus ad idem of two parties, it is convenient for the purposes of analysis to divide it into two parts. The first limb requires the agent to introduce a party prepared to enter into a contract and the second limb requires him to prove the assent of the vendor to the contract into which the other party is prepared to enter.

Speaking for myself, I am unable to read the words " prepared to enter into a contract " as being equivalent to entering into a contract, because that is altering the language which the parties have thought fit to employ. It seems to me essentially a question of fact to decide whether the agent has introduced a purchaser who satisfies that description. Certainly there are some observations to be found in the reported cases which support the view which I have just expressed. Perhaps the closest case is *John E. Trinder & Partners* v. *Haggis* (7). We have had the advantage of being supplied with photostat copies of the judgment. The terms of the commission agreement sufficiently appear from the following extract from the judgment of Sir Raymond Evershed, M.R.:

> " I have once again the misfortune to differ from Denning, L.J., but, in my judgment, ' willing to sign a contract ' must in its context mean and does mean ' willing to sign a contract ' (that is a document being on the face of it an exhaustive statement of the terms of a bargain), ' in form put to him or approved by the vendor '. In the present case that is exactly what [the purchaser] did. He was not only willing to sign but in fact signed a contract in the form which had been approved by the defendant's legal agents duly authorised by him in that behalf. The defendant having, nevertheless, refused to proceed with the matter cannot now, in my judgment, escape the penalty which flows from the fact that the plaintiffs, according as I read the letter, have earned their commission."

The third member of the court, Roxburgh, J., delivered a judgment placing the same construction on the commission agreement as Sir Raymond Evershed, M.R.

Then in two cases where the words " ready able and willing to purchase " have been used, Bucknill, L.J., has pointed out that the agent may (if the facts are established) be entitled to commission though no contract results: see *E. P. Nelson & Co.* v. *Rolfe* (8). In the second case *Dennis Reed, Ltd.* v. *Goody* (9) the learned lord justice said (admittedly obiter) (10):

> " It seems to me that the plaintiffs place an interpretation on the words

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(7) [1951] W.N. 416.
(8) [1949] 2 All E.R. 584; [1950] 1 K.B. 139.
(9) [1950] 1 All E.R. 919; [1950] 2 K.B. 277.
(10) [1950] 1 All E.R. at p. 922; [1950] 2 K.B. at p. 283.

> which would, in effect, make them equivalent to words such as 'on introduction of a purchaser'. I think the words of this clause which are in question are intended to give to the agents a claim to commission in circumstances which fall short of the execution of an enforceable contract on both sides. I do not think it unreasonable that house agents should try to arrange for their claim to commission to be earned in some cases where a sale through their introduction of a person willing to purchase is not in fact effected."

The words in this case seem to me to be perfectly clear and unambiguous though whether the person introduced by the agent satisfies that description may be a difficult question of fact in each particular case. I regretfully find myself unable to agree with the learned judge on this part of the case.

Counsel for the defendant further submitted that where the negotiations are expressed to be "subject to contract" there cannot be a purchaser who is aptly described as being one who is prepared to enter into a contract until the contract is signed and he relied on the case in this court of *Graham & Scott* (*Southgate*), *Ltd.* v. *Oxlade* (11). No doubt that case did decide that prima facie a purchaser who is only prepared to negotiate subject to contract is not properly described as one who is prepared to enter into a contract. Cohen, L.J., delivering the leading judgment, put it in this way (12):

> "Applying that case by analogy to the case before us, I think that the agent may prove that a person he has introduced is willing to purchase the property by showing that that person has made an unqualified offer or expressed an unqualified intention to make an offer notwithstanding that such an offer until accepted could be withdrawn. On the other hand, if the evidence shows that the offer is qualified by a condition inserted to prevent the other party turning the offer into a contract by acceptance, I think it is impossible to say that the agent has discharged the onus which rests on him of proving that the person he has introduced was willing to purchase the property."

On the other hand he recognised that each case must depend on its own particular facts, for he said (13):

> "In reaching my conclusion I am not saying that the introduction into the preliminary arrangements of the expression 'subject to contract' would necessarily in all cases prevent the agent establishing that the person he introduced was willing to purchase. It clearly would not be fatal to the agent's claim if it was introduced by the vendor in accepting an unqualified offer, but, if it was introduced by the prospective purchaser, the normal inference would be that he did so with a view to reserving to himself a locus poenitentiae, conduct which seems to me inconsistent with the view that he is a willing purchaser."

No doubt the principle established in the *Oxlade* case (11) applied during the active negotiations between the parties and during that time the Chinese applicants could not be properly described as persons prepared to enter into a contract, for they were not making an unconditional offer. But I have set out the history of the negotiations between the parties at some length, because on the facts of this case it seems to me that, although the negotiations remained subject to contract, yet in fact the position had been reached by Jan. 17, 1957, where the purchasers satisfied the test laid down by Cohen, L.J., as it has in my judgment been shown that the Chinese applicants had made an unqualified offer, i.e., one capable of acceptance at once by the vendors.

Now what was the situation on Jan. 17, 1957? Mr. Blum, the solicitor acting for the vendors, had in his possession an unconditional offer by the Chinese applicants contained in a completely detailed contractual document with annexures signed by the proposing purchasers. It is clear that he had full authority to accept the offer contained in those documents by sending by way of exchange his own clients' part duly executed to Young & Co. and that would constitute a contract. True it is that it was still an offer subject to contract, but the parties had reached a stage where, at all events so far as the solicitors were concerned, they were or appeared to be ad idem because the solicitors were prepared to advise their clients to sign the lengthy and complicated documents in the form and having the contents which they had so painstakingly prepared. No one was contractually bound at that stage and either party could of course have withdrawn from the negotiations until actual exchange. But it seems to me that the fact that the negotiations were all " subject to contract " had for the relevant purpose become unimportant. It merely meant that the unconditional offer made on behalf of the Chinese applicants could only be accepted in a particular way, i.e., by exchange of contracts. It seems to me that here was a perfectly plain and unconditional offer capable of acceptance in that way, and I think that on the facts of this case the plaintiffs have established the first limb of the event on which the commission is payable: they have introduced a purchaser who was prepared to enter into a contract to purchase on the terms contained in the contract and its annexures which they had, in fact, signed.

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(11) [1950] 1 All E.R. 856; [1950] 2 K.B. 257.
(12) [1950] 1 All E.R. at p. 861; [1950] 2 K.B. at p. 266.
(13) [1950] 1 All E.R. at p. 861; [1950] 2 K.B. at p. 265.

But that is only one side of the medal. The commission agent has to prove that the terms so unconditionally offered were terms to which the vendors would assent. That again is purely a question of fact in each particular case. I am unable to accept the learned judge's view that, on the construction of the commission agreement, " assent " meant assent by a legally binding contract, and, for this reason, that it must then follow that not only the vendor but the purchaser must be legally bound, so that to establish the event on which commission is payable the agents must prove a contract. But that is inconsistent with the other limb of the agreement because all that the commission agent has to do is to introduce a purchaser " prepared to enter into a contract " and not one who does enter into a contract. The learned judge is in fact reading the contract as though the commission became payable only on the introduction of a party who did enter into a contract with the vendor. But those are not the words which the parties have used in their contract. Accordingly, I cannot agree to that construction of the word " assent ".

Has there then been an assent in this case? That again is purely a question of fact. I can envisage circumstances such, for example, as those in *Trinder* v. *Haggis* (14) or in *Eccles* v. *Bryant & Pollock* (15) where although the parties were never legally bound together, it could be strongly argued that the purchaser in signing his part of the contract satisfied the description of a person prepared to enter into a contract and the vendor was one who assented to it by signing his part of the contract though he then withdrew before exchange. However, naturally, I express no concluded view on such a hypothetical case.

The facts here were entirely different. Counsel for the plaintiffs argued that there had in fact been assent by the vendors for the reason that as early as Dec. 28, in the letter to which I have already referred (16) the vendors plainly knew of the terms of the underlease and he urged that they must be taken to have assented to those terms. That the defendants may have seen the draft lease I have already assumed, but I am quite unable to accept the argument. The solicitors had no authority to bind their clients to the terms which they were negotiating and in fairness to them let it be said they never purported to bind their clients. It would be an impossible situation if, during the negotiation of a complicated contract such as this, the parties for the purposes of some collateral commission agreement were to be taken to assent piece by piece to the terms as they were agreed by their solicitors and one of the difficulties of counsel for the plaintiffs in this case was to fix a date on which it could fairly be said there had been an assent by the vendors to the terms offered by the Chinese applicants. In my view no question of assent could arise until the proposed agreement as finally approved between the respective solicitors as being proper to put before their respective clients for signature was in fact submitted to their clients. Just as it could not be suggested that the Chinese applicants satisfied the description of persons prepared to enter into the contract until they had signified such preparedness by signing their part of the contract, so in my view the first moment of time when any question of an assent could arise for the purposes of the commission agreement was when the vendors received the completed documents ready for signature from Mr. Blum. They considered them and never at any time did they give their assent to those documents because it emerged that there had been a fundamental difference of conception as to the subject-matter of the sub-lease. They never had been willing to give up all rights to occupation of every part of the first floor.

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(14) [1951] W.N. 416. (15) [1947] 2 All E.R. 865; [1948] 1 Ch. 93.

(16) See p. 256, letter I, ante.

Accordingly, on this short ground, it seems to me clear in this case that the plaintiffs have never established the event on which they were entitled to claim commission, because they never established that the vendors assented to the terms to which the purchaser was prepared to contract. Later on, the vendors suggested certain terms to which they would give their assent but unfortunately for the plaintiffs the Chinese applicants were not prepared to enter into an agreement containing those terms. It follows therefore that the plaintiffs have not established that the event has happened on which they are entitled to claim payment of the commission, and for those reasons I dismiss this appeal.

ORMEROD, L.J.: I agree. The appeal turns in the first place on the construction of the contract between the parties, which is contained in the letter dated July 24, 1956, from the plaintiffs to the defendant. The material paragraph is:

> " We would take this opportunity of confirming that in the event of our introduction of a party prepared to enter into a contract to purchase on the above terms or on such other terms to which you may assent you will allow us commission upon the scale of the Estate Agents Institute."

No party prepared to enter into a contract in the terms set out in the earlier part of the letter was introduced by the plaintiffs, and the question was whether on a true construction of the above paragraph, and in the light of the evidence, the plaintiffs introduced a party prepared to enter into a contract on the terms to which the defendant had assented.

The learned judge after a careful consideration of numerous authorities cited to him dismissed the plaintiffs' claim. He held that on a true construction of the contract between the parties the event had not happened which would entitle the plaintiffs to commission. He took the view that commission could not be earned until the parties had entered into a binding contract. In his judgment he said (17):

> "... I am now constrained by the philosophy implicit in the judgments in cases decided in 1950 and 1952, rather than by any express direction from the Court of Appeal, to regard the introduction, into the definition of the operative event on which commission will be earned, of the phrase ' prepared to enter into a contract ' as a nullity. If that phrase is sought to be construed against the owner of the property, in my opinion it amounts to a nullity in law, so that one ignores the phrase and construes the document, as a matter of law, as though it did not contain the words ' a party prepared to enter into a contract ', but contained in place of those words, ' a party who enters into a contract ' ... It is a matter of following the philosophy and the reasoning rather than any express direction in any of the judgments.

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(17) [1959] 2 All E.R. at pp. 372, 373.

> A I hold as a matter of construction that this phrase ' introduction of a party prepared to enter into a contract ' means precisely the same as ' introduction of a party who does enter into a contract to purchase ' . . . it is necessary to have the one clear and undoubted criterion—Has there been a contract?"

I find myself unable to agree with the view which the learned judge has taken. B It is well established that a contract of agency of this type must be interpreted according to the ordinary rules of construction, and if, on a proper construction of the contract, commission is payable before the purchase is completed or if the purchase never is completed, there is no reason in such circumstances why an agent should not succeed in establishing a claim for such commission. In considering the matter, however, it is well to have in mind the words of LORD C RUSSELL OF KILLOWEN in *Luxor* (*Eastbourne*), *Ltd.* v. *Cooper* (18):

> " It is possible that an owner may be willing to bind himself to pay a commission for the mere introduction of one who offers to purchase at the specified or minimum price, but such a construction of the contract would, in my opinion, require clear and unequivocal language."

D Applying the ordinary rules of construction and bearing in mind this warning, the contract in this case does not appear to me to be sufficiently clearly expressed to warrant the construction which the learned judge placed on it. I can find no justification, with all respect to him, for holding that the words " prepared to enter into a contract " mean the same as " introduction of a party who does enter into a contract ". The words would not, in my view, be so construed in any other class of contract, and so to construe them in this case appears to be applying E some special rule of construction to estate agents' contracts.

In *Trinder & Partners* v. *Haggis* (19) a case which came before this court on July 2, 1951, the relevant words in the contract for commission were,

> " In the event of us being successful in introducing a person willing to sign a contract to purchase at an agreed price, you will pay us the usual scale F commission."

It was held, DENNING, L.J., dissenting, that the agents were entitled to their commission even though the sale eventually went off altogether. SIR RAYMOND EVERSHED, M.R., after referring to the passage in the speech of LORD RUSSELL OF KILLOWEN in the *Luxor* case (18) to which I have already referred, said (20):

> G " I take that passage as a sufficient statement of the relevant law which is now well established, and I take it to be true that if commission is to be attracted at any stage prior to the coming into existence of a binding contract, it must be so provided in clear terms . . . It is no doubt on a close analysis possible to create doubts and ambiguities in the language used, but it is, I conceive, the duty of the court to give a meaning to the relevant words, H if reasonably possible to do so, and not lightly to conclude that the words are too uncertain and vague to be capable of making an enforceable bargain."

It is true that in *Dennis Reed, Ltd.* v. *Goody* (21), DENNING, L.J., said (22):

> " I can see no sensible distinction between instructions to ' find a purchaser ', ' find a party prepared to purchase ', . . . and ' find a person ready, I willing and able to purchase '. The rights and liabilities of house owners in these cases should not depend on fine verbal differences."

It may be that the learned judge had this and other similar passages from the judgment of DENNING, L.J., in mind when he considered this case, but it is to be observed that the learned lord justice went on to say (22):

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(18) [1941] 1 All E.R. at p. 47; [1941] A.C. at p. 129. (19) [1951] W.N. 416.

(20) The judgment is nowhere fully reported; cf., p. 259, letter F, ante.

(21) [1950] 1 All E.R. 919; [1950] 2 K.B. 277.

(22) [1950] 1 All E.R. at p. 925; [1950] 2 K.B. at p. 288.

> "If estate agents desire to get full commission, not only on sales, but also A on offers, they must use 'clear and unequivocal language'."

In my judgment the language here is clear and unequivocal. The words "prepared to enter into a contract" appear without any straining of language, to bear the meaning that commission will be earned when a party fulfilling the necessary conditions is introduced, and not, as the defendant contends, and as B the learned judge found, only when a binding contract is entered into.

If that is the proper construction of the contract, it remains to consider whether the plaintiffs did introduce a party prepared to enter into a contract on terms assented to by the defendant. Counsel for the plaintiffs contended that the necessary conditions had been fulfilled. He pointed out that the time came when all the details of the contract had been agreed between the respective solicitors C and the applicants had actually signed their part of the contract and forwarded it through their solicitors to the defendant's solicitors together with the balance of the deposit. This, he contended, must be conclusive evidence of the applicants' preparedness to enter into a contract. Counsel for the defendant on the other hand contended that the commission could not be earned, as the learned judge found, until the contract had been signed by both parties and the respective parts had been exchanged. The offer made by the applicants was "subject to contract" D and therefore neither party could be bound until a binding contract was executed; see *Chillingworth* v. *Esche* (23). There is no doubt that an offer "subject to contract" is not evidence that the person making the offer is "willing" to purchase the property. The offer must be a firm one and not one subject to a condition: see *Graham & Scott (Southgate), Ltd.* v. *Oxlade* (24). In that case the wording of the contract was: E

> "We confirm that in the event of our introducing a person or persons willing and able to purchase we shall look to you for the payment of the usual commission . . ."

An offer was made which was expressed to be "subject to contract, satisfactory survey". It appeared from the evidence that the words "subject to contract" F had been inserted by the agent, but that the words "satisfactory survey" were put in at the instance of the purchaser. It was held that the agent was not entitled to commission as an unconditional offer had not been made. COHEN, L.J., said (25):

> "In reaching my conclusion I am not saying that the introduction into G the preliminary arrangements of the expression 'subject to contract' would necessarily in all cases prevent the agent establishing that the person he introduced was willing to purchase. It clearly would not be fatal to the agent's claim if it was introduced by the vendor in accepting an unqualified offer, but, if it was introduced by the prospective purchaser, the normal inference would be that he did so with a view to reserving to himself a locus H poenitentiae, conduct which seems to me inconsistent with the view that he is a willing purchaser."

It is to be remembered in considering the present case that the contract, under which the claim is made, is not between vendor and purchaser. It is between the agents and the vendors. The two questions which have to be decided are (i) were the Chinese applicants (the purchasers) prepared to enter into a contract to I purchase on certain terms, and (ii) were those terms assented to by the defendant. I have no doubt that the first question should be answered in the affirmative. It is true that in the first place the offer was subject to contract and therefore conditional, but by Jan. 17, 1957, all the details had been agreed to the satisfaction of the Chinese applicants who had actually signed their part of the contract, and paid the balance of the deposit. At that time the conditional offer became, in my judgment, an unconditional one, and the only question which remains is whether the terms of the offer were assented to by the defendant. I have come to the conclusion that there was no assent by the defendant. It is not suggested that at any time her solicitor, Mr. Blum, was acting other than within his instructions. He discussed from time to time with the applicants' solicitors the various terms of the transaction, which was more complicated than usual since not only were the terms of a mortgage to be arranged, but there was also to be a lease of part of the premises to the defendant's husband. Eventually the transaction was embodied in the necessary documents, but there is no evidence that Mr. Blum had authority to assent on behalf of his client to the terms of the documents. The true position appears to be that the form of the documents was agreed between the solicitors, but that it was still necessary to get the final assent of the defendant to the terms. I have no doubt that Mr. Blum anticipated that this would be forthcoming when he sent the documents to the defendant on Jan. 14 with a letter in which he said, " if necessary I shall be pleased to discuss the documents with you ". He attended on the defendant and her husband on Jan. 18 when a further question was raised which had apparently been overlooked up to that time, with the result that the transaction after some further negotiations went off. The position therefore appears to be that when Mr. Blum sent the documents to the defendant, there had been no final assent, but that the documents were sent to her for her consideration with a view to her assent being given. Assent was not given, and therefore the event did not happen which would have entitled the plaintiffs to their commission. I would dismiss the appeal.

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(23) [1924] 1 Ch. 97.

(24) [1950] 1 All E.R. 856; [1950] 2 K.B. 257.

(25) [1950] 1 All E.R. at p. 861; [1950] 2 K.B. at p. 265.

SELLERS, L.J. (read by ORMEROD, L.J.): I agree with my Lords that this appeal fails and should be dismissed. I have nothing to add to what has been said on the facts of this case which show no assent by the vendors.

In view of some of the observations of the learned judge I would, however, quote a brief extract from the speech of LORD RUSSELL OF KILLOWEN in *Luxor (Eastbourne), Ltd.* v. *Cooper* (26) which puts some essential and established considerations concisely (27):

> " A few preliminary observations occur to me. (1) Commission contracts are subject to no peculiar rules or principles of their own. The law which governs them is the law which governs all contracts and all questions of agency. (2) No general rule can be laid down by which the rights of the agent or the liabilities of the principal under commission contracts are to be determined. In each case, these must depend upon the exact terms of the contract in question, and upon the true construction of those terms. (3) Contracts by which owners of property, desiring to dispose of it, put it in the hands of agents on commission terms are not (in default of specific provisions) contracts of employment in the ordinary meaning of those words. No obligation is imposed on the agent to do anything."

Although the learned judge expressed himself in language wider perhaps than I would use, I am not at present satisfied that he was wrong in his conclusions and that circumstances could arise, under such an agreement as this, where commission would be payable where the assent of the vendors, which the agreement requires, could be an assent which fell short of concluding a bargain with the proposed purchasers. The assent which the commission agreement requires is clearly an assent to the offer which the agent has obtained. An assent to an unqualified offer would conclude a bargain and commission would be payable. Can an assent not communicated or an acceptance of his offer to the proposed purchaser (whose offer must to meet the first requirement of the event be unqualified) be treated as an assent which entitled the agent to commission? I am not convinced that it could and would reserve consideration of it should it arise on another set of facts.

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(26) [1941] 1 All E.R. 33; [1941] A.C. 108.
(27) [1941] 1 All E.R. at p. 43; [1941] A.C. at p. 124.

Appeal dismissed. No order on the respondent's notice. Leave to appeal to the House of Lords refused.

Solicitors: *Pratt & Sidney Smith* (for the plaintiffs); *R. C. de M. Blum* (for the defendant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

HULTQUIST *v.* UNIVERSAL PATTERN & PRECISION ENGINEERING CO., LTD.

[COURT OF APPEAL (Sellers, Ormerod and Upjohn, L.JJ.), March 31, April 1, 11, 1960.]

Negligence—Damages—Personal injury—Measure of damages—Loss of earnings—Deduction of industrial disablement benefit—Disablement assessed within five years of accident at less than twenty per cent.—Assessment made in respect of period of plaintiff's life—What amount of industrial disablement gratuity to be deducted from loss of earnings—Law Reform (Personal Injuries) Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 41), *s.* 2 (1), *s.* 2 (6) (*c*).

In an action for damages for personal injuries, where, under s. 2 (1)* of the Law Reform (Personal Injuries) Act, 1948, there has to be taken into account, against any loss of earnings of the injured person, " one half of the value of any rights which have accrued or probably will accrue to him [from the injuries] in respect of . . . industrial disablement benefit . . . for the five years beginning with the time when the cause of action accrued," the amount of a disablement gratuity to be taken into account is one half of such proportion of the gratuity as the five-year period (or the unexpired portion thereof) bears to the injured person's expectation of life, if the gratuity is for life, or to any less period specified, under s. 12 (1) (5)† of the National Insurance (Industrial Injuries) Act, 1946, as the period taken into account in the assessment of the extent of the disablement (see p. 271, letter G, post).

On Dec. 9, 1957, the plaintiff, in the course of his employment with the defendants, sustained injuries for which the defendants were liable. As a result of the injuries he was away from work for thirteen weeks and his loss of earnings amounted to £197 18s. 6d. During this period he received £61 1s. 6d. as industrial injury benefit. At the end of the period he was awarded an industrial disablement gratuity of £210, under s. 12‡ of the National Insurance (Industrial Injuries) Act, 1946, the extent of disablement resulting from the loss of faculty being finally assessed at fourteen per cent. for the period (specified in the assessment in accordance with s. 12 (5) of the Act of 1946) from Mar. 16, 1958, for life. His expectation of life was thirty-five years. In an action by the plaintiff for damages,

Held: in assessing the plaintiff's special damage, the proper deduction to be made, under s. 2 (1) of the Act of 1948, in respect of the disablement gratuity was £15 (viz., half of one seventh of £210, the amount of the gratuity, one seventh being the proportion that the five years specified in s. 2 (1) bore to the thirty-five years, which was the period of the plaintiff's expectation of life), because under s. 2 (6) (c) of the Act of 1948 the gratuity was to be treated as benefit received by the plaintiff for the period taken into account by the assessment, which period in the present case was that of the plaintiff's life.

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* The terms of the subsection are printed at p. 268, letter I, post.

† The relevant terms of s. 12 (4) (5) (6) are printed at p. 270, letters C to G, post.

‡ As amended by the National Insurance (No. 2) Act, 1957, and under the National Insurance (Industrial Injuries) (Increase of Benefit and Miscellaneous Provisions) Regulations, 1957, Sch. 1, Part 2.

Perez v. *C.A.V., Ltd.* ([1959] 2 All E.R. 414) approved.

Roberts v. *Naylor Brothers, Ltd.* ([1959] 2 All E.R. 409) overruled.

Appeal allowed.

Costs—Payment into court—Denial of liability—Liability established but lesser amount recovered at trial—Costs of issue of liability subsequent to time of payment in—R.S.C., Ord. 22, *r.* 6.

In an action for damages, where it was necessary to prove both breach of duty and damage, the defendants, who denied liability, paid money into court in satisfaction of the plaintiff's claim. At the trial the plaintiff established liability, but recovered less than the sum paid into court. He applied for costs of the action, after the date of payment into court, on the issue of liability. The judge awarded the plaintiff his costs down to the date of payment in and awarded the defendants their subsequent costs of the action.

Held (*obiter*): the question of costs was within the judge's discretion, to be exercised in accordance with R.S.C., Ord. 22, r. 6*, and the Court of Appeal would not intervene except in special circumstances within the decision in *Evans* v. *Bartlam* ([1937] 2 All E.R. 646); in the present case the judge had rightly exercised his discretion.

[As to allowances for statutory benefits when computing damages in respect of loss of earnings, see 11 HALSBURY'S LAWS (3rd Edn.) 259, para. 431.

As to the discretion over costs after payment into court, see 30 HALSBURY'S LAWS (3rd Edn.) 383, para. 714; and for cases on the subject, see DIGEST (Practice) 874-876, *4156-4163*.

For the Law Reform (Personal Injuries) Act, 1948, s. 2 (1), s. 2 (6), see 25 HALSBURY'S STATUTES (2nd Edn.) 365.

For the National Insurance (Industrial Injuries) Act, 1946, s. 7, s. 12, see 16 HALSBURY'S STATUTES (2nd Edn.) 814, 819.

For the National Insurance (No. 2) Act, 1957, Sch. 2, see 37 HALSBURY'S STATUTES (2nd Edn.) 819.

For the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948, reg. 3, see 15 HALSBURY'S STATUTORY INSTRUMENTS (First Re-issue) 370.

For R.S.C., Ord. 22, r. 6, see the ANNUAL PRACTICE, 1960, p. 534.]

Cases referred to:

De Ridder v. *Ford Motor Co., Ltd.*, (Oct. 3, 1958), unreported.

Evans v. *Bartlam*, [1937] 2 All E.R. 646; [1937] A.C. 473; Digest Supp.

Meagher v. *Parnall (Yate), Ltd.*, (Mar. 3, 1958), unreported.

Munday (J. R.), Ltd. v. *London County Council*, [1916] 2 K.B. 331; 85 L.J.K.B. 1509; 115 L.T. 99; 80 J.P. 403; 36 Digest (Repl.) 195, *1028*.

Perez v. *C.A.V., Ltd.*, [1959] 2 All E.R. 414; [1959] 1 W.L.R. 724.

Roberts v. *Naylor Brothers, Ltd.*, [1959] 2 All E.R. 409; [1959] 1 W.L.R. 718.

Watkin v. *C. A. Parsons & Co., Ltd.*, (Jan. 15, 1958), unreported.

Appeal.

This was an appeal by the plaintiff from so much of the judgment of FINNEMORE, J., dated Mar. 16, 1959, in an action for damages for personal injuries, (a) as related to the assessment of damages; (b) as related to the proportion of a final payment for life made by the Ministry of Pensions and National Insurance

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* The relevant terms of R.S.C., Ord. 22, r. 6, are printed at p. 272, letter H, post.

to be deducted from such damages; and (c) as related to the costs of the action. A
The cause of action alleged in the statement of claim was breach of the duty owed at common law by a master to take reasonable care not to expose his servant to unnecessary risk, as well as breach of statutory duty under s. 14 (1) of the Factories Act, 1937. The defendants denied liability and alleged also contributory negligence on the part of the plaintiff. The trial judge began his judgment by saying: "It is now agreed that the plaintiff, subject to a finding B
of contributory negligence, is entitled to recover". The facts are set out in the judgment of SELLERS, L.J.

Miss Rose Heilbron, Q.C., and *J. D. Stocker* for the plaintiff.
Fenton Atkinson, Q.C., and *Tudor Evans* for the defendants.

Cur. adv. vult. C

Apr. 11. **SELLERS, L.J.**, read the following judgment: In this action for damages for personal injuries sustained while at work, FINNEMORE, J., gave judgment for the plaintiff for £612 7s. 9d. The plaintiff has appealed against the assessment of the damages and against the order made as to costs. Liability is no longer contested by the defendants and they seek to uphold the judgment as given or a slight variation of it. D

The appeal against the damages is on two separate grounds. First, the general damages were assessed at £550 and it was contended that that sum should be substantially increased. At the time of the accident on Dec. 9, 1957, the plaintiff was an operator of a milling machine and was earning just over £15 a week. He was thirty-six years of age. He lost the whole of the index finger on his right hand. The cosmetic result of the amputation was excellent; the E
grip is impaired, but he has a reasonable grip. The important factors in support of the learned judge's assessment are that the plaintiff was only off work for thirteen weeks, that is until March, 1958, since when he has worked with no loss of wages; he is a skilled man able to do his work as before the accident and there seems very little risk of him losing employment in the future by reason of the loss of this finger. The medical reports were agreed and the only task F
for the learned judge was to assess the appropriate damages. He has done so, in my opinion, fairly and adequately, and I can see no reason for disturbing the assessment.

The second ground of appeal is more involved and raises, for the first time in this court, a question on which there has been a conflict of judicial opinion; FINNEMORE, J., and PAULL, J., have taken one view, and STABLE, J., ASHWORTH, G
J., and EDMUND DAVIES, J., another. Counsel for the defendants has contended that neither view is correct and he has submitted an alternative. The special damage alleged by the plaintiff was £197 18s. 6d. loss of wages, and this was an agreed sum, but from this sum certain deductions have to be made and it is here that the controversy has arisen. While he was off work the plaintiff received industrial injury benefit amounting to £61 1s. 6d., and at the end of that H
period of benefit he was awarded an industrial disablement gratuity of £210. The extent of disablement resulting from the loss of faculty was assessed at fourteen per cent. for the period from Mar. 16, 1958, for life. It was a final assessment.

The deductions arise under the Law Reform (Personal Injuries) Act, 1948, from which I cite the relevant provisions. Section 2 (1) reads: I

> "In an action for damages for personal injuries (including any such action arising out of a contract), there shall in assessing those damages be taken into account, against any loss of earnings or profits which has accrued or probably will accrue to the injured person from the injuries, one half of the value of any rights which have accrued or probably will accrue to him therefrom in respect of industrial injury benefit, industrial disablement benefit or sickness benefit for the five years beginning with the time when the cause of action accrued."

No difficulty arises in respect of the accrued injury benefit of £61 1s. 6d. It was accepted that credit should be given for half of that, namely, £30 10s. 9d. With regard to the disablement gratuity, FINNEMORE, J., has treated that as received and accruing within five years of the accident and has allowed half of £210, namely, £105, to be credited against the loss of wages, making a total of £135 10s. 9d. and so reducing the special damages to £62 7s. 9d. The plaintiff submitted that it was erroneous on the facts of this case to take into account half of the gratuity of £210, because this sum was not an industrial disablement benefit for the five years beginning with the time when the cause of action occurred but was a gratuity for life. The expectation of life of the plaintiff was agreed at thirty-five years, and, therefore, the portion of the gratuity to be attributed to the first five years was one seventh of £210, namely, £30, and the appropriate credit was half of that, namely, £15. The two credits together, on this basis, would amount to £45 10s. 9d., which, deducted from the loss of wages of £197 18s. 6d. would give special damages of £152 7s. 9d., making the total damages £702 7s. 9d. As £700 had been paid into court, this became a vital figure on the question of costs.

In arriving at his decision FINNEMORE, J., followed his own judgment in *Watkin* v. *C. A. Parsons & Co., Ld.* (1), and after considering a judgment to the contrary of STABLE, J., in *Meagher* v. *Parnall* (*Yate*), *Ltd.* (2). These two cases were considered and extracts were cited from them in *Roberts* v. *Naylor Brothers, Ltd.* (3), where PAULL, J., took the same view as FINNEMORE, J., and also in *Perez* v. *C.A.V., Ltd.* (4) where EDMUND DAVIES, J., held, agreeing substantially with the decision of STABLE, J., in *Meagher* v. *Parnall* (*Yate*), *Ltd.* (2), that the proper deduction, under s. 2 (1) of the Act of 1948, from a plaintiff's loss of earnings to be made in assessing his special damage was such proportion of one half of a life disablement gratuity as the years unexpired of the five-year period bore to the plaintiff's expectation of life at that time. In *De Ridder* v. *Ford Motor Co., Ltd.* (5), ASHWORTH, J., took the same view as STABLE, J., and EDMUND DAVIES, J., and held that " for " in the phrase " for the five years ", in s. 2 (1), does not indicate that all money received in the period of five years has to be deducted in the proportion of one half, but indicates that the court is faced with the task of assessing the benefit attributable to the loss during that period.

The vexed question which brought this difference of opinion was thought by at least some of the learned judges mentioned to have been a difficulty which had not occurred to the draftsman of the Act of 1948. But, although it does not appear to have been referred to in the argument of counsel or in any of the several judgments delivered on this point, s. 2 (6) (c) of the Act in question provides that for the purposes of s. 2:

> " an industrial disablement gratuity shall be treated as benefit for the period taken into account by the assessment of the extent of the disablement in respect of which it is payable."

By this provision, as I read it, the draftsman had anticipated and had provided for the uncertainty which the earlier part of the same section, that is sub-s. (1), might contain. If this provision had been read, there might well have been unanimity amongst the judges and agreement with the view expressed by EDMUND DAVIES, J., in *Perez* v. *C.A.V., Ltd.* (4), the only reported case to this effect.

Counsel for the defendants, while recognising the applicability of s. 2 (6) (c), submitted that to interpret it correctly one had to consider the structure of the provision of these benefits and payments, and the effect was, he alleged, that the benefit all accrued within seven years and this worked out at 11s. 8d. a week or £30 a year, and, therefore, for the five-year period the total benefit of the gratuity would be £150, half of which would give a credit of £75. In order to follow this argument it is necessary to refer in some detail to the provisions made for compensating persons disabled in industry in substitution for the benefit of the Workmen's Compensation Acts, 1925 to 1945.

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(1) (Jan. 15, 1958), unreported.

(2) (Mar. 3, 1958), unreported.

(3) [1959] 2 All E.R. 409.

(4) [1959] 2 All E.R. 414.

(5) (Oct. 3, 1958), unreported.

The National Insurance (Industrial Injuries) Act, 1946, provided a system of insurance against personal injury caused by accident arising out of and in the course of a person's employment. By s. 7 provision is made (inter alia) for (a) industrial injury benefit and (b) industrial disablement benefit. Section 12 states the circumstances in which an insured person shall become entitled to disablement benefit. By sub-s. (2) the extent of disablement has to be assessed by reference to the disabilities incurred by the claimant as a result of the relevant loss of faculty in accordance with principles laid down in the subsection. Subsection (3) provides that regulations may be made for further defining the principles of assessment and for treating a loss of faculty as a prescribed degree of disablement. Subsection (4) reads, without the proviso:

> " The period to be taken into account by an assessment of the extent of a claimant's disablement shall be the period (beginning not earlier than the end of the injury benefit period, and limited by reference either to the claimant's life or to a definite date) during which the claimant has suffered and may be expected to continue to suffer from the relevant loss of faculty . . . "

Subsection (5) reads, without the proviso:

> " An assessment shall state the degree of disablement in the form of a percentage and shall also specify the period taken into account thereby and, where that is limited by reference to a definite date, whether the assessment is provisional or final . . ."

Subsection (6), of which I shall read only part, provides:

> " Where the extent of the disablement is assessed for the period taken into account as amounting to less than twenty per cent., disablement benefit shall be an industrial disablement gratuity (in this Act referred to as a ' disablement gratuity ')—(a) of an amount fixed, in accordance with the length of the said period and the degree of disablement, by a prescribed scale, but not in any case exceeding £150 (6); and (b) payable, if and in such cases as regulations so provide, by instalments. The scale prescribed for the purposes of this subsection shall be the same for all persons, except that a lower amount may be fixed thereby for cases where at the beginning of the period taken into account by the assessment the beneficiary is under the age of eighteen . . ."

The rates of disablement pension were set out in Sch. 3 to the Act of 1946, but these have been replaced by new rates established by Sch. 2 to the National Insurance (No. 2) Act, 1957. The current scale of disablement gratuities is contained in the National Insurance (Industrial Injuries) (Increase of Benefit and Miscellaneous Provisions) Regulations, 1957 (S.I. 1957 No. 2074), Sch. 1, Part 2, which fixes the new amount of gratuity for degrees of disablement from one per cent. to nineteen per cent. Under these provisions the maximum amount of disablement gratuity for disablement of less than twenty per cent. is £280. The weekly pension ranges from 85s. for a hundred per cent. disablement to 17s. for twenty per cent. disablement, there being a reduction of 8s. 6d. a week for every ten per cent. decrease in extent of disablement (7).

It is provided by the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948 (S.I. 1948 No. 1372), reg. 3:

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(6) The sum of £150 has been increased by subsequent Acts and the present maximum amount of disablement gratuity for disablement of less than twenty per cent. is £280; see letter I, supra.

(7) Under the National Insurance (No. 2) Act, 1957, Sch. 2.

> " Where the extent of a claimant's disablement is assessed at any of the degrees of disablement severally specified in the first column of Sch. 2 to these regulations, the amount of any disablement gratuity payable shall —(a) if the period taken into account by that assessment is limited by reference to the claimant's life or is not less than seven years, be the amount specified in the second column of that Schedule as appropriate to that degree of disablement; (b) in any other case, be an amount which bears the same proportion to the amount so specified as the period taken into account by the assessment bears to a period of seven years, a fraction of a shilling being, for this purpose, treated as a shilling."

It was, therefore, submitted for the defendants that, as the lump sum payable for disablement gratuity was the same whether the assessment was for the claimant's life or for not less than seven years, the gratuity was on the basis of a seven years' purchase and no more, and that was the only material period to be considered in assessing the benefit which had accrued for the five years since the accident. Counsel submitted that s. 2 (1) of the Law Reform (Personal Injuries) Act, 1948, when it refers to industrial disablement benefit, has to be read in the light of s. 2 (6) (c), and that the gratuity has to be treated as a payment of so much a week over seven years. On that basis there should be a credit of £75, and not either £105, as found by the judgment, or £15, as claimed by the plaintiff. I do not so read the provisions. On the contrary, s. 12 (5) of the National Insurance (Industrial Injuries) Act, 1946, requires an assessment to state, not only the degree of disablement in the form of a percentage (in this case fourteen per cent. being the extent of the disablement), but also to specify the period taken into account thereby (in this case life). Section 2 (6) (c) of the Act of 1948 requires the gratuity to be treated as benefit " for the period taken into account ". Here that is for life and not for a period of seven years as the defendants contend. This is the conclusion to which Edmund Davies, J., came in *Perez* v. *C.A.V., Ltd.* (8) without reference to this vital subsection, and it is contrary to the views of Finnemore, J., in the present case.

The result is that, where under s. 2 (1) of the Act of 1948 there has to be

> " taken into account, against any loss of earnings or profits which has accrued or probably will accrue to the injured person from the injuries, one half of the value of any rights which have accrued or probably will accrue to him therefrom in respect of . . . industrial disablement benefit . . . for the five years beginning with the time when the cause of action accrued ",

the amount of the disablement gratuity to be so taken into account should be half of such proportion of the gratuity as the five-year period (or the unexpired period thereof) bears to the injured person's expectation of life, if the gratuity is for life, or to any less period specified for the duration of the gratuity. No point was taken before this court that the words " shall . . . be taken into account " in s. 2 (1) meant anything other than shall be deducted, when the benefits have been assessed and so are ascertainable. All the judgments under review have so accepted it. I would agree with this view. Where, however, the court has to assess the value of any rights which " probably will accrue ", there can be no accurate assessment possible and the court will then take them into account by way of an estimated allowance.

Mr. Atkinson, leading counsel for the defendants, made a further submission that, assuming that this construction is to be accepted, as £210 had in fact been received within the five-year period it could be invested in the purchase of an annuity or otherwise and was worth something more than the aggregate of a succession of payments paid as each week fell due. Far from this point having been taken at the trial, at which Mr. Atkinson was not present, it seems to have been agreed that, if the plaintiff was right in principle on this matter, the total benefit to be taken into account was half of £30. I find nothing in the Act to support the defendants' argument and s. 2 (6) (c) is against it, and, having regard to the small amounts of gratuity, decreasing to £28 for one per cent. disablement, and the unlikelihood of the recipients so treating the gratuity or of it being contemplated that they would do so, I think that common sense requires the argument to be rejected.

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(8) [1959] 2 All E.R. 414.

I, therefore, would allow the appeal on this point and, by reducing the credit from the sum of £105, which the learned judge awarded, to the sum of £15, the total damages for which judgment should be entered are £702 7s. 9d. As this sum is in excess of the £700 paid into court, the plaintiff is entitled to the costs of the trial in substitution for the judge's order. The plaintiff's third point of appeal does not, therefore, arise, but as Finnemore, J., gave leave to appeal I will make brief reference to the submission.

As the matter stood at the trial, judgment was entered, as far as costs were concerned, with costs to the plaintiff up to the date of the payment into court, the defendants to recover against the plaintiff their costs of defence from the date of payment into court, both to be taxed. In the course of the argument on costs, the learned judge said:

> " I think the proper course to follow here is the one I confess I was always brought up on . . . which is that the plaintiff has his costs up to the time of payment in and the defendant has the costs thereafter."

The plaintiff had asked for the costs of the issue of liability on which he had succeeded, and in this court it was submitted that he was entitled to these costs. In my experience also, it is very rarely that a plaintiff in such an action as this and in similar circumstances is awarded the costs of the issue of liability. It is a matter in the discretion of the trial judge, and, whichever way he might exercise it, this court would not intervene except in special circumstances within the decision of *Evans* v. *Bartlam* (9).

The action of tort consists of wrong-doing and damage resulting therefrom (*J. R. Munday, Ltd.* v. *London County Council* (10)), and the plaintiff must prove both to obtain a judgment. On the face of it there can be no complaint and no ground for an order for costs of the issue of liability because the plaintiff has been called on to prove a case to establish his right to damages and has failed to get more than the amount in court. A payment into court is an offer to dispose of the action and, if accepted, prevents all further costs. A plaintiff who continues an action after a payment in takes a risk and cannot normally complain if he has to pay all the costs which his acceptance of the offer would have avoided.

R.S.C., Ord. 22, r. 6, took its present form in 1933, and provided that payment into court should not be disclosed

> " . . . to the judge or jury until all questions of liability and amount of debt or damages have been decided, but the judge shall, in exercising his discretion as to costs, take into account both the fact that money has been paid into court and the amount of such payment."

Counsel for the plaintiff relied on a number of cases cited in the Annual Practice in the notes to this rule, and submitted that the plaintiff was entitled to the costs of the issue on which he had succeeded. Those cases must be treated as relying on their special facts. I do not think that they can be regarded at the present time as authorities which require a judge to grant such costs or which require this court to intervene if he fails to do so. The whole question must be dealt with in the discretion of the judge in accordance with the rule. I entirely agree with the order which Finnemore, J., made in the circumstances as they then existed, but, if I did not, I do not think that this court could in the circumstances of the case have altered it. The appeal will be allowed and judgment entered for the plaintiff for £702 7s. 9d., with costs here and below.

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(9) [1937] 2 All E.R. 646; [1937] A.C. 473.

(10) [1916] 2 K.B. 331. This was an action at common law for negligence.

ORMEROD, L.J.: I have had an opportunity of reading the judgment which has just been delivered by my Lord and I am in full agreement with it. There is nothing that I wish to add.

UPJOHN, L.J., read the following judgment: I agree. I am unable to accept the ingenious arguments of counsel for the defendants that, on the true construction of s. 2 (6) (c) of the Law Reform (Personal Injuries) Act, 1948, the period taken into account by the assessment of the extent of the disablement is the period of seven years merely because that is, in fact, the number of years on which the gratuity is calculated. It seems to me quite plain that the " period taken into account " is the period which by statute must be stated in the assessment of the extent of the disablement, and, in this case, that is a period for life.

It follows, therefore, that half of the gratuity in question, that is the sum of £105, must be taken as spread over the period of the life of the plaintiff. How is that to be done in practice? There seemed to me, during the course of argument, much to be said for taking the view that one ought to treat this sum of £105 as representing a capital sum which must be treated as invested in a pension for the life of the annuitant, and that would involve some computation by reference to the mortality and annuity tables to see what annuity this sum would purchase for a man aged, in this case, thirty-five years. If that be done, it cannot be doubted that a higher pension would result than a mere division of £105 by the expectation of life of the annuitant, and that, in this particular case, would have an all-important effect on the question of costs. However, it seems to me, looking at s. 2 (1) of the Act of 1948, that no precise or exact calculations were intended to be made. The trial judge may have to take into account industrial injury benefits which will probably accrue but which may not have been assessed or finally assessed at the date of judgment. Small sums are involved, and, in fact, it is most unlikely that the beneficiary would in fact purchase an annuity with his gratuity. The figure to be taken into account for the purposes of s. 2 (1) and s. 2 (6) (c) have to be determined by the judge, and he will do so on the evidence before him, exercising his own judgment and common sense. If, for example, a gratuity is assessed for life but there is no evidence before the judge as to the beneficiary's expectation of life, he will, no doubt, make some rough and ready assessment of the proper proportion of the gratuity to be taken into account, just as ASHWORTH, J., in my judgment quite rightly did in *De Ridder* v. *Ford Motor Co., Ltd.* (11). In the present case there was evidence before the learned judge of the plaintiff's expectation of life and the parties actually agreed on the figure to be taken into account on the footing that the plaintiff's contention was correct in law. In my judgment, that figure should be adopted in this case with the result which my Lord has indicated.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *W. H. Thompson* (for the plaintiff); *Carpenters* (for the defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(11) (Oct. 3, 1958), unreported.

KIMPTON *v.* THE STEEL COMPANY OF WALES, LTD.

[COURT OF APPEAL (Sellers, Ormerod and Upjohn, L.JJ.), March 23, 24, 25, 1960.]

Factory—" Staircase "—Set of three steel steps leading to platform—Steps three feet in height and not built into building—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 25 (2).

Master and Servant—Duty of master—Reasonable care not to expose servant to unnecessary risk—Set of three steel steps leading to platform—Duty to provide hand-rail.

The plaintiff was employed as a maintenance electrician in the defendants' factory, where a set of three steel steps led to a platform. The steps, which were three feet in height altogether, consisted of a solid structure of considerable weight. They were not built into the building, but there was an inset into the uppermost step of some part of the platform in order to prevent lateral movement. The treads of the steps, which were protected by studs, were somewhat worn, but not enough to condemn them. The width of each step was only eight inches, and the rises between the steps varied. There was no hand-rail on either side of the steps. While descending the steps hurriedly to deal with a breakdown in the electricity, the plaintiff slipped and injured himself. In an action by him for damages against the defendants, the trial judge held that, in failing to provide a hand-rail to the steps, the defendants were in breach of s. 25 (2)* of the Factories Act, 1937, the steps being a " staircase " within the meaning of the subsection, and, on the facts, the defendants were also in breach of their common law duty as the plaintiff's employers because, if there had been a hand-rail, the plaintiff might have been able to save himself when he slipped and thus have avoided his injuries. On appeal by the defendants,

Held: (i) the defendants were not in breach of s. 25 (2) of the Act of 1937, because the set of steps did not constitute a " staircase " within the meaning of the subsection.

OBSERVATIONS on construing ordinary words in a statute, such as the Factories Act, 1937, according to ordinary standards of usage rather than strictly according to rigid dictionary definitions.

(ii) in determining that, in the circumstances, the defendants were liable at common law for breach of duty to take reasonable care not to expose their servants to unnecessary risk, the trial judge had duly approached the standard of care required as a question distinct from that of breach of statutory duty and his finding of breach of duty was justified.

Appeal dismissed on (ii) above.

[As to the obligation to provide a hand-rail for a staircase in a factory building, see 17 HALSBURY'S LAWS (3rd Edn.) 85, para. 142.

As to a master's duty not to expose servant to unnecessary risk, see 25 HALSBURY'S LAWS (3rd Edn.) 508, para. 976.

For the Factories Act, 1937, s. 25 (2), see 9 HALSBURY'S STATUTES (2nd Edn.) 1017.]

Cases referred to:

Bath v. *British Transport Commission*, [1954] 2 All E.R. 542; [1954] 1 W.L.R. 1013; 24 Digest (Repl.) 1063, *257*.

Latimer v. *A.E.C., Ltd.*, [1952] 1 All E.R. 1302; [1952] 2 Q.B. 701; *affd.* H.L., [1953] 2 All E.R. 449; [1953] A.C. 643; 117 J.P. 387; [1953] 3 W.L.R. 259; 24 Digest (Repl.) 1065, *267*.

Richard Thomas & Baldwins, Ltd. v. *Cummings*, [1955] 1 All E.R. 285; [1955] A.C. 321; [1955] 2 W.L.R. 293; 24 Digest (Repl.) 1056, *223*.

Rogers v. *News of the World*, (Nov. 19, 1958), unreported.

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* The terms of the subsection are printed at p. 275, letter I, post.

Tate v. *Swan Hunter & Wigham Richardson, Ltd.*, [1958] 1 All E.R. 150; [1958] 1 W.L.R. 39; 3rd Digest Supp.

Appeal.

The defendants appealed from a judgment of EDMUND DAVIES, J., dated Apr. 14, 1959, in an action by the plaintiff for damages for personal injuries. The plaintiff was employed as a maintenance electrician in the defendants' factory at Port Talbot. On Feb. 9, 1956, he slipped and injured himself while descending a set of three steps in the factory. EDMUND DAVIES, J., held (a) that the steps constituted a staircase within the meaning of s. 25 (2) of the Factories Act, 1937, and that the defendants were in breach of their duty under the subsection to provide a hand-rail to the staircase, and (b) that, on the facts, the defendants, in failing to provide a hand-rail, were in breach of their common law duty to take reasonable care for the safety of their servants, and he awarded £2,000 damages to the plaintiff.

John Thompson, Q.C., and *A. T. Davies* for the defendants.
Elwyn Jones, Q.C., and *D. Pennant* for the plaintiff.

SELLERS, L.J.: The plaintiff was an electrician employed by the Steel Company of Wales, Ltd. On Feb. 9, 1956, in the course of his work as a maintenance electrician, he was descending three iron or steel steps in the factory when he slipped. The learned judge, EDMUND DAVIES, J., has found that the plaintiff, in descending the steps, probably slipped on the second step and slipped through no fault of his own, that the accident involved him striking his back, and that that accident would probably never have occurred if there had been a hand-rail, because the learned judge thought—and it has not been challenged—that if there had been a hand-rail the plaintiff might have been able to save himself in some way. This set of steps was placed in position, I apprehend, at the time of the construction of this part of the factory in 1951, and there had been no mishap, of which any evidence was accepted in regard to it, in the whole of its history. It is depicted in a photograph which may give an appearance of larger dimensions than it in fact possesses. It is just over three feet in height altogether. The steps are there for the purpose of giving access to or means of descent from a table or platform or a cat-walk (as it has been called). The whole set of steps is made of steel and the treads of the steps are studded so as to give a better foothold or grip. The set of steps is not attached to the building (that is to say, the steps are not built in to the building in any way), but is removable or detachable. It is a solid structure of considerable weight and, no doubt, was wedged in securely, there being an inset into the uppermost step of some part of the platform which prevents lateral movement. Indeed, this case was brought, in one of its aspects, as a breach of duty by the defendants in having this set of steps in such a condition that it wobbled and was unsafe, the allegation being that this was a breach of s. 25 (1) of the Factories Act, 1937. That was rejected by the learned judge and there is no appeal on that point. Another complaint was that there was a breach of s. 26 (1) of the Act of 1937, in that the steps at the time of the accident were greasy and oily. That allegation was also rejected and there is no appeal from that finding either.

The plaintiff succeeded before the learned judge on the last of the main matters which were advanced in order to establish a claim against the defendants. That was under s. 25 (2) of the Factories Act, 1937, which reads:

> "For every staircase in a building or affording a means of exit from a building, a substantial hand-rail shall be provided and maintained, which, if the staircase has an open side shall be on that side, and, in the case of a staircase having two open sides, or in the case of a staircase which, owing to the nature of the construction thereof or the condition of the surface of the steps or other special circumstances, is specially liable to cause accidents, such a hand-rail shall be provided and maintained on both sides. Any open

> side of a staircase shall also be guarded by the provision and maintenance of a lower rail or other effective means." A

The learned judge found that these three steps were a staircase within the meaning of s. 25 (2), and he held, therefore, that there had been a breach of that subsection in that there was no hand-rail (the subsection requiring, in the circumstances, two hand-rails). He also found liability at common law.

B Both points (which on the face of them seem quite simple matters) have created some difficulty. The learned judge stated in his judgment the arguments on the question whether these three movable steps should be called a " staircase " or not, and, having so done, he came to the conclusion that they did constitute a " staircase ". I need not repeat the arguments in full. Reference was made to s. 25 (1) of the Act of 1937, which provides that " All floors, steps, stairs, passages and gangways shall be of sound construction . . ." drawing a distinction between C " steps " and " stairs ", as, indeed, there may be. Section 25 (2), however, does not repeat either " steps " or " stairs ", but refers to a " staircase ". The judgment likewise sets out the material parts of dictionary definitions of what may be a " staircase " and a " flight " of steps, or a " series " of steps. I think that there is little doubt that, on the strict dictionary definition, one might say that these three steps fell within a dictionary definition. The learned judge, D however—I think rightly—did not decide this point on a strict dictionary definition. He was, no doubt, guided by dictionary definitions (as any court would be) and arrived at his conclusion after considering what those definitions were. He took the view, looking at all the circumstances of the case, that this particular structure was a " staircase."

E The approach to this matter must be, I think, first to recognise that the Act does not itself define a " staircase " or, indeed, a " step " or " stairs ". It is dealing with the safety of factories, and using words which have to be considered in the ordinary everyday fulfilment of what is required by its remedial and protecting measures, what is required to be done. I think that the whole Act has regard to what is the ordinary description of things in a factory. The F matter is not without some authority and we were referred to the observations of SOMERVELL, L.J., in *Bath* v. *British Transport Commission* (1). In *Tate* v. *Swan Hunter & Wigham Richardson, Ltd.* (2) MORRIS, L.J., referring to those observations of SOMERVELL, L.J., said:

> " I find myself, in approaching this case, feeling very much as SOMERVELL, L.J., did when he expressed himself in his judgment in *Bath* v. *British* G *Transport Commission* (1). In that case it was held that it was impossible to regard an excavation which constitutes a dry dock as an ' opening ' within the meaning of s. 25 (3), and SOMERVELL, L.J., in this court, said (3): ' I do not know that I can say much more about that point. Where words are, as the words of s. 25 (3) are, perfectly familiar, all one can do is to say whether or not one regards them as apt to cover or describe the circumstances in question in any particular case.' " H

The particular case which the learned lord justice was considering there was the definition of the word " floor ". We have been referred further by counsel for the defendants to some observations of LORD REID in *Richard Thomas & Baldwins, Ltd.* v. *Cummings* (4), where the noble Lord said:

> I " The fact that the interpretation for which the respondent contends would lead to so unreasonable a result is, in my opinion, sufficient to require the more limited meaning of ' in motion ' to be adopted unless there is some very strong objection to it, and none was suggested. It is true that the Factories Act is a remedial statute and one should, therefore, lean towards

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(1) [1954] 2 All E.R. 542.
(2) [1958] 1 All E.R. at p. 153.
(3) [1954] 2 All E.R. at p. 543.
(4) [1955] 1 All E.R. at p. 290; [1955] A.C. at p. 334.

> giving a wide interpretation to it, but that does not justify interpreting an ambiguous provision in a way which leads to quite unreasonable results."

Approaching this question on the facts of this case, I have formed the view that it would be unreasonable to require that these few steps should be dealt with in the way that s. 25 (2) provides, and that, looking at the matter from the approach which these cases indicate, it could not be said that this was a " staircase ". It is not the way in which it would be described; indeed, it was not the way in which it was described by the witnesses in the case who were familiar with it.

There was a somewhat similar set of steps—although one cannot usefully make comparisons with those in different premises—which came for consideration before this court in *Rogers* v. *News of the World* (5). The photographs of that stairway were made available to this court by leading counsel for the defendants in the present case, as he appeared in that case for the appellant plaintiff. Lord Evershed, M.R., said:

> " The first question . . . is this: do these three steps constitute a ' staircase ' within the meaning of s. 25 (2) of the Act? If you get into a debate on the meaning of the words ' steps ', ' stairs ', ' stairway ', ' staircase ', you find yourself, I think, in an atmosphere which might have been appropriate to the ancient sophists; but I agree with the learned judge that the construction of these words, which are ordinary English words, in this Act must be determined according to the ordinary standards of common sense; and if that is right, I would myself avoid any attempt at definition and philosophical discussion. I would confine myself to the question posed as I have earlier posed it—looking at these three steps as there illustrated in these photographs, do they constitute a ' staircase ' within the meaning of s. 25 (2) of the Act? With all respect to Mr. Thompson's argument—attractive as it always is—I must say that I would answer that question unhesitatingly in the negative."

I recognise that it is not a highly scientific basis on which to base a conclusion, but it is a very practical one, and, I think, one to be preferred to a rigid attempt to apply a dictionary definition disregarding the setting and the background on which this Act has to be construed and applied.

The learned judge, however, made an alternative finding. He was prepared to find that there was liability established here at common law, and there is an appeal against that finding as well. We were reminded by learned counsel for the defendants of some observations of Lord Tucker in *Latimer* v. *A.E.C., Ltd.* (6), in the House of Lords. Counsel advanced those observations as a warning that, when considering the common law position, one had to divest oneself of the considerations of the statutory duty and to look at the question only from the point of view of the common law obligations. In the passage relied on, Lord Tucker said (7):

> " With regard to the alleged breach by the respondents of their common law duty to take reasonable care for the safety of their servants, I am in complete agreement with what was said by Singleton, L.J., in the Court of Appeal in his application of the standard required to the facts as found by the trial judge."

I read that part because learned counsel for the plaintiff likewise relied on what Singleton, L.J., said. Lord Tucker went on (8):

> " I only venture to add a few observations out of respect for the careful judgment of Pilcher, J., and because it appears to me desirable in these days, when there are in existence so many statutes and statutory regulations imposing absolute obligations on employers, that the courts should be

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(5) (Nov. 19, 1958), unreported. (6) [1953] 2 All E.R. 449; [1953] A.C. 643.
(7) [1953] 2 All E.R. at p. 454; [1953] A.C. at p. 658.
(8) [1953] 2 All E.R. at p. 455; [1953] A.C. at p. 658.

> vigilant to see that the common law duty owed by a master to his servants should not be gradually enlarged until it is barely distinguishable from his absolute statutory obligations."

I do not think that the learned judge in dealing with this matter infringed that warning in any way. He approached this as a separate matter of inquiry and came to the conclusion that there was here established a breach of the common law duty of the defendants in that he found that this set of steps was dangerous—a potential danger and an unnecessary danger—and that something could and should have been done to have reduced or minimised that risk. It is a case which I would describe as a borderline one. These steps were of no great height. There is no drop of any moment on either side which would, as far as the statute is concerned, require a hand-rail for lateral safety. Those factors do not enter in; but these steps do have some peculiarities which are all relied on, and I have come to the conclusion, not without some hesitation, that they are sufficient and proper to justify the learned judge's conclusion.

The plaintiff was coming down the steps, having clambered up on to the platform from which they led. The first descent which he had to make was a drop of eleven inches on to the top step, the next drop was only nine inches, the next nine inches, and then the bottom one was ten inches. Those were, though not by very much, different lengths of descent. The treads of the steps, protected by studs, were somewhat worn, though not in a way to condemn them. But a factor which was not without importance was that they were only eight inches wide, and anyone coming down would not be able to get his full foot on them. They were rather narrow in that respect; this was not in itself perhaps sufficient to condemn them entirely but should be considered in conjunction with other matters. It was said that the angle was acute. It was forty-nine degrees—which perhaps may not be exceptional. There is, however, another factor, in that, although there was no negligence with regard to the method of maintenance of these stairs, from time to time oil might get on them and might remain there for some little time until ordinary reasonable care could see that it was removed, as the learned judge was entitled to find. Added to that, in a factory such as this, people might move over these steps fairly quickly. The plaintiff himself on this occasion was dealing with an emergency. There had been some breakdown in the electricity. He was a maintenance electrician and was taking a short cut and was hurrying somewhat to get to his work when he slipped on these steps. I think that all these factors together justified the learned judge in thinking that this was a danger in the factory which should have been minimised by the provision of a hand-rail. He has so found. I think that it is unchallenged that the learned judge was justified in saying that, if a hand-rail had been there, the probabilities were that the plaintiff would have been able to save himself and would have avoided the injuries from which he suffered. I differ from the learned judge with regret on the first point with regard to the staircase. I think that it is a difficult point. I prefer the other view, supported as it is by authority. I would uphold the learned judge on the second point. I would, therefore, dismiss the appeal on this ground.

ORMEROD, L.J.: I agree, and I would only add a few words as we are differing from the learned judge on the question whether there was a breach of statutory duty in this case. As my Lord has pointed out, s. 25 (2) of the Factories Act, 1937, provides:

> " For every staircase in a building or affording a means of exit from a building, a substantial hand-rail shall be provided and maintained . . ."

The question is whether the structure in this case (which has been variously described but generally described by the witnesses in the case as " steps ") can be regarded as a " staircase " within the meaning of that subsection. Counsel for the plaintiff submitted that the proper approach to this question was what I may term the dictionary approach, and argued that the definitions of the words "staircase" and "flight", as given in the OXFORD ENGLISH DICTIONARY were wide enough to cover this particular structure. I have no doubt that, if one relies on the definitions, counsel for the plaintiff is perfectly right in that submission, but that, in my view, is not the way in which this matter must be approached. As SOMERVELL, L.J., said in *Bath* v. *British Transport Commission* (9):

> "Where words are, as the words of s. 25 (3) are, perfectly familiar, all one can do is to say whether or not one regards them as apt to cover or describe the circumstances in question in any particular case."

The word "staircase" is one with which we are perfectly familiar and one which is in common and daily use in our language. As I see it, the way to approach the question is to ask oneself whether in the circumstances, looking at this structure, one can properly say that it would be described as a "staircase". In my judgment, looking at the photograph and the plan of this structure (which is, of course, all we have before us), it is not a staircase and, therefore, s. 25 (2) does not apply to it.

With regard to liability at common law, the issue there is, not whether there should have been a hand-rail, but whether this structure was reasonably safe in the circumstances. There have been numerous definitions of the employer's responsibility towards his workpeople, and perhaps that of SINGLETON, L.J., in *Latimer* v. *A.E.C., Ltd.* (10) is sufficiently comprehensive when he says that it is the employer's duty

> ". . . to take care in the way that a prudent employer would to see that his workmen are not exposed to unnecessary risks . . ."

The issue here is whether this structure, as it was at the time of the accident, did expose workmen to unnecessary risks. The learned judge, after considering all the various qualities of the structure (to which reference has already been made) came to the conclusion that this was not a safe structure as it was. It probably would have been a safe structure with a hand-rail, but, as it was at the time of the accident, it was not a safe structure. Although I agree with my Lord that this is a case which is very much on the borderline, I have come to the conclusion that the learned judge was right in deciding, as he did, that this was not a sufficiently safe structure in the circumstances, and, therefore, the liability at common law rested on the employers for this accident.

In his judgment the learned judge said:

> "The conclusion I have come to is that reasonable foresight on the part of the employer as to what might well happen to a man descending those steps in a hurry (as could well be the case) required the provision of a hand-rail on one side or the other."

Counsel for the defendants submitted that it could really be inferred from what the learned judge was saying that the words "what might well happen" meant "what might possibly happen". That, I think, is putting much too limited a meaning on the words. I think that the learned judge was stating quite sufficiently and clearly the duty of an employer towards his workmen. In the circumstances I can find no fault in the way in which the learned judge approached this part of the case, nor with the conclusion to which he came. I too would dismiss the appeal.

UPJOHN, L.J.: I agree. I only desire to add a few words because counsel for the plaintiff invited us to clarify the law for the future by giving a definition to the word "staircase" to be found in s. 25 (2) of the Factories Act, 1937, and, in particular, to adopt the definition to be found in the OXFORD

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(9) [1954] 2 All E.R. at p. 543.
(10) [1952] 1 All E.R. at p. 1304; [1952] 2 Q.B. at p. 708.

Dictionary. It is to be observed, however, that the Act itself has carefully refrained from any such definition. I think that it would be wrong for this court to attempt to do so. Whether a structure is or is not a staircase must depend on the circumstances and facts in each particular case, and it is not possible to lay down any rule of general application. When the court has to consider the meaning of ordinary words in common use in the English language such as "staircase", "floor", "steps", "stairs", "passages", and "gangways", the court must apply its own general knowledge and common sense to the solution of the problem. A dictionary may in some cases be of assistance, but it certainly provides no sure guide to the ultimate solution of the problem.

Having, like my Lords, given the matter the best consideration that I can, I have come to the conclusion that the structure in this case is quite clearly not a "staircase" for the purposes of the Act, although it may fall within the definition in the Oxford Dictionary.

With regard to the claim at common law, I agree exactly with the way in which the matter has been put by Sellers, L.J., and do not desire to add anything thereto. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Kenneth Brown, Baker, Baker,* agents for *Gee & Edwards,* Swansea (for the defendants); *Rowley Ashworth & Co.* (for the plaintiff).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

LE MARE *v.* LE MARE.

[Probate, Divorce and Admiralty Division (Collingwood, J.), April 13, 1960.]

Infant—Maintenance—Child of divorced parents—Age of child—Order for unsecured maintenance for child extending beyond age of twenty-one—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 26 (1).

The court has power under the Matrimonial Causes Act, 1950, s. 26 (1), to order unsecured maintenance for a child beyond the age of twenty-one years.

[As to age limits for orders for children, see 12 Halsbury's Laws (3rd Edn.) 356, para. 760, note (e); 395, para. 874, note (r); and for cases on the subject, see 27 Digest (Repl.) 500, *4433-4436*; 663, 664, *6282*, *6283*.

For the Matrimonial Causes Act, 1950, s. 23 (1), s. 24 (1), s. 25, s. 26, see 29 Halsbury's Statutes (2nd Edn.) 410-413.

For the Matrimonial Proceedings (Children) Act, 1958, s. 1 (1), see 38 Halsbury's Statutes (2nd Edn.) 477.]

Cases referred to:

Blandford v. *Blandford*, [1892] P. 148; 61 L.J.P. 97; 67 L.T. 392; 27 Digest (Repl.) 500, *4434*.

Thomasset v. *Thomasset*, [1894] P. 295; 63 L.J.P. 140; 71 L.T. 148; 27 Digest (Repl.) 664, *6283*.

Summons adjourned into open court for judgment.

This was a summons referred to a judge by order of Mr. Registrar Compton Miller dated Apr. 5, 1960. The facts appear in the judgment of Collingwood, J.

Joseph Jackson for the wife.
Victor Williams for the husband.

Cur. adv. vult.

Apr. 13. **COLLINGWOOD, J.:** The wife petitioner was granted a decree nisi on Dec. 14, 1959, on the ground of the husband's adultery. The present summons is by the wife for an order for secured provision for maintenance for

A herself, maintenance for the child of the marriage, Robert, from the date of decree absolute until Apr. 1, 1963, and for payment to the said child of such additional sum as is necessary to pay for the child's tuition and examination fees. The son is now aged twenty years, and the question raised is whether the court has power to provide maintenance for a child beyond the age of twenty-one years.

B Section 26 of the Matrimonial Causes Act, 1950, provides as follows:

> " (1) In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children the marriage of whose C parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court.
>
> " (3) On any decree of divorce or nullity of marriage, the court shall have power to order the husband, and on a decree of divorce made on the ground of the husband's insanity, shall also have power to order the wife, to secure D for the benefit of the children such gross sum of money or annual sum of money as the court may deem reasonable, and the court may for that purpose order that it shall be referred to one of the conveyancing counsel of the court to settle and approve a proper deed or instrument to be executed by all necessary parties: Provided that the term for which any sum of money is secured for the benefit of a child shall not extend beyond the date when the child will attain twenty-one years of age."

E It is to be observed that sub-s. (1) speaks of " children of the marriage " without any restriction as to age. Furthermore, the proviso to sub-s. (3) says that where the money is secured for the benefit of the child then the term shall not extend beyond the date when the child attains twenty-one years. This specific restriction in respect of secured maintenance would seem to indicate that unsecured payments F were the subject of no such restriction, otherwise there would be no necessity for this proviso.

Again, if one looks at s. 23 (1) of the same Act, it is provided:

> " Where a husband has been guilty of wilful neglect to provide reasonable maintenance for his wife or the infant children of the marriage, the court, if it would have jurisdiction to entertain proceedings by the wife for judicial G separation, may, on the application of the wife, order the husband to make to her such periodical payments as may be just . . ."

In that subsection it is to be observed that the power is restricted to " infant children " specifically. Section 24, which relates to the power of the court to order settlement of the wife's property, is said to be for the benefit of the children H of the marriage, in that instance without the use of the word " infant "; and in s. 25, which relates to the power of the court to make orders as to application of settled property, again there is no restriction as to age.

Furthermore, the Matrimonial Proceedings (Children) Act, 1958, s. 1 (1), which extends the jurisdiction of the court to further classes of children, refers specifically to s. 26 of the Act, whilst s. 4 (1), which deals with cases of wilful I neglect to provide reasonable maintenance, refers to s. 23 (1) of the Act—which shows that the legislature had in mind the distinction between " child " and " infant child ".

The case cited in support of the proposition that the power of the court is limited to the age of twenty-one years was *Thomasset* v. *Thomasset* (1). The head-note of that case reads:

> " The court has power to make orders respecting the custody, maintenance,

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(1) [1894] P. 295.

> and education of children during the whole period of their infancy—that is, till they attain the age of twenty-one years. *Blandford* v. *Blandford* (2) overruled."

The facts in that case, which was an appeal from SIR FRANCIS JEUNE, P., were these: On Mar. 15, 1892, the petitioner, Mrs. Thomasset, obtained a decree of divorce from her husband, the respondent. On Aug. 8, 1893, an order was made for the payment by the respondent to the petitioner of permanent alimony at the rate of £266 per annum and £23 6s. 8d. per annum for each of the four younger children of the marriage for their maintenance and education. On Mar. 27, 1894, T., the eldest of these four children, attained the age of sixteen years; and on June 1, 1894, an order was made by the registrar, on the application of the respondent, that the allowance of £23 6s. 8d. for the maintenance of that child should cease. This order was affirmed by the President, who considered that he was bound by the authority of *Blandford* v. *Blandford* (2). From that decision the petitioner appealed, and the Court of Appeal allowed the appeal.

I need only refer to a portion of the judgment of LINDLEY, L.J. He said (3):

> "In my judgment, the wide discretion conferred on the Divorce Court by the Divorce Acts has been unduly restricted by judicial decisions. Such discretion ought to be exercised in each particular case as the circumstances of that case may require; and in exercising such discretion the Divorce Court, which has all the old powers of the Court of Chancery, is not and ought not to consider itself fettered by any supposed rule to the effect that it has no power to make orders under the Acts respecting the custody, maintenance, and education of infants who, being males, are over fourteen, or who, being females, are over sixteen. I am clearly of opinion that, whether the children are males or females, the jurisdiction conferred by the sections of the Divorce Acts (4) on which this case turns can, since the Judicature Acts, at all events, be exercised during the whole period of infancy—that is, until the children, whether males or females, attain twenty-one; although I do not say that a child who has attained years of discretion can, except under very special circumstances, be properly ordered into the custody of either parent against such child's own wishes. The appeal must therefore be allowed . . ."

That decision was under s. 35 of the Matrimonial Causes Act, 1857, and in that Act there is no proviso such as there is to s. 26 (3) of the Act of 1950, and in my opinion, the wording of s. 26 and the proviso to s. 26 (3) of the Matrimonial Causes Act, 1950, show that there is no such restriction under that section. Therefore, the order will be made in accordance with the wife's summons.

Order accordingly.

Solicitors: *Oswald Hickson, Collier & Co.* (for the wife); *Withers & Co.* (for the husband).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

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(2) [1892] P. 148.

(3) [1894] P. at p. 302.

(4) Matrimonial Causes Act, 1857, s. 35; Matrimonial Causes Act, 1859, s. 4.

HARRY FERGUSON RESEARCH, LTD. *v.* DAWKINS (VALUATION OFFICER). HARRY FERGUSON RESEARCH, LTD. *v.* WARWICK RURAL DISTRICT COUNCIL.

[Court of Appeal (Hodson, Willmer and Devlin, L.JJ.), April 8, 11, 1960.]

Rates—De-rating—Industrial hereditament—Research establishment—Use for making and testing prototypes and parts of vehicles—Factory and Workshop Act, 1901 (1 *Edw.* 7 *c.* 22), *s.* 149 (1)—*Rating and Valuation* (*Apportionment*) *Act,* 1928 (18 *&* 19 *Geo.* 5 *c.* 44), *s.* 3 (1), *proviso* (*f*).

Premises were used for the construction and testing of prototype vehicles and for the making and testing of parts to go into the vehicles, in connexion with the development of a new type of transport vehicle, and also for the development of the ideas tested in the prototypes and the necessary work of design and drawing. It was conceded that the premises were a factory within the meaning of s. 149 (1) of the Factory and Workshop Act, 1901. It was found by the Lands Tribunal that the work on the premises was done " for the purpose of finding out whether an idea is good and practical ".

Held: the purpose of finding out whether an idea was good and practical was one which was not the purpose of a factory, and accordingly the premises were primarily occupied for a non-factory purpose within proviso (f) to s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, and were thereby excluded from being an industrial hereditament within s. 3 (1).

Grove v. *Lloyd's British Testing Co., Ltd.* ([1931] All E.R. Rep. 242) applied.

Appeal allowed.

[As to primary purposes of user of a hereditament for de-rating purposes, see 27 Halsbury's Laws (2nd Edn.) 448-455, paras. 881-886; and for cases on the subject, see Digest Supp.

For s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, see 20 Halsbury's Statutes (2nd Edn.) 176, and for s. 149 (1) of the Factory and Workshop Act, 1901, see ibid. 180.]

Cases referred to:

Grove (*Dudley Revenue Officer*) v. *Lloyd's British Testing Co., Ltd.*, [1931] All E.R. Rep. 242; [1931] A.C. 450; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.

Moon (*Lambeth Revenue Officer*) v. *London County Council,* [1930] All E.R. Rep. 63; [1931] A.C. 151; 100 L.J.K.B. 153; 144 L.T. 410; 95 J.P. 64; Digest Supp.

Case Stated.

The respondent ratepayers were the occupiers of a hereditament described as offices, research establishment and premises, Approach Road, Baginton Airport, in the county of Warwick. They appealed to the Lands Tribunal against a decision of a local valuation court of Warwickshire Local Valuation Panel determining that the hereditament should be assessed at £1,140 gross value, £947 rateable value in the valuation list for Warwick Rural District. By an agreement in writing they and the appellant valuation officer and the rating authority also referred the matter of a proposal for the alteration of the valuation list which they had made with respect to the hereditament, and to which the valuation officer had objected, to arbitration by the Lands Tribunal. On Jan. 9, 1959 ((1959), 4 R.R.C. 339) the Lands Tribunal determined the appeal and the reference and held that the hereditament was an industrial hereditament within the meaning of s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, and should be assessed as such in Part II of the valuation list. The valuation officer appealed by way of Case Stated to the Court of Appeal. He contended that the hereditament was not an industrial hereditament, inter alia on the ground that it was

primarily occupied and used for purposes not those of a factory or workshop, A
viz., for the purposes of research and other scientific work.

J. P. Widgery, Q.C., and *A. S. Orr* for the valuation officer.
D. G. Widdicombe for the ratepayers.

HODSON, L.J.: This is an appeal against a decision of the Lands Tribunal dated Jan. 9, 1959, on a reference to arbitration in respect of two proposals B concerning an assessment of a hereditament described as offices, research establishment and premises at Approach Road, Baginton. The question is whether or not the premises constitute an industrial hereditament. The hereditament is a factory building taken by the respondent ratepayers in June, 1956, and used by them for the purpose of developing a revolutionary type of transport vehicle. The following facts were proved (1): C

> " At the date of the first proposal the hereditament consisted of a machine shop, main workshop, engine test house, drawing office and other offices and ancillary buildings, together with a car park. By the date of the second proposal a new office block had been erected enabling the main workshop area to be enlarged. The type of work done on the hereditament consists of the D construction and testing of prototype vehicles and of the making and testing of parts to go into those vehicles. This work is in connexion with the development of a new type of transport vehicle, the ideas for which originated in the main with the chairman of the [ratepayer] company, and embody patents which were acquired in 1950 from a Mr. Dixon and a Mr. Rolt. The vehicle is still in the process of research and development and is not yet available to E the public."

Further facts proved were:

> " (a) The work done by the company at this hereditament embraced most elements of a vehicle but especially the suspension, transmission, braking and driving. (b) At the date of the hearing four prototype vehicles had been F constructed. These were all in existence but had not yet reached finality. (c) The prototype can be used for the purpose of practical demonstration. (d) For manufacture in bulk outside the hereditament complete sets of blue prints would be supplied. (e) The development of the ideas tested in the prototype and the necessary work of design and drawing took place on the hereditament."

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The member of the Lands Tribunal made an inspection on Dec. 15, 1959, when he saw the drawing office as well as the various workshops mentioned in the decision. The process involves that the inventor's conception has to be expressed in blue prints and the design has to be tested to see whether it works in practice. It is to this end that prototypes are required. In these operations something is made which gives the premises a factory flavour, and it is conceded that the premises H are a factory within the definition contained in the Factory and Workshop Act, 1901, s. 149 (1), which reads:

> " Subject to the provisions of this section, the following expressions have in this Act the meanings hereby assigned to them; that is to say:—The expression 'non-textile factory' means—(a) any works, warehouses, furnaces, mills, foundries or places named in Part 1 of Sch. 6 to this Act." I

Paragraph 13 of that Schedule is:

> " 'Metal and india-rubber works', that is to say, any premises in which steam, water or other mechanical power is used for moving machinery employed in the manufacture of machinery or in the manufacture of any article of metal not being machinery or in the manufacture of india-rubber

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(1) 4 R.R.C. at p. 341.

> or gutta-percha or of articles made wholly or partially of india-rubber or gutta-percha."

It is immaterial to consider whether the premises come within the definition of "factory" contained in s. 149 (1) (c):

> "any premises wherein or within the close or curtilage or precincts of which any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes, namely—(i) the making of any article or of part of any article."

The premises being a factory, the remaining question is whether they are precluded from being an industrial hereditament by the terms of the proviso to s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, which reads:

> "In this Act the expression 'industrial hereditament' means a hereditament . . . occupied and used . . . as a factory . . . Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes . . . (f) any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop."

The Lands Tribunal found the following facts (2):

> ". . . I accept the evidence of Mr. J. R. Peacock, the secretary of Harry Ferguson Research, Ltd., Harry Ferguson Holdings, Ltd. and H. F. Holdings, Ltd., that the object of the work done here is the construction of prototypes and parts and the testing of them for the purpose of finding out whether an idea is good and practical, and the only product of the premises is a prototype and parts thereof."

The Lands Tribunal also accepted the evidence of the ratepayers' witness when he said (2):

> ". . . that the prototype was one of the most important articles in the business as it was relied upon for the purpose of demonstrating principles."

The decision went on (2):

> "This is a relatively small works and is not adapted for manufacture of cars for sale to the public, as I have said the final product is the completed prototype or perfected parts; manufacture in bulk cannot be undertaken in the premises as they now are."

The Lands Tribunal, having found those facts, answered the question posed by saying that it found that the hereditament was an industrial hereditament and not within the proviso. Immediately before the conclusion, as if it were the basis of that conclusion, it said this (2):

> "The receipts of the [ratepayers] arise almost wholly from payments made by the parent company and I think that these payments are made not to finance research as such, but to enable research to be carried out with the object of placing either a new type of vehicle or new type components or parts of vehicles on the market, and it seems to me that the work done by the [ratepayers] is by way of trade or for the purposes of gain, though these are indirect and nothing comes out of the factory which is immediately saleable to the general public."

With all respect to the Lands Tribunal, I do not think that the question of ultimate gain is relevant to the question under consideration, although, of course, it would be relevant had the question been: Are the premises a factory within the definition contained in s. 149 (1) (c) of the Act of 1901? It has not been suggested that the activities of the ratepayers are altruistic: but the contention before the Lands Tribunal and in this court was that the primary purposes of the factory are not factory purposes but research purposes, the work being of an experimental nature involving the making and perfecting of a design, and it is contended that the purpose of the operation is to produce a design, the end product being a blue-print which can be used elsewhere in practice.

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(2) 4 R.R.C. at p. 342.

Reliance was placed on a decision of the House of Lords in *Grove* (*Dudley Revenue Officer*) v. *Lloyd's British Testing Co., Ltd.* (3). In that case, there was a conflict of judicial opinion in the lower courts on the question whether the hereditament was a factory; but the matter which is relevant to this case appears in the speech of LORD DUNEDIN (4). The factory in question, a cable testing station occupied by Lloyd's British Testing Co., Ltd., was engaged in testing cables and anchors and it was used for forging links to join up chains which had been severed in the process of testing. When the admission was made that the premises were a factory, the argument turned on the question whether the primary purpose was a factory purpose or not. LORD DUNEDIN said (5):

> " Undoubtedly, there is in these works the forging of links to join up the chains which have been severed, and that forging gives to the premises the character of a factory. The Attorney-General admits this in his Case, but then he says: ' True, it becomes a factory, but it is not an industrial hereditament because it is struck at by s. 3 (1) (f) of the Act of 1928, namely, being primarily occupied and used for other purposes which are not those of a factory or workshop.' The question, put in this way, was, as I have said, not dealt with in the courts below. In answer to the argument of the Attorney-General, counsel for the respondents presented an argument to this effect: ' This is ', said he, ' admittedly a factory, but this factory has only one purpose, to wit, testing. Therefore, it cannot be said that it is mainly used for a purpose which is not a factory purpose.' This argument is very ingenious and seems, at first sight, difficult to answer, but, on consideration, I am satisfied that it is unsound. One must begin by remembering that, in considering this argument, testing alone is, ex hypothesi, not a factory purpose. The purpose of a particular factory must be gathered from that which makes it a factory. If it was made a factory because it fell within an actual description in Part I of the Schedule, you must gather the purpose from that description. Here the hereditament is made a factory because of the manufacture of articles of metal. Therefore, so far as this hereditament is a factory, its purpose is the manufacture of metal. But the hereditament is, without doubt, primarily occupied and used for the purposes of testing operations, and such operations are, ex hypothesi, not factory purposes, and, consequently, the case falls within the words of the exception, and the hereditament, although a factory, is not an industrial hereditament."

It is submitted by the valuation officer, on whom is the burden of showing what the primary purpose is, that research, like testing, is not a factory purpose and he emphasises that the word " research " does not appear in any of the definitions of a factory. If research is the primary purpose it matters not that articles are made such as prototypes. The work carried on prior to manufacture is no more a factory purpose than, say, the testing in the *Grove* case (3). Making the article is an incidental part of the research process, and, as it were, the middle part of the operation.

Counsel for the ratepayers seeks to distinguish the *Grove* case (3) on the facts by emphasising that the Lands Tribunal has inspected the factory and has come to the conclusion that, whatever may be the position of the testing of anchor chains, where admittedly factory operations were carried out, the manufacture of the prototype is truly a primary purpose of this factory.

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(3) [1931] All E.R. Rep. 242; [1931] A.C. 450.
(4) [1931] All E.R. Rep. at p. 252; [1931] A.C. at p. 466.
(5) [1931] All E.R. Rep. at p. 253; [1931] A.C. at p. 468.

In my view of the evidence which was accepted by the Lands Tribunal (6) which I have read, viz., the evidence of Mr. Peacock, I think that the question has been answered in favour of the valuation officer by the finding that the object of the work being done was the primary purpose, or, as it is put in the finding of fact, " the purpose is to find out whether an idea is good or practical ". This is entirely different from saying that the construction of the prototype is the primary object of the factory. In my judgment, the conclusion which the Lands Tribunal finally reached is inconsistent with the conclusion which was foreshadowed by an acceptance of the evidence of Mr. Peacock, and, accordingly, I would allow the appeal.

WILLMER, L.J.: I agree that this appeal must be allowed. The sole question raised by the case is whether the tribunal came to a correct decision in law in finding that the ratepayers' hereditament is an industrial hereditament within s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928. By that section an industrial hereditament is defined as a hereditament occupied and used as a factory, subject to the proviso that the expression does not include a hereditament occupied and used as a factory if it is primarily occupied and used for any of a number of defined purposes, including purposes which are not those of a factory. By sub-s. (2) the expression " factory " is given the same meaning as in the Factory and Workshop Acts, 1901 to 1920.

It is admitted by the valuation officer that the ratepayers' hereditament is a factory within s. 149 (1) (a) of the Act of 1901, in that it comes within the description contained in para. (13) of Part I of Sch. 6, as consisting of premises in which mechanical power is used for moving machinery employed in the manufacture of machinery or articles of metal. Counsel for the valuation officer did not admit, though he was not concerned to deny, that the hereditament might also be a factory within para. (c) of the same section, in that it comprises premises wherein manual labour is exercised by way of trade or for purposes of gain in or incidental to the purpose of making any article or part of an article. He contended, however, that this was not a relevant question; for once it was admitted that the hereditament was a factory under para. (a) it mattered not whether it was also a factory under para. (c). The only relevant question, he contended, was whether the hereditament, assuming it to be a factory under one paragraph or the other, fell within the proviso to s. 3 (1) of the Act of 1928, so as to be excluded from the definition of industrial hereditament.

It appears that a good deal of the argument before the tribunal was directed to the question whether the work done in the ratepayers' hereditament was done by way of trade or for purposes of gain. I agree with the submission of counsel for the valuation officer that this question, while directly relevant in considering whether the hereditament is a factory, is of no materiality in determining whether it falls within the proviso to s. 3 (1) of the Act of 1928. The member of the tribunal, however, having found that the work done was by way of trade or for the purposes of gain, went on to find that for that reason the hereditament was an industrial hereditament. This appears to me to be a complete non sequitur, for the question whether a factory is an industrial hereditament within the Act of 1928 does not depend on whether the work done there is by way of trade or for the purposes of gain.

Let it be assumed that the ratepayers exercise labour by way of trade and for the purposes of gain (albeit indirectly) in the making of articles, such as the prototypes and parts thereof, in their hereditament. Let it be assumed that this supplies an additional reason for concluding that the hereditament is a factory within the meaning of the Act of 1901. The question still remains whether, being a factory for the purposes of that Act, it is primarily occupied and used for purposes other than factory purposes. Following the dictum of LORD DUNEDIN in *Moon* (*Lambeth Revenue Officer*) v. *London County Council* (7), I construe " primarily " as meaning " mainly ". The question which then has to be answered is: what is the main purpose for which the hereditament is occupied or used? I venture to draw attention to the use by the draftsman of the word " purpose ". This to my mind connotes the subjective intention of the person occupying or using the hereditament. The question has to be solved by considering the purposes of the occupiers. If their main purpose is to make articles, then without question that is a factory purpose, the proviso to s. 3 (1) of the Act does not apply, and the hereditament is plainly an industrial hereditament. But if the main purpose is something other than the mere making of articles, different considerations apply.

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(6) **4 R.R.C. 339.**

On this very point there was fortunately direct evidence before the tribunal, namely, that of Mr. Peacock, which was specifically accepted. Accepting this evidence, the tribunal finds (8):

> " . . . that the object of the work done here is the construction of prototypes and parts and the testing of them *for the purpose of finding out whether an idea is good and practical.*"

I venture to italicise the words " for the purpose of finding out whether an idea is good and practical", because it seems to me that the finding of this purpose is really conclusive in favour of the valuation officer. It is a finding which involves, as a necessary inference, that the manufacture of articles, i.e., the prototypes and parts, is subsidiary and incidental to the main or primary purpose. In my judgment, this finding renders the present case indistinguishable in principle from *Grove* v. *Lloyd's British Testing Co., Ltd.* (9). In that case the hereditament in question was admittedly a factory within the meaning of s. 149 (1) of the Factory and Workshop Act, 1901, because, in the course of testing the chain cables, articles, namely, additional links, were manufactured. But this work of manufacturing links was found to be merely incidental to the main purpose for which the hereditament was occupied and used, namely, the testing of cables. Since testing of cables was not a factory purpose, it was held by the House of Lords that the hereditament fell within the proviso to s. 3 (1) of the Act of 1928, so that it was not an industrial hereditament.

In my judgment, the same result should follow in the present case. As in *Grove's* case (9), so here, the main or primary purpose for which the hereditament is occupied and used is experimental. Manufacture takes place only for the purpose of aiding, and as incidental to, the work of experiment, which is not a factory purpose. On the finding of the tribunal, which I have already quoted, as to the purpose of the work that is done, only one conclusion is in my judgment open, viz., that this hereditament is primarily occupied and used for a purpose which is not a factory purpose, and, accordingly, it is not an industrial hereditament.

It follows, therefore, that the valuation officer is entitled to succeed.

DEVLIN, L.J.: Is what is going on in this factory the making of prototypes or the trying out of a new idea? The obvious answer is both. But the Act requires that one of the two should be put first. Are prototypes being made for the purpose of testing the idea or has the idea been conceived for the purpose of making prototypes? When, as here, all the facts are known, I think this is a question of law because the answer to it depends on the meaning and intent of the Act. The matter hardly admits of elaboration. There is nothing to be done on a question of this sort except to answer it one way or the other according to the best of one's judgment, and I say that the prototypes are being made for the purpose of testing out the idea. If this be so, it is not disputed that the appeal should be allowed, and I, therefore, agree with the judgments which my Lords have delivered.

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(7) [1930] All E.R. Rep. at p. 70; [1931] A.C. at p. 166. (8) 4 R.R.C. at p. 342.
(9) [1931] All E.R. Rep. 242; [1931] A.C. 450.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue* (for the valuation officer); *Joynson-Hicks & Co.*, agents for *R. A. Rotherham & Co.*, Coventry (for the ratepayers).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

In the Estate of COCKE (*deceased*).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lloyd-Jones, J.) February 10, 1960.]

Will—Revocation—Dependent relative revocation—Revocation clause in later will—Later will though executed left incomplete—Admission of both wills to probate.

The testatrix made a will in 1956 which was prepared for her by a solicitor, and by which, after making certain specific bequests, she left the residue of her estate to her executor, an accountant, C. This will also contained a charging clause. In 1958 the testatrix made a second will in holograph form, using a completed carbon copy of the first will as a draft. The second will contained a revocation clause; C. was again appointed executor and there were specific bequests to some of the beneficiaries named in the first will but the clause dealing with the residue of her estate was left incomplete. There was no charging clause in the second will. C. now applied for probate of the two wills, omitting the revocation clause from the second will, and omitting the clause containing the specific bequests and the charging clause from the first will.

Held: both wills would be admitted to probate, as sought, since the second will was incomplete owing to a mistake on the part of the testatrix.

In the Estate of Brown ([1942] 2 All E.R. 176) applied.

[As to dependent relative revocation, see 34 HALSBURY'S LAWS (2nd Edn.) 89, para. 127; and for cases on the subject, see 44 DIGEST 361, *1946* and SUPPLEMENTS.]

Case referred to:

Brown, In the Estate of, [1942] 2 All E.R. 176; 167 L.T. 95; sub nom. *In the Goods of Hope Brown*, [1942] P. 136; 111 L.J.P. 78; 2nd Digest Supp.

Probate Motion.

The applicant sought probate of two wills dated Nov. 26, 1956, and Sept. 22, 1958, with the exception of certain clauses in each will.

On or about Nov. 26, 1956, the testatrix consulted her solicitor with a view to making a will. The solicitor prepared a will which was duly executed and at the request of the testatrix the will was deposited by the solicitor at a bank. By that will she appointed the applicant, who was a nephew of her deceased husband and was a chartered accountant, to be the executor and trustee thereof. By cl. 3 she made certain specific bequests to the applicant and by cl. 4 she made specific bequests to various other persons. By cl. 5 she bequeathed the whole of her residuary estate to the applicant on trust for sale and conversion, the proceeds after payment of debts and funeral and testamentary expenses to be held by him on trust for himself absolutely. By cl. 6, she charged her estate for the payment of solicitors' and professional expenses in connexion with the trusts. In June, 1958, the testatrix wrote to her solicitor asking him to send her the will as she wished to alter it. On June 7, 1958, the solicitor sent her a completed carbon copy of the will. On Sept. 22, 1958, the testatrix executed a holograph will. By this " second " will the testatrix revoked all former wills and again appointed the applicant to be the executor and trustee. By cl. 3 she made substantially the same specific bequests to the applicant as in her " first " will, and by cl. 4 she made specific bequests to some of the persons mentioned in the " first " will. Clause 5 read:

> " I devise and bequest the whole of the residue of my estate both real and personal unto my trustee upon trust to sell call in and convert the same into money with power to postpone the sale calling in and conversion thereof for so long as my trustee shall in his or her absolute discretion, and after payment of my debts and funeral expenses."

The will then continued with cl. 6 which read: " I witness thereof I have hereunto set my hand " etc. There was no charging clause in the " second " will. The testatrix died on Feb. 9, 1959. It was apparent from the markings on the carbon copy of her " first " will that the testatrix had used that as a draft for the preparation of her " second " will. The applicant now applied for an order that the " second " will omitting the revocation clause be admitted to probate together with the " first " will omitting cll. 3, 4 and 6 (the specific bequests and the charging clauses). There were no known persons interested in the event of an intestacy.

Counsel for the applicant submitted that this was a case of dependent relative revocation and referred to *In the Estate of Brown* ([1942] 2 All E.R. 176); *Garnett-Botfield* v. *Garnett-Botfield* ([1901] P. 335); and *In the Goods of Irvine* ([1919] 2 I.R. 485).

Counsel for the Treasury Solicitor did not oppose the motion and referred to an article entitled " Dependent Relative Revocation " in 71 L.Q.R. 374 and to *In the Goods of Agnes Evans* (unreported), 71 L.Q.R. at p. 386, note 55.

R. J. A. Temple, Q.C., and *A. J. Balcombe* for the applicant.
C. T. Reeve for the Treasury Solicitor.

LLOYD-JONES, J.: I am greatly assisted by learned counsel in presenting the facts and the law which is relevant to this motion. As a result of considering the evidence and the documents and the submissions made to me I am satisfied that the second will, that is the 1958 will, was incomplete and I am further satisfied that it was incomplete due to a mistake which probably was induced by an increasing lack of concentration and failure on the part of the testatrix.

In those circumstances, and having the support of *In the Estate of Brown* (1) which was cited to me by counsel for the applicant, I think that it is right that I should order that both the wills should be admitted to probate as together constituting the true last wishes of the deceased with the omission from the first will of cll. 3, 4 and 6, and from the second will of the revocation clause.

Order accordingly.

Solicitors: *Oldschool, Cutner & Co.* (for the applicant); *Treasury Solicitor.*

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

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(1) [1942] 2 All E.R. 176; [1942] P. 136.

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BLACKER *v.* BLACKER.

[Court of Appeal (Hodson, Willmer and Devlin, L.JJ.), March 15, 16, 17, April 5, 1960.]

Divorce—Practice—Pleading—Amending answer to petition and answer to cross-petition by adding cross-charges of desertion—Desertion three years before B *amendments, less than three years before original petition and answer—Cruelty alleged and divorce prayed in original petition and answer—Validity of amendments—Jurisdiction to give leave to amend—Matrimonial Causes Rules*, 1957 (*S.I.* 1957 *No.* 619), *r.* 3 (2).

The effect of r. 3 (2)* of the Matrimonial Causes Rules, 1957, is that a petitioner for divorce cannot file a reply praying for divorce on a further C ground unless and until the prayer for relief in the original petition has been disposed of, and that a respondent who has filed an answer containing a prayer for divorce cannot present a cross-petition for divorce unless and until the prayer in his answer has been disposed of (*Thatcher* v. *Thatcher & Gill*, [1959] 2 All E.R. 649, and *Swiszczowski* v. *Swiszczowski & Jewasinski*, [1959] 1 All E.R. 495, overruled; *Robertson* v. *Robertson*, [1954] 3 All E.R. D 413, distinguished) (see p. 293, letter F, and p. 295, letter D, post).

A husband and wife separated on Dec. 31, 1955. On Apr. 3, 1957, the wife petitioned for divorce on the ground of cruelty, and on Apr. 13, 1957, the husband filed an answer containing a prayer for divorce on the ground of cruelty. At the trial, in June, 1959, the trial judge, on the application of the parties, " ordered that the respondent do amend the answer by way E of cross-petition to allege desertion . . . and that service be effected in court. And . . . ordered that the petitioner do amend her reply by way of answer to the cross-petition . . . and that service be effected in court ".

Held: these orders were ineffective, because both parties were already seeking relief on the ground of cruelty so that the procedure contemplated by the orders contravened r. 3 (2) of the Matrimonial Causes Rules, 1957; F therefore neither the petitioner's nor the respondent's allegations of desertion had been effectively before the court (see p. 294, letter D, and p. 296, letter C, post).

Quaere (per Willmer, L.J.): whether the trial judge could properly have acceded to a request to dispose of the prayer and cross-prayer for relief on the ground of cruelty, and then have allowed fresh proceedings G on the ground of desertion to have been instituted, by adding a cross-petition and an answer thereto, and heard forthwith (*Chapman* v. *Chapman & Thomas*, [1938] 1 All E.R. 635, doubted) (see p. 295, letter I, to p. 296, letter B, and cf., p. 296, letter H, post).

Per Hodson and Devlin, L.JJ.: (i) where the requirements of the rules of the court are being dispensed with, this should be stated in the order H made by the court (see p. 294, letter C, and p. 297, letter C, post);

(ii) semble, R.S.C., Ord. 70, r. 1, does not confer authority to authorise disregard of rules of court in advance (see p. 293, letter H, and p. 296, letter G, post).

Appeals dismissed.

[As to the restriction on presenting a petition when there is another undis- I posed of petition by the same petitioner, see 12 Halsbury's Laws (3rd Edn.) 314, 315, para. 630, text and note (e).

As to the effect of irregularity and non-compliance with rules, see 30 Halsbury's Laws (3rd Edn.) 399, 400, para. 748.]

Cases referred to:

Chapman v. *Chapman & Thomas*, [1938] 1 All E.R. 635; [1938] P. 93; 107 L.J.P. 30; 158 L.T. 424; 27 Digest (Repl.) 364, *3014*.

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* Rule 3 (2) is printed in full at p. 293, letter G, post.

Faulkner v. *Faulkner*, [1941] 2 All E.R. 748; 110 L.J.P. 70; 165 L.T. 381; 27 Digest (Repl.) 356, *2943*.

Robertson v. *Robertson*, [1954] 3 All E.R. 413; [1954] 1 W.L.R. 1537; 3rd Digest Supp.

Sandler v. *Sandler*, [1934] All E.R. Rep. 213; [1934] P. 149; 103 L.J.P. 88; 151 L.T. 313; 27 Digest (Repl.) 451, *3826*.

Spawforth v. *Spawforth*, [1946] 1 All E.R. 379; [1946] P. 131; 115 L.J.P. 38; 174 L.T. 260; 27 Digest (Repl.) 451, *3823*.

Swiszczowski v. *Swiszczowski & Jewasinski*, [1959] 1 All E.R. 495; [1959] 1 W.L.R. 187.

Thatcher v. *Thatcher & Gill*, [1959] 2 All E.R. 649; [1959] 1 W.L.R. 730.

Appeals.

The wife and the husband respectively appealed against so much of the order of His Honour JUDGE REWCASTLE, Special Commissioner, made on June 8, 1959, on the trial of her petition and his cross-petition for divorce, as dismissed his or her charge of desertion against the other. The facts, which are summarised in the headnote, are stated in the judgment of HODSON, L.J.

At the conclusion of the argument, on Mar. 17, the court dismissed the appeals but said it would give its reasons for so doing later.

David Karmel, Q.C., and *A. B. Hollis* for the wife.

F. Donald McIntyre, Q.C., and *D. P. F. Wheatley* for the husband.

Cur. adv. vult.

Apr. 5. The following judgments were read.

HODSON, L.J.: On Apr. 3, 1957, the wife petitioned for divorce on the ground of cruelty, and on Apr. 13, 1957, the husband answered by denying the cruelty and alleging cruelty and praying for divorce on the same ground. The suit came on for hearing on June 2, 1959, and continued until June 8, when, the husband having abandoned his charge of cruelty, judgment was entered dismissing both allegations of cruelty. Neither party had appealed against this part of the judgment.

The parties had separated on Dec. 31, 1955: namely, less than three years before petition and answer but more than three years before the hearing. At the hearing each party sought to charge desertion against the other and obtain a divorce on that ground, relying on the provisions of s. 1 (1) of the Matrimonial Causes Act, 1950, which provides:

> " . . . a petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent . . . (b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition . . ."

In what was no doubt a laudable attempt to save the costs of fresh proceedings being instituted, leave was given to both parties to amend as follows:

> " And it is ordered that the respondent do amend the answer by way of cross-petition to allege desertion . . . and that service be effected in court. And it is ordered that the petitioner do amend her reply by way of answer to the cross-petition . . . and that service be effected in court."

These amendments were duly made and supported by affidavits as the rules required. The learned judge's order shows that he dismissed the husband's cross-petition based on desertion and also the wife's charge of desertion contained in her amended reply, which, although not described as a new petition, was in effect such. There appears to have been some confusion as a result of these amendments adding additional charges because, although the learned judge dismissed both charges of desertion in his order, he made no reference at all to the wife's charge of desertion in his spoken judgment. He cannot be criticised for this since he was addressed by her counsel in his final speech on the issue of cruelty alone. Both parties have appealed against the dismissal of these charges of desertion and have asked this court to pronounce a divorce on the ground of desertion; and in the case of the petitioner there is the anomalous position that she is relying, as her main ground of appeal, on the learned judge's failure to deal with the charge of desertion which she did not press before him.

The question is whether there is in this suit any jurisdiction to deal with the desertion issue which each party now seeks to raise. This cannot be done simply by amendment, for that would be to defeat the plain language of the statute, which requires the period of three years to elapse not before the amendment of but before the presentation of the petition. Compare *Spawforth* v. *Spawforth* (1), where an attempt was made to circumvent the statute by a supplemental petition, three years' desertion not having run before the date of the petition but having expired before the date of the supplemental petition. The supplemental petition was held to be the equivalent for this purpose of an amendment; see *Sandler* v. *Sandler* (2). The attempt accordingly failed.

The question is, can the same result be achieved by cross-petition? The answer to this is in the affirmative if the three years have expired before the presentation of a cross-petition. For this purpose an original answer may be regarded as a cross-petition (see *Faulkner* v. *Faulkner* (3)); for by s. 6 of the Matrimonial Causes Act, 1950, the court may give to the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking for such relief.

If there is a separate cross-petition there is no obstacle to this being consolidated with the original petition; and in *Robertson* v. *Robertson* (4) BARNARD, J., allowed a cross-petition to be included in an answer when no cross-relief had been previously sought, thus avoiding the necessity of a separate suit and consolidation, etc. This does not mean that where the respondent has already prayed for relief in his answer and thus placed himself in the position of a petitioner a further petition can be presented by him before the first has been disposed of.

The same applies to the original petitioner. If, as in this case, she has presented a petition based on cruelty, she cannot present a fresh petition based on desertion until the first has been disposed of. To do so is to contravene r. 3 (2) of the Matrimonial Causes Rules, 1957, which provides:

> " A petition shall not be filed if there is before the court another petition *by the same petitioner* which has not been dismissed or otherwise disposed of by a final order."

The cross-petition in the answer based on desertion and the equivalent contained in the reply were plainly filed in breach of this rule.

The rules have statutory effect, and although no doubt the court has a power after the event, under R.S.C., Ord. 70, r. 1, to dispense with the requirements of rules where justice requires and needless inconvenience would otherwise result, it does not follow that, notwithstanding the consent of the parties, the court can authorise disregard of the rules in advance. It has not been and cannot be contended that in this case the first petition of the petitioner or its equivalent by the respondent were dismissed or wholly disposed of by final order before the new petitions were presented, and indeed the situation was so confused that the wife's allegation of desertion was apparently forgotten. No application either to dispense with the rule or to dispose of the cruelty first was ever made. The more substantial objection is, however, that to allow this course to be taken would be to ignore the plain language of the statute by enabling a petitioner or respondent to pray for relief on some ground other than desertion and later at the hearing treat the statute as having provided that the relevant period of desertion expired at the trial and not at the presentation of the petition.

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(1) [1946] 1 All E.R. 379; [1946] P. 131.

(2) [1934] All E.R. Rep. 213; [1934] P. 149.

(3) [1941] 2 All E.R. 748.

(4) [1954] 3 All E.R. 413.

Rule 3 (2) deals with substance and not with mere technicality. It is just that a petitioner should not be allowed to present a fresh petition until the first has been disposed of and reasonable that in a situation like the present the petitioner and respondent should, before launching against one another charges of cruelty, which are notoriously easy to make, at least reflect what the consequences may be if their charges turn out to be groundless.

In my opinion, leave to amend by alleging desertion was wrongly given, although no criticism can be levelled against the learned judge, who, in giving leave, had followed the decisions of KARMINSKI, J., in *Thatcher* v. *Thatcher & Gill* (5) and *Swiszczowski* v. *Swiszczowski & Jewasinski* (6), both of which cases were, I think, wrongly decided.

Apart altogether from the provisions of r. 3 (2), which must certainly, where desertion as a ground for divorce is concerned, be strictly adhered to, it is right that where the requirements, even what may be regarded as the technical requirements, of the rules concerned are being dispensed with, this should be stated in the order made by the court. Affidavits in support, service, time for appearance and answer and registrar's certificate are all matters subject to rules of court. If these provisions or some of them are simply ignored it is not to be wondered at that a muddle will occur.

These appeals must be dismissed, on the ground that neither the petitioner's nor the respondent's allegations of desertion have been effectively before the court as grounds for dissolution of the marriage.

WILLMER, L.J.: The appeal and cross-appeal in this case are both confined to the issue of desertion which was raised by the respondent husband's cross-petition and the petitioner wife's answer thereto contained in her amended reply. I also have come to the conclusion that both appeal and cross-appeal must be dismissed, for the reason that the learned commissioner, having regard to the course that was taken at the trial, would have had no jurisdiction to grant relief to either party on the ground of desertion. Consequently his dismissal of the cross-charges of desertion is not a matter in respect of which complaint can properly be made to this court.

It is a regrettable fact that the difficulties in which the parties now find themselves arise out of a laudable desire to save costs. If I thought that these difficulties were of a purely technical nature, I should for my part have been disposed to struggle hard to find a way of overcoming them, but I am satisfied that the objection to the course which was adopted in this case is one of substance, and that if that course were regularly followed it might lead to an abuse of the process of the court and to the possible prejudice of parties in other suits. For it would be open to parties, whose only real case was one of desertion, to file a petition or answer before the expiration of the necessary three years praying for relief on sham grounds—with the possibility perhaps of obtaining thereby various forms of interim relief—and then, as soon as the three years have elapsed, to obtain leave to file a cross-petition and an answer thereto alleging desertion, with the possible effect of obtaining undue expedition of their case in priority to other litigants. [HIS LORDSHIP then referred to the facts, and continued:] When the appeal on behalf of the wife was opened a question was immediately raised as to the propriety of the course taken by the learned commissioner in allowing the charges of desertion to be raised in the present proceedings. The question is whether it is permissible for a respondent, when an answer is already on the file containing a prayer for substantive relief, to be given leave to amend that answer, once the necessary period of three years has elapsed, by adding a cross-petition for relief on the ground of desertion. This was a course taken in *Swiszczowski* v.

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(5) [1959] 2 All E.R. 649.

(6) [1959] 1 All E.R. 495.

Swiszczowski (7) and in *Thatcher* v. *Thatcher* (8), both of which were relied on to justify what was done in the present case. If that course is permissible, I think that the further step taken in *Thatcher* v. *Thatcher* (8), and followed in this case, of granting leave to amend the reply by adding an answer to cross-petition containing a cross-prayer for relief on the ground of desertion would be an almost necessary corollary.

Having considered the propriety of this procedure I have been unable to see any escape from the dilemma that was put during the argument. Either the cross-petition and the answer thereto are to be regarded as one with the original petition and answer, or else they must be regarded as separate proceedings. If they are to be regarded as one with the original petition and answer, then they are no different from a supplemental petition or answer, and must be held to speak from the dates of the original petition and answer. That seems to me to be the effect of *Spawforth* v. *Spawforth* (9) and *Chapman* v. *Chapman & Thomas* (10), following the decision of this court in *Sandler* v. *Sandler* (11). If that is the correct view, it will not help the parties in the present case, since three years had not elapsed at the date of either the original petition or the original answer.

If, on the other hand, as I think, the cross-petition and the answer thereto are to be regarded as separate proceedings from the original petition and answer, it seems to me that the effect of r. 3 (2) of the Matrimonial Causes Rules, 1957, is to forbid their being filed unless and until the original proceedings have been finally disposed of. It was suggested in argument that R.S.C., Ord. 70, r. 1, could be invoked, so as to enable the court to dispense with the application of r. 3 (2) of the Matrimonial Causes Rules, 1957. In that connexion our attention was called to a note at p. 1600 of the ANNUAL PRACTICE for 1957. But this note has not been repeated in the current edition of the ANNUAL PRACTICE, and no case has been called to our attention in which strict compliance with r. 3 (2) of the Matrimonial Causes Rules, 1957, has been dispensed with. It seems to me that, if we are to regard the cross-petition and the answer thereto as proceedings entirely separate from the original petition and answer—as we must, if either party is to be able to allege desertion for three years—r. 3 (2) is a fatal objection to the course that has been taken. If that rule is to be complied with, it must follow that leave cannot properly be granted to file a cross-petition or an answer thereto, unless and until the prayers for relief in the original petition and answer have been disposed of, which was not done in this case.

This conclusion necessarily involves that we must hold the course taken in *Swiszczowski* v. *Swiszczowski* (7) and *Thatcher* v. *Thatcher* (8) to have been misconceived and unjustified. The procedure followed in those cases was in purported pursuance of the decision in *Robertson* v. *Robertson* (12). In that case also leave was granted to amend the answer, after the expiration of the necessary three years, so as to add a cross-petition alleging desertion; but I think it is possible to distinguish what was done in that case, on the ground that there the original answer contained no prayer for substantive relief. It can, therefore, be said that the course taken in that case did not offend against r. 3 (2), since there was nothing equivalent to a " petition " by the respondent already on the file. The vice of what was done in the present case was that leave to institute fresh proceedings by adding the cross-petition and the answer thereto was granted at a time when the prayer and cross-prayer for substantive relief on the ground of cruelty in the original petition and answer were still on the file and undisposed of.

Though I do not find it necessary to express any concluded opinion on the matter, it occurs to me that possibly the same objection could not have been taken if in the present case the learned commissioner had been invited first to dispose of the prayer and cross-prayer for relief in the original petition and answer, before leave was asked to amend the answer by adding a cross-petition and the reply by adding an answer to the cross-petition. Had that been done, and had the parties then asked leave to institute their fresh proceedings by adding a cross-petition and an answer thereto, it may be that the learned commissioner could properly have acceded to the request, and with the consent of the parties could then have given the necessary directions for abridgement of time, dispensing with the registrar's certificate, and so forth, so as to enable him to dispose of the issue of desertion while he was yet seised of the case, and thus avoid the necessity for the parties to incur the additional costs of a fresh trial before another judge. It would appear from the report of *Chapman* v. *Chapman* (13) that this was the course in fact adopted in that case. If this is so, I should not wish, as at present advised, to be regarded as dissenting from it.

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(7) [1959] 1 All E.R. 495.

(8) [1959] 2 All E.R. 649.

(9) [1946] 1 All E.R. 379; [1946] P. 131.

(10) [1938] 1 All E.R. 635; [1938] P. 93.

(11) [1934] All E.R. Rep. 213; [1934] P. 149.

(12) [1954] 3 All E.R. 413.

Be that as it may, in the present case I can see no ground on which we can say that the course adopted by the learned commissioner was other than irregular. The irregularity was such that in my judgment this court can do no other than direct, in pursuance of R.S.C., Ord. 70, r. 1, that the proceedings instituted by way of cross-petition and answer thereto were void. It follows, therefore, that in so far as the learned commissioner's order purported to dispose of the cross-charges of desertion it was a nullity. So far as these charges are concerned, accordingly, there is no valid order from which to appeal. Appeal and cross-appeal must be dismissed, leaving the parties free to institute such fresh proceedings as they may be advised.

DEVLIN, L.J.: I agree that the cross-petition and answer thereto should be declared void for the reasons given by my Lords and that accordingly the appeal and cross-appeal should be dismissed.

We have listened to some discussion about the propriety of the decision in *Robertson* v. *Robertson* (14), and about whether the present difficulties could have been surmounted if the original proceedings had first been dismissed so that no breach of r. 3 (2) of the Matrimonial Causes Rules, 1957, was involved. On this point I wish to make some observations.

First, I am not satisfied that the court has power, even with the consent of the parties, to dispense in advance with compliance with any of the Rules of the Supreme Court, these being made under the authority of an Act of Parliament. I should wish to hear that point fully argued before reaching any conclusion on it. The procedure under R.S.C., Ord. 70, r. 1, can be used after the event to cure irregularities, especially those brought about by inadvertence. But the order does not authorise in advance disregard of the rules, and it ought not to be supposed that it is automatically available for curing the deliberate infraction of any rule, even the least important.

Secondly, I consider that if there is any such power it ought to be used only in the most exceptional circumstances. The rules themselves provide various methods of saving costs and expediting proceedings in appropriate cases—as, for example, provision for an early trial (R.S.C., Ord. 50, r. 1A, and Ord. 64, r. 9) and the formulation by consent of an issue for trial without pleadings (Ord. 34, r. 9). I think that the court should be slow to attempt the invention of other methods.

Thirdly, I doubt whether the court should use any powers that it may have to assist parties who, having failed in one claim for relief, seek priority in bringing on another. I appreciate that the chief object in these cases is to save costs and that is always tempting. But two things ought to be borne in mind. The first is that, if relief is to be granted in one case, it ought to be granted in all cases of the same type; and there must be many cases of the type in which a petitioner has unsuccessfully brought cruelty charges before the period of desertion has been completed. If relief is to be given in a class of case, it ought surely to be done by

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(13) [1938] 1 All E.R. 635; [1938] P. 93.

(14) [1954] 3 All E.R. 413.

A means of an alteration to the rules and not by the action of an individual judge, which should, I think, be reserved for exercise in circumstances peculiar to the case before him. The second thing to be borne in mind is that it is not in the public interest that charges of cruelty should be made when the real case, if there is one, is one of desertion. WILLMER, L.J., has pointed out the danger that a spouse, whose real case is one of desertion, may be tempted to file a petition before B the expiration of the necessary three years, praying for relief on sham grounds in order that a charge of desertion, made as soon as the three years have expired, may obtain a hearing earlier than if it had been made in the ordinary way. Apart from the danger of abuse, it cannot be desirable that a party who makes charges of cruelty which he cannot prove should obtain a divorce more quickly than one who, taking a more balanced view of such conjugal unkindnesses as may have C occurred, decides to wait for the period of desertion to be completed.

My final observation is that a rule is not dispensed with merely by ignoring it. If that were so, then r. 3 (2) could be taken as having been dispensed with in this case and none of the difficulties which we have been considering would have arisen. If rules are to be dispensed with, presumably under some inherent power of the court, I think that there should be an order specifying precisely what is D being done. The order made in this case—" that the respondent do amend the answer by way of cross-petition "—is confusing, if not meaningless. The cross-petition was not an amendment to the answer; as such, it would have no virtue. It was a separate proceeding and no order was required to institute it. What was required, and what was not made, was some order dispensing with all the other rules that would normally have to be complied with before the matter could be E brought to trial. If the issue had been disposed of and judgment delivered, R.S.C., Ord. 70, r. 1, could no doubt have been invoked—I do not say with what success—to cure the irregularities involved. But the complaint that is made here—namely, that the issue was not adjudicated—cannot be made successfully unless it is shown that the procedure prerequisite to adjudication has either been complied with or dispensed with. On that ground alone, and apart from r. 3 (2), I F should be prepared to dismiss these appeals.

Appeals dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *J. E. Baring & Co.* (for the wife); *C. E. Maplestone* (for the husband).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

Re SERVERS OF THE BLIND LEAGUE.

[CHANCERY DIVISION (Pennycuick, J.), May 2, 1960.]

Company—Dissolution—Avoidance of dissolution—Charity—Gift by testatrix' will to charitable company—Testatrix dying after date of dissolution—Declaration avoiding dissolution refused—Companies Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 38), *s.* 352 (1).

A charitable company limited by guarantee entered into voluntary liquidation and its assets, both present and future, were assigned to the Royal National Institute for the Blind. The date of the dissolution of the company under s. 290 (4) of the Companies Act, 1948, was June 6, 1958. By the will made in 1950, of a testatrix who died after the date of dissolution, the company was expressed to be the legatee of a fourth part of her residuary estate. On application to the court under s. 352 of the Companies Act, 1948, for a declaration that the dissolution might be declared void,

Held: the declaration would not be granted in the present case, because the purpose of an order under s. 352 of the Companies Act, 1948, was generally to enable distribution to be made of an asset which belonged to the company before dissolution, but in the present case the asset in question had never belonged to the company and the making of the declaration would divest vested interests in the fourth part of the testatrix' residuary estate.

[As to the power to declare the dissolution of the company void, see 6 HALSBURY'S LAWS (3rd Edn.) 732, para. 1473; and for cases on the subject, see 10 DIGEST (Repl.) 1105, 1106, *7638-7646.*

For the Companies Act, 1948, s. 352, see 3 HALSBURY'S STATUTES (2nd Edn.) 726.]

Motion.

This was an application by John Alfred Godfrey, the liquidator in the voluntary winding-up of the Servers of the Blind League, for a declaration that the dissolution of the company on June 6, 1958, was void. After hearing argument, HIS LORDSHIP adjourned the case for consideration and delivered judgment later on the same day. The facts appear in the judgment.

C. A. Settle, Q.C., for the applicant.

Cur. adv. vult.

May 2. **PENNYCUICK, J.**, read the following judgment: The Servers of the Blind League was a charitable company limited by guarantee. By a special resolution passed on Sept. 20, 1955, it was resolved that the company be wound-up voluntarily, and the present applicant was appointed the liquidator. On Feb. 17, 1958, the liquidator, in compliance with cl. 9 of the memorandum of the company, executed an assignment of the assets, both present and future, of the company in favour of the Royal National Institute for the Blind. The final meeting of the company was held on Feb. 18, 1958; and on Mar. 6, 1958, the liquidator filed his final account, pursuant to s. 290 of the Companies Act, 1948, (1). The company was accordingly dissolved under the same section on June 6, 1958.

By her will dated May 12, 1950, one Margaret Moir Petrie (to whom I will refer as "the testatrix") gave one-fourth of her residuary estate to the company. The testatrix died on Jan. 5, 1959, i.e., after the dissolution of the company, and her will was proved on Apr. 3, 1959. It is clear, apart from the order which I am now asked to make, that the gift of a residuary share to the company lapsed and it must follow, in the absence of any express provision in the will, that the share devolved on the footing of a partial intestacy. I have not seen the will of the testatrix.

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(1) See s. 290 (4); 3 HALSBURY'S STATUTES (2nd Edn.) 684.

The liquidator now makes an application under s. 352 of the Companies Act, 1948, for a declaration that the dissolution of the company is void. Subsection (1) of the section is in the following terms:

> "Where a company has been dissolved, the court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the court to be interested, make an order, upon such terms as the court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved."

The effect of this order, if made, would be that the dissolution would be void ab initio, with the consequence that the company must be regarded as having been in existence at the date of the death of the testatrix, and accordingly the gift to it of a residuary share would have been effective. Equally, the order would now divest the interest which the next of kin took on the date of death and with which they were in a position to deal from that date.

In my judgment, it would not be right to make such an order. Generally speaking, I think, the purpose of an order under s. 352 is to enable distribution to be made of an asset which belonged to the company before dissolution but which, for some reason, was overlooked and has vested in the Crown as bona vacantia under s. 354 of the Act of 1948. The position here is wholly different. The asset in question, namely, the residuary share under the will of the testatrix, never belonged to the company at all, and the order would dispossess other persons who obtained a vested interest in the asset under a title not derived from the company.

No authority for such an order has been cited. The power under s. 352 is discretionary; and, without seeking to lay down any rule of universal application, I do not think that it would be right for me to exercise the discretion in the present circumstances. I therefore dismiss the application.

I am informed that an originating summons is pending to determine the question whether, if the gift to the company failed, there was a general charitable intent. I would make it clear that nothing in this judgment is intended to prejudice that application.

Application refused.

Solicitors: *Joynson-Hicks & Co.* (for the applicant).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

CORN *v.* WEIR'S GLASS (HANLEY), LTD. (L. BATES, LTD. Third Party).

[COURT OF APPEAL (Hodson, Willmer and Devlin, L.JJ.), March 22, 23, April 12, 1960.]

Building—Building regulations—" Hand-rail "—" Guard-rail "—Meaning of these terms—" Other efficient means to prevent the fall of persons "—Construction ejusdem generis*—Causation of accident—Hand-rail not provided, but plaintiff had no hand free to grasp one—Building (Safety, Health and Welfare) Regulations,* 1948 (*S.I.* 1948 *No.* 1145), *reg.* 27 (1) (2)*—Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 25 (2).

Statutory Duty—Breach—Causation—Breach of duty not contributing to plaintiff's injury—Hand-rail not provided—Plaintiff having no hand free to grasp a hand-rail—Alternative methods of fulfilling statutory duty—Whether defendant entitled to select method most favourable to his case—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948 *No.* 1145), *reg.* 27 (1).

By reg. 27 (1) of the Building (Safety, Health and Welfare) Regulations, 1948, " stairs shall be provided . . . with hand-rails or other efficient means to prevent the fall of persons except for the time and to the extent necessary for the access of persons or the movement of materials ". In reg. 27 (1) and reg. 27 (2) a " hand-rail " is something whose function is to be gripped and thus to make a fall less likely, a " guard-rail " is something whose function is to provide a barrier and to obstruct a fall (see p. 303, letters I and E, and p. 305, letter C, post), and the alternative " other efficient means to prevent a fall of persons " in reg. 27 (1) should be construed ejusdem generis and denotes something giving equivalent support to that given by a hand-rail (see p. 305, letter A, post).

In certain circumstances, e.g., in s. 25 (2) of the Factories Act, 1937, however, a hand-rail may be required to be so fitted as to serve also as a " guard-rail " (see p. 304, letter H, post).

The bottom flight of stairs in a building that was being erected turned at a half-landing away from a wall. There were seven stairs down from the half-landing which was less than six and a half feet above the floor. The stairs had no rail and were not completed stairs. The plaintiff, a glazier employed by the defendants, was descending the flight of stairs carrying a sheet of glass, measuring some five feet by two feet six inches, in the crook of his right arm and steadying the glass by holding it with his left hand above his head. He over-balanced, owing to a gust of wind, and fell over the side of the stairs, a distance of two or three feet, and was injured.

Held: (i) reg. 27 (1) of the Building (Safety, Health and Welfare) Regulations applied, notwithstanding that the stairs were uncompleted, and the present case was not within the words " except . . . to the extent necessary for the access of persons or the movement of materials " in reg. 27 (1), because the absence of a hand-rail had not been shown to be reasonably necessary as a practical matter to enable equipment to be carried up the stairs; the defendants were accordingly in breach of statutory duty under reg. 27 (1) (see p. 302, letter H, p. 303, letter B, and p. 305, letter F, post).

(ii) nevertheless the defendants were not liable because the plaintiff had not established that the presence of a hand-rail (using the word in the sense stated at letter D, above) would have protected him from injury, as he had no hand free when he fell and the hand-rail (if it had been provided) need not have been of sufficient strength to bar his fall; accordingly, the plaintiff's injury was not caused by the defendants' breach of statutory duty (see p. 304, letter B, and p. 306, letter I, post).

Per DEVLIN, L.J.: if there are two or more ways in which an employer would probably have complied with reg. 27 (1) and one of these ways would, on the facts of the accident, protect the plaintiff and the others would not protect him, and if no one can say that any one way is more likely to be chosen than the others, then the plaintiff, as a matter of probability, fails (see p. 306, letters E and F, post).

Appeal dismissed.

[As to the building regulations, see 17 HALSBURY'S LAWS (3rd Edn.) 125, para. 206; and for the Building (Safety, Health and Welfare) Regulations, 1948, reg. 27 (1), see 8 HALSBURY'S STATUTORY INSTRUMENTS 222.

As to causation in relation to breach of statutory duty, see 17 HALSBURY'S LAWS (3rd Edn.) 10, para. 10.]

Cases referred to:

Bonnington Castings, Ltd. v. *Wardlaw*, [1956] 1 All E.R. 615; [1956] A.C. 613; [1956] 2 W.L.R. 707; 3rd Digest Supp.

Clarke v. *Wright (E. R.) & Son*, [1957] 3 All E.R. 486; [1957] 1 W.L.R. 1191; 3rd Digest Supp.

Appeal.

The plaintiff workman who suffered injuries as a result of a fall from stairs appealed against the decision of Mr. Commissioner MARSHALL, at Stafford Assizes on Mar. 24, 1959, that the defendants, his employers, were not liable to him in damages for negligence or breach of statutory duty. The defendants appealed against the commissioner's decision that the third party, the occupiers of the premises in which the stairs were, were not liable to indemnify the defendants against the plaintiff's claim. By a cross-notice, the defendants submitted, inter alia, that the plaintiff's injuries, loss and damage were not caused by the breach of statutory duty alleged. The facts are stated in the judgment of WILLMER, L.J.

S. Brown for the plaintiff.

E. B. Gibbens for the defendants.

E. W. Eveleigh for the third party.

Cur. adv. vult.

Apr. 12. **HODSON, L.J.:** I have had the advantage of reading a copy of the judgment which WILLMER, L.J., has prepared and I will ask him to deliver his judgment, with which I agree.

The following judgments were read.

WILLMER, L.J.: The plaintiff, a glazier by trade, brought this action against the defendants, his employers, claiming damages for personal injuries alleged to have been sustained in consequence of their negligence or breach of statutory duty. The learned commissioner found that the defendants were guilty of no negligence or breach of statutory duty, but that the plaintiff was himself, in the words of the commissioner, " the main architect of his misfortune ". He accordingly dismissed the action, but at the request of the parties he assessed the plaintiff's damages at £435. He further intimated that, if he had found any breach of statutory duty on the part of the defendants, he would have held the plaintiff guilty of contributory negligence to the extent of two-thirds. By the terms of the notice of appeal the plaintiff appealed against all these findings. But the argument before us has been confined to two submissions, namely, (i) that the defendants ought to have been found guilty of breach of statutory duty, and (ii) that the plaintiff was wrongly found guilty of contributory negligence. The defendants entered a cross-notice, by which they submitted, inter alia, that the plaintiff's injuries, loss and damage were not caused by the breach of statutory duty alleged.

There has been no dispute with regard to the facts found by the learned commissioner, which shortly stated were as follows. The plaintiff was descending the stairs of a building that was being erected, carrying a sheet of plate glass measuring five feet by two feet six inches, which he was holding in the crook of his right arm, using his left arm extended over his head in order to steady it. He therefore had no free hand—a fact which is not unimportant in view of the breach of statutory duty alleged against the defendants. The stairs were five feet six inches in width, and were disposed in two flights, with a half-landing between. The upper flight hugged the wall on one side, while the other side was open to the hall below. The lower flight from the half-landing down to the floor of the hall consisted of seven stairs, and was set at an angle to the wall, so that it was open on both sides. There was no rail of any sort fitted on either side of the stairs, the open side being completely unprotected. When he had nearly reached the bottom of the upper flight the plaintiff slipped or stumbled, but managed to regain his balance and reached the half-landing in safety. He then started to descend the lower flight, but as he did so a gust of wind blowing through a window just above him caught the glass he was carrying and upset his balance. He was coming down close over to the side of the stairs, and in consequence of losing his balance he fell over the open side from the fourth or fifth stair up from the hall—a drop of between two and three feet.

The plaintiff's case is founded on an alleged breach by the defendants of reg. 27 (1) of the Building (Safety, Health and Welfare) Regulations, 1948, which provides as follows:

> " Stairs shall be provided throughout their length with hand-rails or other efficient means to prevent the fall of persons except for the time and to the extent necessary for the access of persons or the movement of materials. If necessary to prevent danger to any person the hand-rails shall be continued beyond the ends of the stairs."

It will be convenient also to refer to part of para. (2) of this regulation, not because any breach of its provisions is alleged, but because its terms were much relied on by the defendants as throwing light on the construction of para. (1). The material words are:

> " (2) All gangways, runs and stairs from which a person is liable to fall a distance of more than six feet six inches shall be provided with—(a) suitable guard-rails of adequate strength to a height of at least three feet above the gangway, run or stair."

The plaintiff's case is that his fall was due to the defendants' failure to provide any hand-rail as required by reg. 27 (1). It has been contended that the type of rail contemplated by this regulation would be a rail on the open side. Had such a rail been provided the plaintiff, it is alleged, would have been protected from falling over the open side of the stairs, and consequently the accident would not have occurred.

The learned commissioner found that there had been no breach of reg. 27 (1), for two reasons. First, he held that the regulation only applied to completed stairs, and these stairs had not been completed. Secondly, he considered that the absence of a rail was justified, as being necessary for the movement of materials.

I find myself unable to agree that either of these is a good reason for holding reg. 27 (1) to be inapplicable. As to the first, the defendants have not sought to support the learned commissioner's judgment on this point. There is nothing in the terms of the regulation to restrict its application to completed stairs. On the contrary, it could well be said that when stairs are incomplete there is all the more reason for applying the regulation and insisting on the provision of a hand-rail.

With regard to the second reason, the learned commissioner relied on evidence that was given to the effect that certain heavy equipment, such as book-cases and cupboards, had still to be taken up the stairs to the upper floors. He considered that the words of the exception in the regulation should be construed broadly, and that the evidence justified him in concluding that the non-provision of a hand-rail was necessary in a broad sense. If the learned commissioner meant that "necessary" was to be construed as in effect equivalent to convenient, I should certainly be unable to agree with him; but if he meant no more than that necessity does not have to be the subject of absolute mathematical proof, I should not be disposed to quarrel with his view. It seems to me that the defendants could bring themselves within the exception in the regulation by showing that the absence of a hand-rail was reasonably necessary as a practical matter; but in my judgment the evidence fell far short of proving any such thing. The stairs in question were broad, and had only a slight turn at the half-landing. Even if fitted with rails on both sides I cannot see that there would be any practical difficulty for skilled men in carrying upstairs articles of equipment such as were described.

In my judgment, therefore, there is no room for doubt that reg. 27 (1) applied. If so, it was clearly not complied with. The defendants indeed have not sought to deny that, unless excused on the ground of necessity, they were in breach of this regulation. The main contention on their behalf has been that their breach of reg. 27 (1) was not the cause of the plaintiff's fall. The validity of this contention depends on the true construction of reg. 27 (1). It has to be determined what, on the true construction of the regulation, the defendants were required to do. The question then arises whether, if this had been done, it can be shown that the plaintiff's accident would have been avoided.

I think it is clear, from the fact that different words are used, that a distinction is to be drawn between a "hand-rail", as prescribed by reg. 27 (1), and "guard-rails", which are the subject of reg. 27 (2). There can be no doubt that down to a height of six feet six inches above the floor of the hall guard-rails ought to have been provided on the open side of the stairs in accordance with reg. 27 (2). I think that in this context guard-rails must be construed as rails of such a character as will provide a physical barrier against the possibility of falling over the side. That this must be so is, I think, borne out by the provision that such guard-rails must be of "adequate strength". Moreover, it seems to me clear from its wording that reg. 27 (2) contemplates the provision of a plurality of guard-rails. This, I think, is clear enough from the wording of sub-para. (a), but it is placed beyond doubt by the reference to "the lowest guard-rail" in sub-para. (b). All this goes to emphasise what I have already said, namely, that the guard-rail contemplated by reg. 27 (2) must be intended as a physical barrier. Admittedly no guard-rails were provided on these stairs, and their absence no doubt constituted a breach of reg. 27 (2). It is not, however, suggested that this had any causal connexion with the plaintiff's fall. Since the height above the floor level was less than six feet six inches, there was no requirement that guard-rails be fitted to any part of the lower flight, where the plaintiff was when he fell.

The plaintiff's case is that reg. 27 (1) may be called in aid to fill in, as it were, the gap left by reg. 27 (2). Undoubtedly a hand-rail ought to have been provided for the whole length of the stairs, including the lower flight, and it is suggested that such a hand-rail ought to have been fitted on the open side, so as to serve in lieu of a guard-rail and provide a physical barrier to prevent a person falling over the side. But, as I have already said, a hand-rail must in my judgment be construed as something different from a guard-rail. A hand-rail—which is not required by reg. 27 (1) to be of any particular strength—connotes to my mind a rail that can be gripped by the hand. Such a rail need not necessarily act as a physical barrier; it need only be such a rail as will enable any person, by gripping it, to steady himself against falling. There is no requirement that the hand-rail prescribed shall be fixed on the open side of the stairs. I see no answer to the argument that, if a hand-rail was intended to serve the same purpose as a guard-rail, there would have been no need to apply reg. 27 (2) to stairs at all. It seems to me that reg. 27 (1) would be fully satisfied by the provision of a hand-rail fixed on the wall side, or even, as was suggested in argument, in the case of broad stairs by a hand-rail fixed in the middle, such as is commonly found on the stairways of underground railway stations in London. If this is the correct view, I can see no answer to the defendants' contention that the mere provision of a hand-rail, as required by reg. 27 (1), would have made no difference whatsoever to the plaintiff in the present case. I say this for two reasons. First, the regulation would have been complied with even though no hand-rail, certainly no hand-rail of adequate strength to serve as a physical barrier, had been fitted on the open side of the stairs. Secondly, as previously pointed out, the plaintiff did not in any event have a free hand with which to grip any hand-rail that might have been provided.

In the course of the argument before us reference was made to s. 25 (2) of the Factories Act, 1937, the statute under which the regulations here in question were made. This subsection, which of course applies to staircases in completed buildings in use as factories, rather than to staircases in use for the purpose of building operations, is in the following terms:

> " For every staircase in a building or affording a means of exit from a building a substantial hand-rail shall be provided and maintained, which, if the staircase has an open side shall be on that side, and, in the case of a staircase having two open sides, or in the case of a staircase which, owing to the nature of the construction thereof or the condition of the surface of the steps or other special circumstances, is specially liable to cause accidents, such a hand-rail shall be provided and maintained on both sides. Any open side of a staircase shall also be guarded by the provision and maintenance of a lower rail or other effective means."

Both sides relied on the terms of this subsection as tending to support their respective contentions. For the plaintiff it was argued that the word " hand-rail " in this subsection is clearly used as meaning something equivalent to a guard-rail—hence the specific provision that it must be fitted on the open side of the stairs. On the other hand, the defendants contended (i) that the requirement that the hand-rail shall be " substantial " is enough to differentiate what is required under the subsection from the kind of hand-rail required by reg. 27 (1); (ii) that the requirement that a hand-rail fitted in pursuance of the subsection shall be fitted on the open side shows that, but for this provision, a hand-rail could be fitted on either side, or indeed in any position; and (iii) that the subsection is specifically directed, as reg. 27 (1) is not, to the danger of a person falling over the side of the stairs.

The argument that the word " hand-rail " should be given the same meaning both in s. 25 (2) of the Act and in reg. 27 (1) is certainly attractive. But after consideration I do not think that it is possible to draw any conclusion from it beyond this. A hand-rail may in certain circumstances be required to fulfil the same function as a guard-rail—that is to say, in some cases a hand-rail may be required to be fitted in such a way that it serves also as a guard-rail. Equally, as it seems to me, a guard-rail may in certain circumstances serve also as a hand-rail. Thus, it is doubtless permissible, where guard-rails are required to be fitted, as for instance under reg. 27 (2), to allow the top guard-rail on the open side to serve as a hand-rail, without the necessity of fitting a separate hand-rail to comply with reg. 27 (1). But to say this is far from equating a hand-rail with a guard-rail, or vice versa. The two expressions are both used in the course of the same regulation, and each must, therefore, in my judgment, be assigned its own meaning.

The plaintiff further relied on the additional words in reg. 27 (1)—" or other efficient means to prevent the fall of persons ". It was argued that at least the presence of these additional words imported a duty on the defendants to fit something which would prevent a fall such as that of the plaintiff. But to my mind these words must be construed in their context as meaning something ejusdem generis with hand-rails. In my judgment they mean neither more nor less than some form of alternative device that will serve in lieu of a hand-rail, that is to say something that will serve to prevent a fall in the same way and to the like extent as a hand-rail would. I do not think, therefore, that the presence of these additional words advances the argument for the plaintiff any further.

What, then, is the result in the present case? It is clear that reg. 27 (2) has no application here, since in the position from which the plaintiff fell there was no possibility of falling more than six feet six inches. Unless, therefore, reg. 27 (1) is to be construed as requiring the defendants to fit something equivalent to a guard-rail on the open side of the stairs, in a position where there was no possibility of a fall of more than six feet six inches, I do not see how the plaintiff can establish that the mere absence of a hand-rail caused his fall. For my part, I do not think that any such construction is permissible. For these reasons, though they are different from those which the learned commissioner himself gave, I do not feel able to say that he came to a wrong conclusion. On the contrary, the argument on behalf of the defendants satisfies me that the breach of duty, of which they were admittedly guilty in failing to fit a hand-rail, was in no sense a cause of the plaintiff's injuries. [HIS LORDSHIP then discussed the allegation of contributory negligence against the plaintiff, agreed with the commissioner's finding thereon, and concluded:]

It follows, therefore, that although I do not agree with all his reasons, I find myself unable to say that the learned commissioner came to a wrong conclusion, and I would accordingly dismiss the appeal.

DEVLIN, L.J.: The decision in this appeal must turn almost entirely on the true construction of reg. 27 of the Building (Safety, Health and Welfare) Regulations, 1948.

I agree completely with the interpretation which WILLMER, L.J., has put on the word " stairs " and the word " necessary ", and there is nothing that I can add on those points. I agree also that the evidence about the articles of equipment that had to be carried upstairs was insufficient to show that the removal of the hand-rail would have been necessary. I do not, therefore, need to consider or determine whether the carrying of equipment, such as book-cases and cupboards, comes within the phrase " movement of materials " in the regulation; I reserve my judgment on that point.

I have hesitated a great deal about the meaning of " hand-rail " in the regulation. It is said that this point was taken before the learned commissioner, but it can hardly have been pressed on him; he does not deal with it in his judgment and so we have not the benefit of his view on it. It is clear that in some parts of the Factories Act, 1937, and the regulations made thereunder a hand-rail is thought of as something that can be used to guard against a fall. WILLMER, L.J., has quoted s. 25 (2) of the Factories Act, 1937. There is another example to be found in reg. 2 of the Shipbuilding Regulations, 1931, (1), which provides that gangways should " (b) be securely protected on each side . . . by strongly constructed upper and lower hand-rails . . ." The word " prevent ", which is used in reg. 27 (1) in conjunction with " hand-rails ", is to my mind more suited to a guard whose function is to obstruct a fall than to a hand-rail whose function is to make a fall less likely. On the other hand, the change of language from " hand-rails " in reg. 27 (1) to " guard-rails " in para. (2) raises a very strong presumption that " hand-rail " has a different meaning from " guard-rail ", at least when used in this regulation.

I have had the opportunity of reading the judgment of WILLMER, L.J., in advance and of studying it, and I am respectfully satisfied that he has found the right solution. A hand-rail is in itself merely something that provides a continuous handhold; but it can also, if suitably constructed and positioned, be made to serve as a guard. When it is so required, as in s. 25 (2) of the Act and reg. 2 of the Shipbuilding Regulations, one may expect to find some provision made about its strength and about the placing of it. In reg. 27 (1) no provision is made in respect of these matters; and the fact that such provision is made in reg. 27 (2) in respect of guard-rails, shows that the hand-rail in reg. 27 (1) is intended to serve merely as a handhold. This means, I think, that the word " prevent " must be construed in the way in which WILLMER, L.J., has construed it.

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(1) S.R. & O. 1931 No. 133.

Accordingly, I agree that the plaintiff has failed to show that his injury was a consequence of the breach of reg. 27 (1), but I do not accept to the full the argument that has been addressed to us on this point. The rule of law on causation was, after some divergence of opinion about the burden of proof, declared in the House of Lords in *Bonnington Castings, Ltd.* v. *Wardlaw* (2) and applied by this court in *Clarke* v. *E. R. Wright & Son* (3). It is that the plaintiff must show that on balance of probabilities the breach of duty caused or materially contributed to his injury. This does not in my judgment leave it open to the defendant when the nature of the accident is known to think out as many ways as he can in which the regulation could conceivably be complied with and then demand that the court tests the question of causation by reference to the way which is of least use to the plaintiff in the circumstances of his accident. The rule requires the plaintiff to show that if before the accident the regulation had been complied with, his injury probably would not have occurred; and this test of probability means, I think, that the court should consider independently of the accident how the employer would probably have complied with the regulation if he had done as he ought. If there are two or more ways in which he might have done so and one would, on the facts of the accident, have protected the plaintiff and the others would not have protected him and if no one can say that any one way is more likely to have been chosen than the others, then the plaintiff as a matter of probability fails. In my judgment the defendant cannot rely on a method that he is unlikely to have used simply because it is within the letter of the regulation.

One method of compliance proposed to us was the erection of a hand-rail down the middle of the stairs, as is done on broad stairways in stations and other public places, primarily, I should imagine, so as to separate the up-stream and the down-stream of passengers. I should dismiss that entirely from consideration. It seems to me to be most unlikely that the persons responsible for safety in this case would have thought of dividing in that way a stairway five and a half feet wide. I should go further and should say on balance of probability that if the defendants or persons responsible for safety had erected a hand-rail they would be more likely to put it on the open side than against the wall. It would certainly be more useful on the open side and I doubt if the cost would be substantially greater. I should expect a prudent employer to have regard to such considerations and, when he has got to carry out a regulation, to do the work in the way that, in the particular situation he is dealing with, gives the greatest protection and benefit to his workmen.

Where the plaintiff in this case fails, I think, is in showing that a hand-rail or other equivalent support erected on the open side would probably have protected him from injury. It might have withstood him if he had fallen against it, but I think that that must be conjectural.

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(2) [1956] 1 All E.R. 615; [1956] A.C. 613.
(3) [1957] 3 All E.R. 486.

For these reasons I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *T. D. Jones & Co.*, agents for *Riley, Sutcliffe & Co.*, Blackburn (for the plaintiff); *Simmonds, Church Rackham & Co.*, agents for *P. J. McKnight & Ryder*, Hanley (for the defendants); *Peacock & Goddard*, agents for *R. W. Beswick*, Hanley (for the third party).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

BULLOCK *v.* BULLOCK.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), January 26, 27, 1960.]

Presumption—Death—Absence of fourteen years before re-marriage and thirty years before plea—Police unable to execute warrant against husband in 1930 *—No further inquiries by wife—Wife married second husband in* 1944*—Second husband disputes validity of* 1944 *marriage in* 1959.

Nullity—Estoppel—Approbation of void marriage—Wife deserted by first husband in 1926*—First husband last heard of in* 1930*—Wife married second husband in* 1944*—Second husband had then full knowledge of facts—Allegation by second husband in* 1959 *that* 1944 *marriage bigamous—Whether second husband estopped from disputing validity of* 1944 *marriage.*

In 1921 the wife married one K. There were two children and in 1926 K. deserted the wife. In 1929 the wife obtained an order in the magistrates' court for the payment by K. of maintenance for herself and the children on the ground of K.'s desertion. In 1930, K. being in arrears under the order, a committal order was made. A warrant was issued against K. to the police but was not executed by them as K. could not be found. The wife made no further inquiries about K. and never heard of him again. In 1944, the wife describing herself as the widow of K., went through a ceremony of marriage with the husband. At the date of the marriage the husband knew all the circumstances concerning the wife's earlier marriage with K. In 1959 the wife applied by way of complaint in the magistrates' court for an order for the payment by the husband of maintenance for herself on the ground of his desertion. The husband contended that there was no jurisdiction to make any order since his marriage to the wife in 1944 was bigamous and void ab initio. As the lapse of time since K. was last heard of was, now, thirty years and, in 1944, had been fourteen years, the magistrates inferred* that K. died before the wife's re-marriage in 1944 and made an order in the wife's favour. The husband appealed on the ground that, as the wife had made no inquiries about K., his death before her re-marriage should not be inferred.

Held: the inference that K. had died before the re-marriage in 1944 was rightly drawn because (i) of the lapse of time between the date when K. was last heard of and the dates of the re-marriage (a period of fourteen years) and of the present proceedings (a period of thirty years), and (ii) of the fact that the police were unable in 1930 to execute the warrant against K. issued to them, which met the objection that the wife had herself made no inquiries concerning K.

Re Watkins, Watkins v. *Watkins* ([1953] 2 All E.R. 1113) applied.

SEMBLE: there can be estoppel in pais preventing a party relying on a plea that a marriage was void on the ground of bigamy (see p. 309, letter I, and p. 313, letter F, post).

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* The reasons of the magistrates on this point are stated by COLLINGWOOD, J., at p. 312, letter F, post.

Observation of LORD SELBORNE, L.C., in *G.* v. *M.* ((1885), 10 App. Cas. at p. 186) considered.

[As to the presumption of death, see 15 HALSBURY'S LAWS (3rd Edn.) 345, para. 623, notes (r)-(u); and for cases on the subject, see 22 DIGEST (Repl.) 159, 160, *1446-1460* and Supplement.

As to estoppel in suits for nullity, see 12 HALSBURY'S LAWS (3rd Edn.) 231, para. 432, note (u); and for cases on the subject, see 27 DIGEST (Repl.) 483, *4215, 4216*.]

Cases referred to:

G. v. *M.*, (1885), 10 App. Cas. 171; 53 L.T. 398; 27 Digest (Repl.) 416, *3461*.

Miles v. *Chilton* (*falsely calling herself Miles*), (1849), 1 Rob. Eccl. 684; 163 E.R. 1178; 27 Digest (Repl.) 448, *3798*.

Watkins, Re, Watkins v. *Watkins*, [1953] 2 All E.R. 1113; [1953] 1 W.L.R. 1323; 3rd Digest Supp.

Wilkins v. *Wilkins*, [1896] P. 108; 65 L.J.P. 55; 74 L.T. 62; 27 Digest (Repl.) 598, *5596*.

Woodland v. *Woodland* (*otherwise Belin or Barton*), [1928] All E.R. Rep. 690; [1928] P. 169; 97 L.J.P. 92; 139 L.T. 262; 27 Digest (Repl.) 553, *5038*.

Appeal.

The husband appealed against an order of the Sheffield City justices dated Nov. 4, 1959, made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949.

On Mar. 15, 1921, the wife, who was then twenty-two years of age, married one Thomas Edward Joseph Kelly, who was then twenty years of age. There were two children and on Sept. 14, 1926, Kelly left the wife. On Dec. 6, 1929, the wife was granted by the Sheffield City justices an order for the payment by Kelly of £1 a week as maintenance for herself and 5s. a week as maintenance for each child, totalling £1 10s. a week. The court records showed no payment by Kelly until Apr. 30, 1930, when he paid £2 14s. 6d. On May 13, 20, 27 and June 4, 1930, he paid £1 7s. 6d. and on June 11, 1930, he paid £1. Thereafter he paid nothing. On Aug. 22, 1930, a committal order was made by the justices and a warrant issued against Kelly. The police were unable to execute the warrant as Kelly could not be found. The wife made no further inquiries about Kelly and she never heard of or from him again. On May 17, 1944, the wife, describing herself as Elsie Kelly, widow, went through a ceremony of marriage with the husband, William Bullock, in Sheffield. On Nov. 4, 1959, the wife was granted by the Sheffield City justices an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on her complaint that the husband had deserted her. The husband contended that the marriage in 1944 was bigamous and, therefore, void ab initio, and that there was no jurisdiction to make the order.

D. T. Lloyd for the husband.

G. H. Dixon for the wife.

LORD MERRIMAN, P., stated the facts and continued: Thus, between the date when Kelly left the wife in 1926 and the date of her marriage in 1944 there is a period of eighteen years, and between the date of the order in 1929 and the date of the marriage a period of fifteen years, which is reduced somewhat by an attempt in 1930 to enforce the order. Then from 1944 to 1959 there is a period of fifteen years, during which the parties had been living together as reputed man and wife, and, so far as I know, only when the husband is threatened with a maintenance order on the ground of his admitted desertion does he raise for the first time the suggestion that she is not his wife at all. I see no reason to doubt the magistrates' finding that the husband knew of the wife's earlier marriage with Kelly and went through the ceremony of marriage in 1944 with full knowledge of the facts. I do not think that it depends only on what the wife said to the registrar, presumably in his hearing. I think that this matter had been discussed between them; I think that that is implicit in the evidence.

The magistrates found:

> " William Bullock [that is, the husband] knew of all the circumstances when he went through the marriage ceremony with her in 1944."

Now those circumstances alone inevitably call to mind the well-known opinion of the EARL OF SELBORNE, L.C., in *G.* v. *M.* (1). I do not propose to read the whole of the passage in question, but in reference to the use of the doubtful phrase " sincerity in the suit " (which was one of nullity) LORD SELBORNE said this (2):

> " . . . I think I can perceive that the real basis of reasoning which underlies that phraseology is this, and nothing more than this, that there may be conduct on the part of the person seeking this remedy which ought to estop that person from having it; as, for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation had ever existed."

That explanation by LORD SELBORNE can be referred to known principles of equity, and, I may say, of general jurisprudence. Then he went on to describe the sort of circumstances which would raise that kind of estoppel, and was careful to say that this catalogue was by no means exhaustive but only illustrative. I need not read any more detail of that. The principle is well known.

The present case is one of a man who for fifteen years has lived with a woman whom he was content with full knowledge of the facts to marry as a widow, and who then, when he is minded to desert her, seeks to throw the whole thing into the melting-pot. Although every word of what LORD SELBORNE said could well apply to this case, yet it is said that there cannot be any sort of estoppel since one is considering a marriage which is void ab initio because it is bigamous, and not a voidable marriage, as there was in *G.* v. *M.* (1). It stands to reason that if the husband is right in the present case the ceremony of marriage in 1944 with him was a bigamous marriage. This proposition is said to be established by a decision of DR. LUSHINGTON in *Miles* v. *Chilton* (*falsely calling herself Miles*) (3). I do not propose to examine that case beyond saying that it was a very plain case of bigamy, of a man setting up his own bigamy in order to get out of the position that he was in. I will read the headnote to show just what the point was:

> " Allegation on behalf of a woman, responsive to a libel of nullity of marriage by reason of bigamy, pleading deception, fraud, and cognizance by the man of the existence of the husband of the first marriage at the date of the second fact of marriage, rejected.—Misconduct, however gross, of a party proceeding, by reason of bigamy, is no bar to a sentence of nullity.—A wife de facto, as a fact of marriage, is necessarily pleaded in such a suit, is entitled pendente lite to alimony."

If that case stood alone it would, of course, be authority for the proposition that where bigamy is involved even the plainest estoppel will not do. I need not go into the circumstances of that case to emphasise the point. However, the case does not stand alone, and it is not, in my opinion, the law that there can be no estoppel where the marriage is void because of bigamy. On the contrary, there are two cases in the opposite sense: *Wilkins* v. *Wilkins* (4) and *Woodland*

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(1) (1885), 10 App. Cas. 171.

(2) (1885), 10 App. Cas. at p. 186.

(3) (1849), 1 Rob. Eccl. 684.

(4) [1896] P. 108.

v. *Woodland* (*otherwise Belin or Barton*) (5). I am not going in detail through those cases. It is sufficient to point out how the question arose. *Wilkins* v. *Wilkins* (6) was a suit for nullity by the husband, but during the subsistence of the so-called marriage the wife had petitioned for judicial separation on the ground of the husband's adultery. The husband by his answer denied the adultery and alleged that at the time of his marriage to the petitioner she had a husband living. At the trial the jury found that the husband had committed adultery, and also that at the time of the marriage the first husband was dead. In fact he turned up some years later, and the husband applied to the Court of Appeal to deal with the situation, which could only be dealt with, the Court of Appeal held, by getting rid of the original finding, which obviously, in effect, constituted estoppel per rem judicatam. The parties were husband and wife. If she had sued him as his wife on the ground of adultery it would be an irrelevancy unless they were adjudged to be husband and wife. So, to take it quite shortly, what happened was that on very strict terms about what the husband must do for this woman if leave to appeal long out of time was given by the Court of Appeal, the husband was given leave to appeal against the verdict of adultery and the finding that the husband had been dead. A new fact was now plain to all concerned, namely, that the husband was alive, and, therefore, had been alive at the time of the marriage, and it followed that the marriage was in fact bigamous. The only point so far as we are concerned is that it is plain that unless this new trial had been ordered, so that the verdict and judgment could be set aside, the husband would have been estopped from denying the validity of the marriage. Indeed, Lindley, L.J., in his judgment said (7):

> " There must be some mode of getting rid of the difficulty which is created by the verdict and the decree in the first suit, and the proper mode is a new trial of that suit."

Kay, L.J., said (8):

> " The verdict of the jury at the trial of the first suit a year ago found erroneously that he was dead at the time of the second marriage."

And Kay, L.J., plainly indicates that that by itself would have been an estoppel, but he agreed that the estoppel could be got rid of by a new trial. Thus, it is not universally true, as was assumed in *Miles* v. *Chilton* (9), that estoppel is prevented from operating merely because a bigamous marriage is involved.

Woodland v. *Woodland* (5) is a curious case. A husband was praying for nullity of marriage on the ground that his marriage was bigamous, the wife having a husband living at the date of it. There had been an earlier suit by the wife for restitution of conjugal rights, which involved the usual finding that the parties were husband and wife, and which proceeded, naturally, on the basis of their status being thus, as the headnote says, conclusively established inter partes. The husband had only stood by, as I understand it, and let that case go by default, but, however that may be, there was a decree for restitution of conjugal rights. Hill, J.'s finding relies implicitly on the decision in *Wilkins* v. *Wilkins* (6), to which I have just referred, and the only difference between the two is that there was no appeal to the Court of Appeal to set aside the original decision which operated as the estoppel. Accordingly, the husband's petition was dismissed.

Now, it is said that there is a vital distinction between what is technically known as estoppel in pais of the kind which might be said to result from this case and an estoppel by record or estoppel per rem judicatam. Of course the two are different, but I am not convinced in my own mind that if the facts are strong enough to warrant an estoppel in pais, not less strong or cogent than is imported by a description of two parties in a restitution suit as husband and wife and

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(5) [1928] All E.R. Rep. 690; [1928] P. 169.
(6) [1896] P. 108.
(7) [1896] P. at p. 113.
(8) [1896] P. at p. 114.
(9) (1849), 1 Rob. Eccl. 684.

A allowing that to go by default, it is impossible for an estoppel in pais to operate merely because what is being dealt with is a void marriage. However, beyond saying that I am not convinced that this is not a case in which what LORD SELBORNE said in *G.* v. *M.* (10) could very properly be applied, I do not pursue the inquiry because I think that there is another very cogent reason for upholding the decision of the magistrates in the present case. I have pointed out already B that from the marriage in 1944 no less than fifteen years elapsed before the present case came before the Sheffield magistrates. I have pointed out that the magistrates have found, on what I think is valid evidence, that the husband knew of the circumstances regarding the wife's earlier marriage with Kelly, and that the magistrates plainly showed that they did not approve of a man who, having gone through that form of marriage with the wife, knowing all the facts, had himself C held out by his conduct that the complainant was a widow.

However, the magistrates also plainly relied on the lapse of time. The critical date is 1944 and the ultimate issue is " ought Kelly to be assumed to be alive or dead in May, 1944? " By 1944 only eighteen years—I say " only " eighteen years in contrast with the whole period—had elapsed since Kelly left the wife. She had last heard of him, according to her evidence, in 1929 when she obtained D the order on Dec. 6, 1929, in the Sheffield magistrates' court. I consider that it is settled beyond all possibility of argument to the contrary, and I do not propose to cite authority for saying, that we are entitled at this stage in 1960 to consider the whole lapse of time from the time when Kelly was last heard of. Now it did occur to us that there was one way of testing the validity of the presumption which the magistrates have drawn and which the wife was entitled to draw, and E that was by recourse to the Sheffield magistrates' court. For there might well be, we thought, some record of what procedure, if any, had been taken to bring Kelly to book on the order that had been made against him in December, 1929. It turns out, happily, that that was a useful inquiry, and I am grateful to those who managed so expeditiously to get the information.

The information comes to this, that although it is true that the wife said that F she had last heard of him in 1929 the true date should have been 1930, for in 1930, there having been no record of any payments made between the date of the order on Dec. 6, 1929, and April, 1930, it appears that he made payments to the court which are recorded in the court register on Apr. 30, 1930, as £2 14s. 6d. As the order was for 20s. for the wife and 5s. for each of the two children, 30s. in all, it is plain beyond any doubt that this was an attempt to pay something off G the arrears, but it was the only attempt to do that, for on May 13 and the succeeding three weeks, namely, May 20, 27, and June 4, Kelly paid into court £1 7s. 6d. each week, half-a-crown less than the amount of his order, and then finally on June 11 he paid £1, which was still less than the order. That, I think, is a very important fact. The sequel is even more important, for on Aug. 22, 1930, the Sheffield court records show that a committal order was issued and the H warrant handed to a constable to execute, and that is recorded as not being executed because Kelly could not be found. So we have got to Aug. 22, 1930, rather than 1929, which is the date, now nearly thirty years ago, when Kelly, looking at it from our point of view, was last heard of, and, in terms of the marriage with which we are dealing, just short of fourteen years before it.

There is one other thing which, I think, may be stated to be settled, and that is I that reliance on the presumption that a man who is completely unheard of for seven years may be presumed to be dead does depend to some extent on the question whether all due inquiries have been made having regard to the circumstances; and that the circumstances may vary between one case and another is plain from various authorities which have been cited to us, quite properly, in the course of the argument. In the present case the importance of the failure to execute that warrant in the case of a man said to be living in or near Sheffield at the time when he left his wife, and certainly at the time of the celebration of and during the marriage, seems to me to be this, that if he could not be found by the police any woman might be fully justified in assuming that he could not be found by her, and it may be a very sensible and satisfactory explanation of the admitted fact that after that time, at any rate, she did not make any inquiries.

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(10) (1885), 10 App. Cas. at p. 186.

I do not want to rely on any particular case, because all these cases differ enormously in their circumstances, but there is no doubt that in *Re Watkins, Watkins* v. *Watkins* (11), a difficult case under the Inheritance (Family Provision) Act, 1938 (12), Harman, J., paid marked attention to the lapse of time, notwithstanding the fact that, though other people were said to have made inquiries and given evidence, the wife herself, who had been in touch with the husband's relatives at one time, had never, apparently, even discussed the topic with them, and had herself made no independent inquiries at all. It is plain from passages in the judgment (13) that it was on the total lapse of time that Harman, J., came to the conclusion that it was established that there had been a valid marriage between the parties which qualified the plaintiff for provision under that Act. Whatever one may feel about a husband being bound not to take what I may call this indecent point against his wife in order to escape liability for the consequence of having deserted her, on this ground alone, the lapse of time, and the lapse of time after the latest time at which she is shown to have known anything about him or been party to any proceedings in connexion with her order, I think that this decision of the magistrates can and should be upheld, and the appeal dismissed.

COLLINGWOOD, J.: I agree. The justices, after saying that " the main point at issue and the matter upon which most of the hearing was concentrated was the question of whether the [wife] was lawfully married to the [husband] on May 17, 1944 ", go on to say in the course of their reasons:

> " We noted that thirty years have now elapsed since Edward Kelly was last heard of, and that fifteen years had elapsed before the time of the second marriage. William Bullock [that is the respondent in those proceedings] having gone through a form of marriage with the complainant knowing all the facts had himself by his conduct held out that the complainant was a widow, and it appeared to us reasonable to infer that Edward Kelly had died prior to May 17, 1944, and that the marriage on May 17, 1944, was a valid marriage."

It is against that finding that the husband now appeals.

The ground of the appeal is that the justices were wrong in holding that that was a valid marriage on May 17, 1944, because, although the seven years had been exceeded, no presumption can arise in a case where no inquiries have been made at all by the wife, and in the course of her evidence she said " I have not seen or heard of him since "—and " since " was 1929, as near as I can tell. Then she went on to say " I have not taken any steps since 1929 to find my husband ". Now it is not, I think, unimportant to consider what was urged by counsel for the husband in what I hope he will allow me to describe as a most admirable argument. He went on to say that at this hearing the wife admitted that she made no inquiries. She did nothing; she did not even go to the police; she did not even go to the court with reference to the order which she had obtained in that court. Lord Merriman, P., has pointed out in his judgment that although reference occurs to that matter in the note we now know that the order to which reference was made below was obtained on Dec. 6, 1929, and that the wife is mistaken when she fixes the date of last hearing of him in 1929; it should have been 1930; but she did qualify that, as far as I can remember.

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(11) [1953] 2 All E.R. 1113.
(12) 9 Halsbury's Statutes (2nd Edn.) 795.
(13) [1953] 2 All E.R. at pp. 1116, 1118.

That order having been made for 20s. a week, and 5s. in respect of each of the two children which there then were, there are recorded six payments made by the husband under it between Apr. 30 and June 11, 1930. None of them is a compliance with the order. He is apparently getting more and more into arrears as time goes on, with the result that on Aug. 22, 1930, a committal order was issued, which shows that she did go to the court with reference to the matter. A warrant was issued to the police, but apparently it was never executed by them because they were unable to find Kelly. Not only, therefore, did the wife go to the court but the services of the police were enlisted to try to find Kelly. Not only does that add the efforts of the police to find the man, but in addition to that in my opinion it affords justification for the wife's attitude of failing to take any further steps herself. Once it is brought to her notice that a warrant has been put into the hands of the police and that they have been unable to execute it because they cannot find her husband, she may well be excused for failing herself to start looking for him, and be excused for not having any hope of succeeding where the police have failed. I think that double reason, the fact of that committal order issued by the justices and the failure to serve it on Kelly, meets the objection which counsel has made in this case that there have been no inquiries as to the whereabouts of Kelly.

I entirely agree with what Lord Merriman, P., has said with regard to the decision of Harman, J., in *Re Watkins* (14). There the wife had made no inquiries herself. There were relations of the husband with whom she had been in touch until her death, and it was clear from her evidence that although she had seen them from time to time she had never discussed the question whether her husband was alive or dead. Harman, J., however, found that she was in fact a widow, quite clearly basing his decision mainly on the long lapse of time, which was something in the neighbourhood of twenty-two years in that case. Here the total is thirty years, fifteen prior to the marriage and fifteen since, and I agree with what my Lord has said, that the decision of the justices here is correct.

With regard to the question of estoppel, that does not arise now, but I would add this, that I entirely agree with what Lord Merriman, P., has said with regard to that matter. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Wing, Keer, Bolsover & Morton Slack*, Sheffield (for the husband); *Jackson & Jackson*, agents for *Irwin Mitchell & Co.*, Sheffield (for the wife).

[*Reported by* A. T. Hoolahan, Esq., *Barrister-at-Law.*]

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(14) [1953] 2 All E.R. 1113.

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BEESLY *v.* HALLWOOD ESTATES, LTD.

[CHANCERY DIVISION (Buckley, J.), March 24, 25, April 11, 13, 1960.]

Option—Option to renew lease—Registration as estate contract—Land Charges Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 22), *s.* 10 (1), *Class C (iv), s.* 13 (2).

Landlord and Tenant—Agreement for lease—Correspondence relating to exercise B
of option to renew lease—Option invalid—Whether contract for grant of new lease constituted.

Deed—Execution—Sealing—Delivery—Sealing by body corporate imports delivery —Lease—Parts of lease not exchanged—Whether corporation bound by lease.

Estoppel—Estoppel in pais—Estoppel by conduct—Lease—Option to renew
lease—Correspondence implying promise not to rely on invalidity of option. C

By a lease dated May 21, 1938, lessors granted to the tenants premises at
Surbiton for a term of twenty-one years with an option for renewal for another
twenty-one years exercisable by notice in writing. The option provided, so
far as material, that on giving notice ". . . the tenants shall have the right to
obtain a further lease for twenty-one years . . ." on certain terms. In 1948
the residue of the term was assigned to the plaintiff, and the benefit of the D
option vested in her. In 1955 the freehold reversion was conveyed to the
defendant company, which bought with express notice of the option. The
option was not registered under the Land Charges Act, 1925. In July, 1958,
the plaintiff gave due notice exercising the option, and correspondence between
solicitors ensued on the basis of a new lease being granted. The
defendant company required that the premises should be redecorated within E
six months (subsequently extended to nine months). The defendant company's
solicitors sent a counterpart lease for execution by the plaintiff, which
she executed on Sept. 24 or 25, 1958. The lease was sealed by the defendant
company before Sept. 26, 1958, when a meeting of the board of directors took
place at which the question was raised whether the option was registered,
and, if it was not, whether the defendant company was bound to grant a new F
lease. On Oct. 8, 1958, the plaintiff was informed that the defendant company
had decided not to grant a new lease.

Held: subject to the plaintiff's handing over to the defendant company
the counterpart lease, which she had executed, the defendant company was
bound by the lease, because by sealing its part of the lease the defendant
company had intended to deliver and had delivered it as the company's deed G
conditionally only on the plaintiff's executing a counterpart lease (see p. 326,
letters B and E, post).

Dictum of HARMAN, J., in *Hollington Brothers, Ltd.* v. *Rhodes* ([1951]
2 T.L.R. at p. 694) considered.

Mayor, etc. of Merchants of the Staple of England v. *Governor & Co. of the*
Bank of England ((1887), 21 Q.B.D. at p. 165) applied. H

Held, further: (i) the option in the present case constituted an offer to
grant a new term, which offer the defendant company was contractually
precluded from withdrawing, so long as the option remained exercisable
(dictum of JENKINS, L.J., in *Griffith* v. *Pelton,* [1957] 3 All E.R. at p. 83,
explained), and the option was registrable under the second limb of s. 10 (1),
Class C (iv) of the Land Charges Act, 1925; accordingly the option was void I
against the defendant company under s. 13 (2) of the Land Charges Act,
1925, as it was not registered before the completion of the defendant company's
purchase (see p. 321, letter D, and p. 332, letter D, post).

(ii) the correspondence did not constitute a new contract to grant a lease
because the letters were written with the intention of carrying out what
were then thought to be existing obligations, but not with the intention of
creating binding contractual obligations; in any event the letters did not
contain an unqualified acceptance of any offer made, nor did the sealing of

the lease by the defendant company constitute such an acceptance, because it was never communicated (see p. 323, letters D, E and G, post).

British Homophone, Ltd. v. *Kunz & Crystallate Gramophone Record Manufacturing Co., Ltd.* ([1935] All E.R. Rep. 627) distinguished.

(iii) the defendant company was not estopped by anything in the correspondence between July and September, 1958, from relying on s. 13 of the Land Charges Act, 1925, because the plaintiff had not in consequence altered her position to her detriment; moreover the doctrine of " promissory estoppel " did not negative the operation of a statute (see p. 324, letters B to F, post).

Central London Property Trust, Ltd. v. *High Trees House, Ltd.* ([1956] 1 All E.R. 256) explained.

[As to an option to renew a lease, see 23 Halsbury's Laws (3rd Edn.) 473, para. 1094; and for cases on the subject, see 31 Digest (Repl.) 67-70, *2235-2267*.

As to the effect of delivery of a deed as an escrow, see 11 Halsbury's Laws (3rd Edn.) 350, para. 561; and for cases on the subject, see 17 Digest (Repl.) 221-225, *200-255*.

As to the effect of omission to register a land charge, see 23 Halsbury's Laws (3rd Edn.) 77, and compare the position as regards the former Middlesex registry legislation (23 Halsbury's Laws (3rd Edn.) 366, para. 916) and the definition of " purchaser " in s. 20 (8) of the Land Charges Act, 1925, ibid., p. 63, note (k). Express notice was unavailing in the present case under the current legislation.

For s. 10 and s. 13 of the Land Charges Act, 1925, see 20 Halsbury's Statutes (2nd Edn.) 1076, 1086; and for s. 142 of the Law of Property Act, 1925, see ibid., 734.]

Cases referred to:

Bowker v. *Burdekin*, (1843), 11 M. & W. 128; 12 L.J.Ex. 329; 152 E.R. 744; 17 Digest (Repl.) 223, *233*.

British Homophone, Ltd. v. *Kunz & Crystallate Gramophone Record Manufacturing Co., Ltd.*, [1935] All E.R. Rep. 627; 152 L.T. 589; 12 Digest (Repl.) 23, *11*.

Central London Property Trust, Ltd. v. *High Trees House, Ltd.*, [1956] 1 All E.R. 256; [1947] K.B. 130; [1947] L.J.R. 77; 175 L.T. 332; 31 Digest (Repl.) 247, *3823*.

Combe v. *Combe*, [1951] 1 All E.R. 767; [1951] 2 K.B. 215; 2nd Digest Supp.

Griffith v. *Pelton*, [1957] 3 All E.R. 75; [1958] Ch. 205; [1957] 3 W.L.R. 522; 3rd Digest Supp.

Helby v. *Matthews*, [1895] A.C. 471; 64 L.J.Q.B. 465; 72 L.T. 841; 60 J.P. 20; 3 Digest 93, *245*.

Hollington Brothers, Ltd. v. *Rhodes*, [1951] 2 All E.R. 578; [1951] 2 T.L.R. 691; 2nd Digest Supp.

Hughes v. *Metropolitan Ry. Co.*, (1877), 2 App. Cas. 439; 46 L.J.Q.B. 583; 36 L.T. 932; 31 Digest (Repl.) 556, *6757*.

Murray v. *Stair* (*Earl*), (1823), 2 B. & C. 82; 3 Dow. & Ry. K.B. 278; 107 E.R. 313; 17 Digest (Repl.) 222, *229*.

Naas v. *Westminster Bank, Ltd.*, [1940] 1 All E.R. 485; [1940] A.C. 366; 109 L.J.Ch. 138; 162 L.T. 277; 17 Digest (Repl.) 234, *373*.

Sharp v. *Coates*, [1948] 2 All E.R. 871; [1949] 1 K.B. 285; [1949] L.J.R. 616; 2nd Digest Supp.

Staple of England (*Mayor, etc. of Merchants of*) v. *Bank of England* (*Governor & Co.*) (1887), 21 Q.B.D. 160; 57 L.J.Q.B. 418; 52 J.P. 580; 21 Digest 401, *1611*.

Action.

The plaintiff, tenant of the demised premises for the remainder of a term of twenty-one years under a lease dated May 21, 1938, claimed (originally) to have exercised the option contained in cl. 5 of that lease and to be entitled to a further lease of the premises; and, by amendment, alternatively that by correspondence between the plaintiff's solicitors and the defendants' solicitors the defendants, who were entitled to the freehold reversion, had agreed by their solicitors to grant and the plaintiff by her solicitors had agreed to take a further lease.

By a further amendment allowed during the course of the hearing the plaintiff alleged that she had duly executed the counterpart lease sent to her by the defendants, and held it as an escrow and that the defendants had executed the further lease which was binding on the defendants. She therefore claimed a declaration that the defendants were bound by the further lease and an order that on the plaintiff handing over to the defendants the counterpart of the further lease the defendants should hand their part to the plaintiff.

F. B. Alcock for the plaintiff, the tenant.

A. E. Holdsworth for the defendants, the freehold reversioners, a limited company.

Cur. adv. vult.

Apr. 13. **BUCKLEY, J.**, read the following judgment: In this action the plaintiff originally claimed, in effect, that she had effectually exercised an option for renewal contained in a lease dated May 21, 1938, of property known as Nos. 132, 132a and 132b, Ewell Road, Surbiton. By the first amendment of her statement of claim she claimed, alternatively, that by a contract by correspondence between her solicitors and the defendants' solicitors the defendants agreed to grant her a further lease of the property in question. By a further amendment, made in circumstances to which I will refer presently, she claims that the defendants are bound by a lease sealed by the defendants in purported pursuance of the option. The defendants counterclaim for possession of No. 132b and mesne profits.

The lease was granted by a company therein referred to as " the lessors " to two individuals therein referred to as " the tenants ". The lease does not attribute any more extensive meaning to the terms " lessors " and " tenants ". The term created by the lease was a term of twenty-one years from Mar. 25, 1938. Clause 5 of the lease was in the following terms:

> " On giving at least six months' notice in writing expiring previous to the determination of this demise the tenants shall have the right to obtain a further lease for twenty-one years on the same conditions subject to the following amendments:—(a) That there shall be no right of renewal of the said term at the end of such further lease. (b) That the yearly rentals payable during the said term shall be as follows:—(i) £200 for the first seven years. (ii) £225 for the second seven years. (iii) £250 for the last seven years. (c) The legal costs, stamp duties and other expenses attendant on the granting of such further lease shall be borne by the tenants."

This option was never registered as a land charge under the Land Charges Act, 1925.

By an assignment dated Jan. 10, 1948, the residue of the term created by the lease was assigned by the original tenants to the plaintiff subject to the rent, covenants and conditions reserved by and contained in the lease. The assignment, which was made in consideration of a payment of £5,000 by the plaintiff to the assignors, also comprised the assignors' stock in trade and other chattels and the goodwill of the business carried on by them on the property. In August, 1955, the freehold reversion expectant on the term was purchased by the defendants and conveyed to them. There has been no express assignment to the plaintiff of the benefits of the option, but it is common ground that the benefit and burden of this (unlike an option to purchase a reversion) run with the term and the reversion and that, unless the option had become unenforceable by reason of non-registration, it was at the relevant time exercisable by the plaintiff against the defendants.

When the defendants bought the reversion they had very clear notice of the option, for they bought by auction and the particulars of sale used at the auction and incorporated in the written contract expressly and explicitly referred to the option. On Aug. 13, 1955, the defendants' solicitors, Messrs. George C. Carter & Co., applied for an official search under the Land Charges Act, 1925, for entries affecting No. 132, Ewell Road under the names of (inter alios) the original lessors and obtained a certificate of no subsisting entries. This search did not extend to No. 132a or No. 132b.

Upwards of six months before Mar. 25, 1959, namely, on July 1, 1958, the plaintiff's then solicitors, Messrs. Wilkinson, Howlett & Co., wrote a letter on her behalf addressed to the original lessors, c/o Messrs. Whiddington, under which style a Mr. Scammel carried on a business of estate agent. In that letter the plaintiff's solicitors stated on her behalf that they enclosed a formal notice to exercise the option given to her by cl. 5 of the lease, and a formal notice of exercise of the option, addressed to the original lessors " or other the persons entitled to the said premises immediately expectant upon the said lease ", and signed by the plaintiff, was enclosed with the letter. After some correspondence in which Messrs. Whiddington referred to " our clients " without further identifying them, Messrs. Whiddington wrote on Aug. 26, 1958, informing the plaintiff's solicitors that they had instructed their clients' solicitors, Messrs. George C. Carter & Co. in the matter. On Aug. 27, 1958, Messrs. George C. Carter & Co. wrote a letter to the plaintiff's solicitors which I will read in full:

> " Dear Sirs, 132, 132a and 132b, Ewell Road, Surbiton. We have received instructions from our clients Hallwood Estates, Ltd., to act on their behalf in connexion with the renewal of the lease of the above property to your client, [the plaintiff], in accordance with the option in the existing lease. We are instructed that the term is to be for twenty-one years at a rental of £200 per annum for the first seven years, £225 per annum for the next seven years, and £250 per annum for the remainder of the term. In other respects the new lease will be in similar terms to the existing one, and this being so, we shall be glad to know whether in the circumstances you require to see a draft. Our clients inform us that the repairing covenants have not been complied with by your client and that the granting of the new lease will be subject to an undertaking being given that the whole of the exterior and interior will be redecorated within the course of the next six months, although they understand that the work to the interior is already in hand. They also point out that a number of the gutters and downpipes are choked and these must receive attention immediately. This applies particularly to the guttering at the rear of the shop in which there is a considerable amount of moss which has completely choked the gutters and is causing excessive dampness."

After some intervening letters to which I need not refer, the plaintiff's solicitors replied on Sept. 10, 1958, in the following terms:

> " Dear Sirs, 132, 132a and 132b, Ewell Road, Surbiton. We duly received and thank you for your letters of the [27th] of last month and of the 2nd instant. We have been able to see our client today on the letter you addressed to us on Aug. 27. Regarding the second paragraph, the rents are to be as set out in your letter and the terms of the new lease are to be similar to those in the existing lease. In these circumstances, we will gladly dispense with a draft, but we should be glad to know by whom the new lease is to be granted. Under the existing lease, the lessors are Dr. R. Collums Representatives, Ltd. Regarding the third paragraph, our client asks if the undertaking could be extended to nine months. She has already referred to builders who state that it is useless to contemplate work on the exterior stonework until March or April of next year. Regarding the fourth paragraph, your remarks are noted and our client is taking steps to see that this work is done."

Two further letters followed. On Sept. 11, 1958, Messrs. George C. Carter & Co. wrote to Messrs. Wilkinson, Howlett & Co.:

> " Dear Sirs, 132, 132a and 132b, Ewell Road, Surbiton. We thank you for your letter of yesterday's date and we accordingly now enclose the counterpart lease for execution by your client with a note of our costs and disbursements. You will see that the lease is being granted by our clients, Hallwood Estates, Ltd., and that we have omitted the first schedule from the existing lease. We enclose a copy of the lease for your own retention. We are asking our clients whether the time for the redecorations may be extended from six months to nine months."

There was enclosed with that letter a note of their costs and disbursements. On Sept. 13, 1958, Messrs. George C. Carter & Co. wrote to Messrs. Wilkinson, Howlett & Co. in the following terms:

> " Dear Sirs, 132, 132a and 132b, Ewell Road, Surbiton. With reference to your letter to us of the 10th instant, our clients say that they are quite prepared for the period of the exterior decorations to be extended from six to nine months, and so far as the interior decorations are concerned they understand that these will be completed shortly, and they will be glad to hear from your client that this has been done, so that they may make an inspection."

Counsel for the defendants does not dispute that, if at the date when the notice enclosed with the letter of July 1, 1958, was received by Messrs. Whiddington the option was exercisable, that notice was effectually served on the defendants. The plaintiff and her solicitors first became aware that the defendants were the reversioners from the letter of Aug. 27, 1958. Mr. Scammel was not only the proprietor of Messrs. Whiddington, but also the chairman of the defendants' board of directors and the director concerned with the management of the defendants' properties. It was he who attended and bid at the auction when the defendants acquired the reversion.

Down to the point in the history of the matter which I have now reached everyone assumed that the option remained operative and enforceable by the plaintiff against the defendants. Neither the plaintiff nor the directors of the defendant company had addressed their minds to the question whether the option was registered or not. If the directors ever knew of the search which I have mentioned, they had forgotten it. If the defendants' solicitors remembered it, they took the view that it was immaterial because, as the evidence showed, they thought the option did not require registration. The plaintiff said in evidence that she knew nothing about registration.

On Sept. 26, 1958, a board meeting was held at which Mr. Scammel reported that a new lease had been executed for the letting of the property to the plaintiff. Mr. Scammel then said that he wished the defendants were not obliged to grant the lease because he had learned that the plaintiff had secured a considerable rent from a subtenant of Nos. 132 and 132a. The subtenant was paying £600 a year and the directors apparently regarded this as extortionate or in the nature of exploitation. Mr. Grimwood, one of the directors, thereupon suggested that the position as to registration of the option should be investigated because he thought that, if it was not registered, it was void as against the defendants. The defendants' solicitors were then communicated with by telephone and asked about this. In reply they did not state whether the option was registered or not; they expressed the opinion that registration was not necessary for this option to be enforceable. On a later occasion, however, after further communication with Mr. Grimwood, who is himself a solicitor, they changed their opinion and advised that the option was void for lack of registration.

On Oct. 8, 1958, they wrote to the plaintiff's solicitors as follows:

> "Dear Sirs, 132, Ewell Road, Surbiton. We are instructed to inform you that our clients have decided not to grant the new lease to your client."

Although that letter is only headed "132, Ewell Road, Surbiton", I think that it is clear that it was intended to apply to the whole of the demised property. Further correspondence followed in which the plaintiff's solicitors called on the defendants to execute the lease, but the defendants, by their solicitors, refused to do so. Consequently the plaintiff commenced this action on Feb. 6, 1959.

As I have already said, the defendants had actual knowledge of the option, having bought with express notice of it. Indeed, Mr. Grimwood said in evidence that if the board had not heard about the plaintiff's dealings with the subtenant they would have stood by the option, meaning that they would have been prepared to treat it as binding. The board's views of the plaintiff's relations with her subtenant were, in my view, officious. These matters were no concern of theirs, and they do not seem to have taken any steps to discover whether the subtenant felt himself in the least aggrieved. The portion of the property which was sub-let included a shop in which a business of some kind was being carried on. The plaintiff explained that the subtenant's rent was in part consideration for goodwill and for use of fixtures and fittings and equipment in the shop which were her property. The defence under the Land Charges Act, 1925, is a purely technical one and is, in my view, unmeritorious. Nevertheless, the defendants are entitled to rely on the technicality if it can be shown to avail them.

It was not until Mr. Grimwood gave evidence before me that the plaintiff and her advisers had any knowledge of what took place at the board meeting of Sept. 26, 1958, or of the fact that the defendants' seal had ever been attached to the new lease. In her statement of claim the plaintiff had alleged that the defendants had refused to execute a lease corresponding to the counterpart sent to her for execution or to grant a further lease in accordance with the terms of cl. 5 of the original lease. In their defence the defendants had admitted their refusal to execute a further lease of the property. Neither the minute book containing the record of the board meeting of Sept. 26, 1958, nor the lease of the property which was referred to at that meeting was disclosed on discovery. The plaintiff was left under the impression that no lease had been sealed by the defendants. The minute and the lease referred to in it were, in my judgment, clearly documents relating to matters in question in the action and should have been disclosed on discovery. At a late stage in the proceedings—indeed, some days after the hearing had been completed and I had reserved my judgment—counsel on the plaintiff's behalf, asked for leave to amend his pleadings. In the circumstances I thought it right to give him leave to do so, and the statement of claim as amended now includes the execution by the defendants of the new lease among the matters relied on for establishing a contract to grant a new lease distinct from the option, and further claims a declaration that the defendants are bound by the new lease and an order on them to hand it over to the plaintiff on her handing over the counterpart in exchange.

The first question for consideration is what is the consequence of the failure to register the option? The Land Charges Act, 1925, s. 10 (1), so far as relevant, provides as follows:

> "The following classes of charges on, or obligations affecting, land may be registered as land charges in the register of land charges, namely . . . Class C:—A mortgage charge or obligation affecting land of any of the following kinds, created either before or after the commencement of this Act, but if created before such commencement only if acquired under a conveyance made after such commencement, namely:— . . . (iv) Any contract by an estate owner or by a person entitled at the date of the contract to have a legal estate conveyed to him to convey or create a legal estate, including a contract conferring either expressly or by statutory implication a valid option of

> purchase, a right of pre-emption or any other like right (in this Act referred to as 'an estate contract')".

Section 13 (2) of the same Act is in the following terms:

> "A land charge of Class B, Class C or Class D, created or arising after the commencement of this Act, shall (except as hereinafter provided) be void as against a purchaser of the land charged therewith, or of any interest in such land, unless the land charge is registered in the appropriate register before the completion of the purchase: Provided that, as respects a land charge of Class D and an estate contract created or entered into after the commencement of this Act, this subsection only applies in favour of a purchaser of a legal estate for money or money's worth."

The defendants having bought the reversion for money, the option is accordingly void as against them if it is an estate contract within s. 10 (1), Class C (iv). A conditional contract to convey or grant a legal estate is registrable under the section (*Sharp* v. *Coates* (1)). An option to purchase a legal estate in land may have the appearance of a conditional contract on the part of the grantor to convey or create that estate, but this is not, I think, the true nature of such an option. In *Helby* v. *Matthews* (2) the House of Lords had to decide whether a person who had entered into a hire-purchase agreement for a piano under which he could terminate the hiring at any time was "a person having agreed to buy goods" within the meaning of the Factors Act, 1889. It was held that what the hirer was entitled to, apart from the arrangements relating to the hire of the piano, was an option to buy the piano by continuing the stipulated payments for a sufficient period. LORD HERSCHELL, L.C., said (3):

> "It was said in the Court of Appeal that there was an agreement by the appellant to sell, and that an agreement to sell connotes an agreement to buy. This is undoubtedly true if the words 'agreement to sell' be used in their strict legal sense; but when a person has, for valuable consideration, bound himself to sell to another on certain terms, if the other chooses to avail himself of the binding offer, he may, in popular language, be said to have agreed to sell, though an agreement to sell in this sense, which is in truth merely an offer which cannot be withdrawn, certainly does not connote an agreement to buy, and it is only in this sense that there can be said to have been an agreement to sell in the present case."

I particularly draw attention to the words "which is in truth merely an offer which cannot be withdrawn". LORD WATSON said (4):

> "Apart from the arrangement for hire of the piano, the only right given to Brewster [the hirer] by the agreement in question was the option to become a purchaser. It is true that whilst he was under no obligation to buy, the appellant [the owner] was legally bound to give him that option, and could not retract it, if the other stipulations of the contract were duly observed by the hirer. But the possession of such a right of option was, in no sense, an agreement by Brewster to buy the piano; and the appellant's obligation to give the option was not, in the sense of law, an agreement by him to sell. In order to constitute an agreement for sale and purchase, there must be two parties who are mutually bound by it. From a legal point of view the appellant was in exactly the same position as if he had made an offer to sell on certain terms, and had undertaken to keep it open for a definite period."

A little later on LORD WATSON said (5):

> "Whilst, in popular language, the appellant's obligation might be described as an agreement to sell, it is in law nothing more than a binding offer to sell."

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(1) [1948] 2 All E.R. 871; [1949] 1 K.B. 285. (2) [1895] A.C. 471.
(3) [1895] A.C. at p. 477. (4) [1895] A.C. at p. 479. (5) [1895] A.C. at p. 480.

In *Griffith* v. *Pelton* (6) Jenkins, L.J., delivering the judgment of the court, referred to an option to purchase land in the following terms (7):

> "An option in gross for the purchase of land is a conditional contract for such purchase by the grantee of the option from the grantor, which the grantee is entitled to convert into a concluded contract of purchase, and to have carried to completion by the grantor, on giving the prescribed notice and otherwise complying with the conditions on which the option is made exercisable in any particular case."

This language, at first sight, seems to be at variance with what was said in *Helby* v. *Matthews* (8)—which was not, apparently, brought to the attention of the Court of Appeal—but I think that Jenkins, L.J., cannot have meant by the expression "conditional contract" to describe a concluded contract under which the rights and liabilities of the parties were dependent on a condition, but a state of affairs capable of resulting in a concluded contract on a certain contingency.

In my judgment the option contained in cl. 5 of the lease in the present case did not constitute a contract, albeit conditional, by the lessor to grant a further term in the land on the exercise by the tenants of the option: it constituted an offer to grant such a term which the lessor was contractually precluded from withdrawing so long as the option remained exercisable. I am consequently of opinion that the option did not fall within what may be called the first limb of s. 10 (1), Class C, para. (iv).

Does it, then, fall within the second limb introduced by the word "including"? As a matter of syntax and interpretation according to the strict sense of the words used this phrase does not seem appropriate to extend the ambit of the paragraph, but merely to emphasise that options of purchase and the like, so far as they fall within the class of contracts to convey or create legal estates, come within the ambit of the paragraph. But if I am right in the views which I have expressed as to the nature and effect of an option (which must, I think, apply equally to a right of pre-emption or other like right), no such right would ever constitute a contract to convey or create a legal estate. Accordingly, I consider that in this context the word "including" must, as a matter of construction, be given the effect of "which for this purpose shall be treated as including" and what I have called the second limb of the paragraph must be read as extending the operation of the paragraph. Indeed, both counsel before me argued on this footing.

Did cl. 5 of the lease create a valid option of purchase within the meaning of the paragraph? It is clear from s. 20 (8) of the Act that, unless the context otherwise requires, the term "purchaser" includes a lessee and the term "purchase" includes a lease. It must follow, again subject to the context, that the term "option of purchase" includes "option of lease", or "option to take a lease."

Counsel for the plaintiff has referred me to the Law of Property Act, 1925, s. 142 (1). He says that as the option runs with the land it is, under the express terms of that section, binding on the reversioner and enforceable by an assignee of the term. He points out that the section says nothing about registration. Reference may also be made to s. 6 of the same Act. In their note to the last mentioned section the editors of Wolstenholme & Cherry's Conveyancing Statutes (12th Edn.), Vol. 1, at p. 246, say:

> "Thus no land charge has to be registered to protect lessor's or lessee's covenants, for the lease is the charter of the title."

With all respect to the learned editors, I think that statement is too wide.

Counsel for the plaintiff says that s. 142 (1) of the Law of Property Act, 1925, and s. 10 (1), Class C (iv) of the Land Charges Act, 1925, must be construed so as to be mutually consistent, and that the way to achieve this is to exclude from the latter any obligation which falls within the former. He says that the term " purchase " does not in its ordinary sense apply to a renewal of a lease. That may be so, but I am concerned with the statutory definition of the term and not merely with its ordinary meaning. Counsel relies, I think, on s. 142 of the Law of Property Act, 1925, as affording a context which requires me to construe " purchase " in para. (iv) of Class C otherwise than according to the statutory definition. I do not consider that it does so. Section 142 renders obligations to which that section is applicable enforceable against a reversioner for the time being " if and so far as the lessor has power to bind " such reversioner. The section does not empower a lessor to bind a reversioner in respect of any obligation which the legislature has said shall not be enforceable against such reversioner. If an obligation which would otherwise run with the reversion is of a kind which, unless registered as a land charge, will be void against a purchaser for money or money's worth, the lessor cannot, in my judgment, bind in respect of that obligation the reversionary estate in the hands of such a purchaser, who acquires the reversion at a time when the obligation is not registered. The effect of the Land Charges Act, 1925, is to take such an obligation out of the scope of s. 142 on a purchase of the reversion for money or money's worth taking place while the obligation is unregistered.

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(6) [1957] 3 All E.R. 75; [1958] Ch. 205.
(7) [1957] 3 All E.R. at p. 83; [1958] Ch. at p. 225.
(8) [1895] A.C. at pp. 477, 479.

I consequently reach the conclusion that the option contained in cl. 5 of the lease was registrable under s. 10 (1), Class C (iv), and that, as it was not registered when the defendants bought the reversion immediately expectant on the term, it is void as against the defendants.

I now proceed to the question whether the parties entered into a new contract by correspondence. The letters relied on by the plaintiff in her statement of claim in this respect in conjunction with the sealing of the new lease by the defendants are those dated July 1, Aug. 27, Sept. 10, 11 and 13, to which I have referred. These letters were all written at a time when the plaintiff and her solicitors and the directors of the defendant company and their solicitors all believed that the option was exercisable by the plaintiff and enforceable against the defendant company. They were written with the mutual intention of giving effect to what were believed to be existing rights of the plaintiff. I am satisfied that none of the parties concerned thought or intended at the time that any new contractual rights would or should be created by this correspondence, except, of course, so far as the exercise of the option (if valid) would have constituted a new contract. Any transaction between two or more parties can, in my judgment, only result in a contract between them if they enter into that transaction with an intention to create binding contractual obligations or in circumstances in which such an intention must be attributed to them. The facts of the present case negative such an intention, for, as I find, these letters were written with the intention of carrying out what were thought to be existing obligations, not of creating any new obligation. On this ground I am of opinion that no contract is shown to have been established by the correspondence.

This view is not, I think, in conflict with *British Homophone, Ltd.* v. *Kunz & Crystallate Gramophone Record Manufacturing Co., Ltd.* (9). In that case the well-known jazz pianist, Charlie Kunz, had entered into a contract of service with the plaintiff company containing an option for either party " to extend same for a further period of twelve months on terms to be hereafter agreed ". This option was held to have no binding effect as being too uncertain. Nevertheless, the company and Kunz, both believing that the clause was binding, before the expiration of the term of the agreement negotiated and entered into a new formal written agreement. This, it seems, was not merely a continuation of the earlier agreement, the terms being different. The company was anxious to retain the services of Kunz and he, although he would otherwise have wished to enter into a contract with another company—and had in fact done so, although he thought the arrangement was only provisional—felt himself bound by the option clause to contract with the plaintiff company if they offered him satisfactory terms. Counsel for Kunz (who had subsequently committed breaches of the later contract) contended that because both parties entered into the later contract in the mistaken belief that the option clause in the earlier contract was binding, Kunz was not liable in damages for breach of the later contract. DU PARCQ, J., said (10):

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(9) [1935] All E.R. Rep. 627.

> "I can deal shortly with the second contention of counsel for the defendant, Kunz. I know of no authority for the proposition that if two parties enter into what is on the face of it a binding contract, in ignorance of their legal rights, each believing the other to be legally bound to enter into such a contract when he is not so bound, the contract so entered into is not enforceable. So to hold would be to decide that a common mistake of law vitiated a contract, and I believe that such a decision would be unsound in principle."

The learned judge was in that case considering the binding character of a formal written agreement, the terms of which did not flow from an earlier contract but had been independently negotiated, and the case is, in my judgment, clearly distinguishable on its facts from the present case, where the correspondence was not, in my view, intended to create any new rights or embody any new agreement.

Even if I am wrong in the views I have expressed, I should still hold that the correspondence did not constitute a contract, for I cannot find in any of the letters an unqualified acceptance of any offer contained in any earlier letter or letters. If the letter of July 1 be regarded as an offer to take a lease incorporating such terms as are indicated in cl. 5 of the existing lease, the letter of Aug. 27 introduces a new term as to an undertaking to do interior and exterior redecorations within six months, which would give that letter the character of a counter-offer. The letter of Sept. 10 asked for the period of the required undertaking to be extended to nine months, and so would constitute a further counter-offer. The letter of Sept. 13 accepts the last proposal, but only as regards exterior decorations, and once again this would constitute a further counter-offer. The question of the form and extent of the proposed undertaking was never fully resolved on the correspondence, and no undertaking was ever given. The defendants' sealing of the new lease cannot, in my judgment, advance the plaintiff's case in this respect. If it is to be regarded as an acceptance of an offer on the part of the plaintiff, it was never communicated to her and so cannot have constituted a contract. There is, I think, no other way in which it can be regarded as relevant to the question whether a contract to grant a new lease was ever concluded between the parties in 1958.

Accordingly, in my judgment, the plaintiff fails to make out her case of a contract for a further lease.

This renders it unnecessary for me to decide the validity of the plea in the defence that, if there was such a contract, it was entered into under a common mistake that the option was binding. As, however, the argument as to mistake is relevant to a later point, and would, of course, be relevant to the present point if the case were to go to a higher court, I should state my view on this. Such a mistake would, I think, have been a mistake of law; viz., a mistaken view held by all parties that on the known facts the option was binding at law irrespective of registration; for until Sept. 26, 1958, none of them had addressed his mind to the question whether the option was registered, but all the other relevant facts were known. The mistake was as to the nature and effect of the general law v Hallwood Estates Ltd

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(10) [1935] All E.R. Rep. at p. 634.

applicable to those known facts. The mistake would not, I think, have been one that would have afforded a defence to a claim under the alleged contract.

By her amended reply the plaintiff claimed that the defendants could not in any case rely on the Land Charges Act, 1925, s. 13, because (a) they had accepted rent from the plaintiff since the end of the term (but I have had no evidence of payment of any such rent), and (b) promises were said to be contained in the letters of Aug. 27, Sept. 11 and 13, 1958, which, as she alleges, were intended to, and did, induce her to believe that the defendants would grant the further lease and would not rely on the section. The plaintiff alleges that she acted on these promises in taking no steps to enforce against the original lessors her rights under cl. 5 of the lease. One short answer to this contention is, I think, that as there was never any privity of contract between the plaintiff and the original lessors, the plaintiff did not at any relevant time have any rights which she could have enforced against the original lessors and, accordingly, she has not altered the position to her detriment in this respect.

On this part of the case counsel for the plaintiff referred me to *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.* (11); to *Hughes* v. *Metropolitan Ry. Co.* (12), and to the statement derived from *Combe* v. *Combe* (13), which is contained in 15 HALSBURY'S LAWS OF ENGLAND (3rd Edn.), p. 175. As I understand this part of the law, which has been described as promissory estoppel, it is that where one party is under an existing legal obligation to another, who has so acted as to lead the former party to believe that the latter will not enforce that obligation, or not enforce it to its full extent, or for the time being, intending the former party to act on that footing, and the former party has so acted, the latter party may be restrained in equity from enforcing the obligation on any footing inconsistent with the belief so induced and may be so restrained notwithstanding that he has received no consideration for the modification of his rights. The doctrine may afford a defence against the enforcement of otherwise enforceable rights; it cannot create a cause of action. It cannot, in my judgment, be invoked to render enforceable a right which would otherwise be unenforceable, nor to negative the operation of a statute (14).

I now pass on to the question whether by sealing the new lease the defendants bound themselves. This falls into two parts: (a) whether the defendants ought to be regarded as having executed the new lease, and (b) if so, whether they ought to be regarded as having done so unconditionally, or as an escrow, and if so, on what condition?

It is clear from authority which counsel for the defendants cited to me, including *Murray* v. *Earl of Stair* (15) and *Bowker* v. *Burdekin* (16)—and see *Naas* v. *Westminster Bank, Ltd.* (17) —that the latter question depends on the intention of the executing party and is a question of fact to be determined on the whole evidence of the circumstances attending the execution.

Before I consider the law, I should say a further word about the facts. The minute of the board meeting of Sept. 26, 1958, is in the following terms:

> "Chairman's report on the matters in hand . . . (d) 132, Ewell Road, Surbiton. A new lease has been executed for the letting of this property to . . . for a term of twenty-one years from Mar. 25, 1959, at a rent of £200 per annum for the first seven years, £225 for the next seven years and £250 for the remaining seven years, the tenant to pay all outgoings."

That is the whole of the relevant passage in the minute.

Counsel for the defendants concedes that the seal of the defendants was regularly attached to the lease. I know nothing further about the actual circumstances of its being attached. It will be recollected that the correspondence to which I have made reference discussed an undertaking to be given by the plaintiff relating to certain decorations. By Sept. 13, a point had been reached at which the defendants' solicitors had said that the defendants were quite prepared for the period of the exterior decoration to be extended from six months to nine months, inferring that the period of the interior decorations should be six months. The lease was sealed at some date before Sept. 26, and, as I think, subsequent to Sept. 13, but I have had no evidence enabling me to fix the date more precisely. The counterpart was executed by the plaintiff on Sept. 24 or 25. Nothing, in my view, turns on the sequence of these events. The two parts were never exchanged.

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(11) [1956] 1 All E.R. 256; [1947] K.B. 130.
(12) (1877), 2 App. Cas. 439.
(13) [1951] 1 All E.R. 767; [1951] 2 K.B. 215.
(14) See 15 HALSBURY'S LAWS (3rd Edn.) 176.
(15) (1823), 2 B. & C. at pp. 87, 88.
(16) (1843), 11 M. & W. at p. 147.
(17) [1940] 1 All E.R. at p. 505; [1940] A.C. at p. 399.

In my view, in accordance with contemporary practice, where a deed is intended to be executed in duplicate to give effect to a transaction between two parties by which each undertakes obligations towards the other, the execution of such a deed by one of those parties prima facie imports that he executes it in escrow conditionally on the other party executing his part of the contract so as to become bound thereby in respect of his obligations thereunder. In this connexion I respectfully accept what was said by HARMAN, J., in *Hollington Brothers, Ltd.* v. *Rhodes* (18). In that case the court was not considering whether a deed was executed conditionally or unconditionally, but was considering whether the sealing of a deed could be relied on as establishing a contract to grant a lease, so that the point considered by the learned judge was rather different from the one I am at the moment concerned with; but he said (19):

> "It is a commonplace that in many, indeed in most cases, where a lease is to be granted everything remains in negotiation until the lease and its counterpart are finally exchanged between the parties, and it seems to me impossible to spell out of the course of business which I have described and which appears from the correspondence anything more than the ordinary course of negotiations."

The sealing of a deed by a corporate body, in my judgment, prima facie imports delivery of that deed, either unconditionally or conditionally; NORTON ON DEEDS (2nd Edn.) at pp. 12, 13; *Mayor, etc. of Merchants of the Staple of England* v. *Governor & Co. of the Bank of England* (20) and I see no reason in the present case to conclude that the sealing of the lease by the defendants did not import delivery so as to constitute due execution either unconditionally or in escrow. Indeed, the plaintiff being a "purchaser" within the meaning of the Law of Property Act, 1925, I think that I am bound, by s. 74 of that Act, to treat the lease as having been duly executed by the defendants, and this, in my judgment, involves treating the lease as having been not only sealed but also delivered. The lease, being a deed intended to be executed in duplicate for giving effect to a transaction between the parties whereby each undertook obligations towards the other, was, in my opinion, executed by the defendants conditionally on the plaintiff executing a counterpart: the crucial question, however, is whether it was also conditional on an undertaking being given in suitable form by the plaintiff in respect of the decorations.

In this connexion I do not think that I am at all concerned with what was at this relevant time in the minds of the defendants' solicitors. What is of importance is what was the intention of the directors of the defendant company when the lease was executed. As I have already said, I know nothing about the circumstances in which the seal was actually affixed. I do, however, know that the seal is countersigned by Mr. Scammel, who was the chairman of the board meeting of Sept. 26, 1958, and that the minute of that meeting—to which I

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(18) [1951] 2 T.L.R. 691.

(19) [1951] 2 T.L.R. at p. 694.

(20) (1887), 21 Q.B.D. at p. 165.

have referred—contains no reference to the execution of the lease being in any A
way conditional on an undertaking being given by the plaintiff as to decorations.
On the contrary, it is, in my view, clear from Mr. Grimwood's evidence that
everybody present at the board meeting of Sept. 26 regarded the lease sealed by
the defendant company as binding, albeit they did so with regret. Whereas this
attitude of mind would, in my opinion, not be inconsistent with the binding
quality of the lease being conditional on the lessee binding herself by execution B
of a counterpart to obligations on her part expressed in the lease, it is, in my
judgment, inconsistent with any idea that it was also conditional on some
matter wholly extraneous to the lease, as was the proposed undertaking as to
redecoration. I, therefore, reach the conclusion of fact that the defendants, by
sealing the lease, intended to deliver, and did deliver, it as their deed intended
to bind them, conditionally only on the plaintiff executing a counterpart, and C
subject to no other condition. The plaintiff has, as I have already stated,
executed the counterpart and in her statement of claim she alleges that she holds
the same as an escrow. She is, and has at all material times been, ready and
willing to exchange her counterpart for the lease executed by the defendants.

The defendants plead that the lease was executed under a mistake, viz., the
mistake to which I have already alluded. The mistake having been, in my view, D
a mutual mistake of general law would not, in my judgment, entitle the defendants
to have the lease rescinded and they do not, in fact, claim rescission.
Indeed, they claim no relief based on mistake but merely rely on the mistake as a
ground of defence. In my judgment, the mistake can have no bearing on the
question whether the defendants have executed the new lease (including delivery
thereof) and, if so, whether unconditionally or as an escrow, or on its binding E
effect on them so long as the lease is allowed to stand unrescinded.

In these circumstances I propose to declare that subject to the plaintiff handing
over to the defendants the counterpart lease referred to in para. 8 of the re-amended
statement of claim duly executed by her, the defendants are bound by
the lease referred to in para. 9 of the re-amended statement of claim and I
propose to make the order (21) asked for in para. 2 of the plaintiff's claim at the F
end of the re-amended statement of claim.

Order accordingly.

Solicitors: *S. Sydney Silverman* (for the plaintiff); *George C. Carter & Co.* (for the defendants).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

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(21) This was an order for handing over the lease; see p. 316, letter B, ante.

Re STRAND & SAVOY PROPERTIES, LTD.

D. P. DEVELOPMENT CO., LTD. v. CUMBRAE PROPERTIES, LTD.

[CHANCERY DIVISION (Buckley, J.), May 5, 6, 1960.]

Landlord and Tenant—Lease—Contract to grant lease more than twenty-one years after date of contract—Validity—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 20), *s.* 149 (3).

The words " any contract . . . to create such a term shall likewise be void " in s. 149 (3)[*] of the Law of Property Act, 1925, invalidate only a contract to grant a lease which, when granted, will be a reversionary lease taking effect more than twenty-one years after the date of the lease; they do not invalidate a contract to grant, at a date more than twenty-one years after that of the contract, a lease which, when granted, will not be a reversionary lease.

[**Editorial Note.** An option for renewal of a lease may not be a contract, but only an offer to grant a further term which offer the landlord is contractually precluded from withdrawing; see *Beesly* v. *Hallwood Estates, Ltd.*, p. 314, ante.

As to the commencement of a term of years, and as to contracts to create a term, see 23 HALSBURY'S LAWS (3rd Edn.) 532, para. 1188. As to perpetually renewable leaseholds, see ibid., p. 628, para. 1331.

For the Law of Property Act, 1922, Sch. 15, para. 7, see 13 HALSBURY'S STATUTES (2nd Edn.) 876, and for the Law of Property Act, 1925, s. 149 (3), see 20 HALSBURY'S STATUTES (2nd Edn.) 753.]

Cases referred to:

Lockwood, Re, Atherton v. *Brooke*, [1957] 3 All E.R. 520; [1958] Ch. 231; [1957] 3 W.L.R. 837; 3rd Digest Supp.

Northchurch Estates, Ltd. v. *Daniels*, [1946] 2 All E.R. 524; [1947] Ch. 117; [1947] L.J.R. 6; 176 L.T. 4; 31 Digest (Repl.) 79, *2326*.

Originating Summons.

This was an application by D. P. Development Co., Ltd., the plaintiffs, by originating summons under R.S.C., Ord. 54A, to which summons their landlords, Cumbrae Properties, Ltd., were defendants, for the determination of the question whether, on the true construction of s. 149 (3) of the Law of Property Act, 1925, a certain provision for renewal for a further thirty-five years contained in the lease for a term of thirty-five years from June 24, 1926, under which they held premises in the Strand, London, was valid. The facts appear in the judgment.

Sir Milner Holland, Q.C., and *J. Bradburn* for the plaintiffs, the tenants.

M. J. Albery, Q.C., and *B. T. Buckle* for the defendants, the landlords.

BUCKLEY, J.: This case raises a question of construction of some importance and I think some difficulty on the Law of Property Act, 1925, s. 149 (3). I understand that the text-book writers have expressed varying views on the question, though I have not been referred to all that they say on the subject.

The facts of the case are quite short. By a lease dated Nov. 1, 1928, and made between Strand & Savoy Properties, Ltd., of the one part, and Louis François Peyrecave, of the second part, the parties of the first part demised certain property in the Strand for a term of thirty-five years from June 24, 1926, on certain terms and conditions, including a provision contained in para. 6 of the sixth schedule to the lease in the following terms:

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[*] Section 149 (3) of the Law of Property Act, 1925, provides: " A term, at a rent or granted in consideration of a fine, limited after the commencement of this Act to take effect more than twenty-one years from the date of the instrument purporting to create it, shall be void, and *any contract made after such commencement to create such a term shall likewise be void . . .*"

> "The lessors will at the written request of the lessee made twelve months before the expiration of the term hereby created and if there shall not at the time of such request be any existing breach or non-observance of any of the covenants on the part of the lessee hereinbefore contained at the expense of the lessee grant to him a lease of the demised premises for the further term of thirty-five years from the expiration of the said term hereby granted at the same rent and containing the like covenants and provisos as are herein contained with the exception of the present provision for renewal the lessee on the execution of such renewed lease to execute a counterpart thereof."

The reversion expectant on the term so created is now vested in the defendants in the present proceedings, and the term is now vested in the plaintiffs. The tenants—that is to say, the plaintiffs—have in fact given notice by a letter dated Oct. 15, 1953, purporting to exercise the option.

The first question which arises for decision is whether, having regard to the terms of s. 149 (3) of the Act of 1925 the option is a valid option at all. That subsection is in the following terms:

> "A term, at a rent or granted in consideration of a fine, limited after the commencement of this Act to take effect more than twenty-one years from the date of the instrument purporting to create it, shall be void, and any contract made after such commencement to create such a term shall likewise be void . . ."

Then there are some words that I need not read for present purposes.

It is the contention of the defendants that the provision for renewal contained in the present lease is void under the second branch of the language I have read, which relates to contracts to create such a term.

Counsel for the plaintiffs, putting his argument in the shortest terms, says that sub-s. (3) makes it impossible for any man to create a reversionary term —that is to say, a term to take effect more than twenty-one years from the date of the instrument creating the term—and it also invalidates any contract by which a man undertakes to create a reversionary term; that is to say, a term which will not commence until twenty-one years after the date of the instrument creating such term. He says that the subsection does not invalidate a contract to create a lease, at however remote a date in the future, which, when it is granted, will create a term which will take effect within twenty-one years of the date of that lease.

He has drawn my attention to Sch. 15 to the Law of Property Act, 1922, which in cl. 7 deals in sub-cl. (1) with perpetually renewable leases, and in sub-cl. (2) with any contract entered into after the commencement of that Act for the renewal of a lease or an underlease for a term exceeding sixty years. He says that if the legislature had intended to legislate to the effect that any contract for the renewal of a lease at a date more remote than twenty-one years from the date of that contract should be void, the natural place where one would expect to find it would be in connexion with the provisions that one finds in cl. 7 of the Act of 1922.

In fact, the provisions of s. 149 of the Act of 1925 replace what was originally enacted as s. 146 of the Act of 1922, with the exception of sub-s. (6) of s. 149 of the Act of 1925, which replaces what was previously sub-cl. (3) of cl. 7 of Sch. 15 to the Act of 1922.

It is, of course, well known that although the Law of Property Act, 1922, was enacted in the year 1922, it did not come into operation until Jan. 1, 1926, when it came into operation contemporaneously with the Law of Property Act, 1925. The legislature, by removing some parts of the Act of 1922 into the Act of 1925 and leaving other parts of the Act of 1922 in that Act of 1922, must, I think, be regarded as having thought there was some difference in character between those provisions which were left in the Act of 1922 and those provisions which were transferred into the Act of 1925 in the course of trying to arrange this very complicated real property legislation in the form of a code which would be intelligible to the user. Therefore, I think, there is some force in the suggestion of counsel for the plaintiffs that the fact that one finds renewal of leases dealt with in terms in Sch. 15 to the Act of 1922 and that one finds the particular provisions with which I am concerned in the present case uplifted out of the Act of 1922 and put into the Act of 1925 is some indication that the provisions of s. 149 (3) of the Act of 1925 were not primarily, at any rate, intended to deal with the case of renewals of leases. Of course, there might be other contracts to create terms in the future besides contracts for renewal in leases already granted. Perhaps one should not place too much reliance on the point but still it is, I think, some slight indication to the court in approaching the construction of s. 149 (3).

Counsel for the defendants, on the other hand, points out that the contention supported by counsel for the plaintiffs really gives no operative effect to that part of sub-s. (3) which deals with contracts at all, because if a lease creating a term to commence at a date later than twenty-one years from the date of the lease is void, a contract to grant such a lease must also necessarily be void without any express provision to that effect in the statute. He says that that is a strong indication that the construction contended for by counsel for the plaintiffs is not the right construction, and that the court ought to try to find some other meaning to give to the words. The meaning which he invites me to put on them is that the subsection renders void any contract to grant a lease to commence at a date later than twenty-one years after the date of the contract.

Looking at the words of the section carefully and analytically, the part of the subsection which deals with contracts must, according to its strict grammatical construction, I think, mean that any contract made after the commencement of the Act to create a term, at a rent or granted in consideration of a fine, to take effect more than twenty-one years from the date of the instrument purporting to create that term, shall be void; that is to say, the strict literal construction of the language, in my judgment, leads to the result for which counsel for the plaintiffs contends. Counsel for the defendants concedes that that is so, but he says that it produces a result which the court should be unwilling to accept, and that, therefore, the court ought to depart from the strict, literal construction of the language and give some other effect to it.

Counsel for the defendants says that one can discern in the subsection a policy which is, he says, to prevent undue complication of title, either by the creation of estates to take effect in futuro beyond the period of twenty-one years, or by the creation of a multiplicity of contracts capable of being protected under the Land Charges Act as estate contracts. He says that the second part of the relevant portion of sub-s. (3) relates to the second part of that policy.

I must confess that when I look at the language of s. 149 and the language of Sch. 15 to the Act of 1922, cl. 7, I find it difficult myself to discover what the policy of the legislature was about this. In particular, I find it difficult to understand the policy of cl. 7 (2) of Sch. 15. The real property legislation of 1925 was an elaborate code which radically altered the law of the land with regard to the tenure of real property and matters relating to that subject, and there are many aspects on which one can discern what the policy of the legislature was from the terms of the Act, but in this particular regard I confess that I find myself unable to distil any particular policy out of the relevant provisions. Although I think that counsel for the defendants is quite right in saying that if the contention of counsel for the plaintiffs is right, the words "and any contract made after such commencement to create such a term shall likewise be void" could just as well have been omitted from this section, because they give no added effect to its operation, I do not feel that that is a circumstance which justifies me in departing from what I think is the correct reading of the language.

Counsel for the defendants has drawn my attention to what is said in Maxwell on Statutes (10th Edn.), at pp. 229 and 252, dealing with modification of language to meet the intention, but I do not feel myself able to find in the language of this particular provision any such contradiction or absurdity as to make it necessary for me to construe the language otherwise than in accordance with its true and natural meaning, nor do I think that giving it that construction produces any inconvenience, hardship or injustice, nor does it result in any sort of repugnance in the terms of the section itself or between the terms of that section and any other provision in the Act.

In those circumstances, I think that the court is bound to construe the section in accordance with its language, more particularly having regard to the fact that it is undoubtedly a section which restricts what would otherwise be the freedom of anyone to contract in this sort of respect in any way he thought desirable.

I ought to refer to a decision of Evershed, J., in *Northchurch Estates, Ltd.* v. *Daniels* (1) where something was said which has some bearing on the present problem. In that case a landlord let a farm to a tenant on terms under which the tenant had the option to renew the tenancy from year to year on giving notice on or before Dec. 25 in each year. The question arose as to what the effect of that tenancy was. The learned judge held that, on its true construction, the tenancy was a perpetually renewable tenancy. It was contended before him that such an arrangement was a contract to create a succession of reversionary terms, each for one year certain, provided the requisite notice was given each year; and on that basis it was contended that s. 149 (3) applied and that, at any rate after twenty-one years, the option would be invalidated by that subsection. The learned judge came to the conclusion that the tenancy, being a perpetually renewable tenancy, was converted by the Law of Property Act, 1922, Sch. 15, cl. 7 (1), into a term of two thousand years; and in dealing with the argument about s. 149 (3), having said this in stating the argument (2):

> " . . . since the contract is made after Jan. 1, 1926, then, at any rate as to all terms starting after Jan. 14, 1959—that is, twenty-one years from the date of the instrument—it is a contract to create a reversionary term or terms which offends against the provisions of the section ",

he came to the conclusion that that argument should be rejected, first, on what he called the simple ground that in reading the Act of 1922 and the Act of 1925 together, the case of a perpetually renewable leasehold was dealt with in the Act of 1922 and was not affected by the provisions of s. 149 of the Act of 1925, and, secondly, on the ground that a contract for perpetual renewal ceased to be a contract for perpetual renewal on Jan. 1, 1926, and became a grant of a term of two thousand years, and on that ground was not within the terms of s. 149.

It certainly looks rather, from the way in which Evershed, J., expressed himself in his judgment, that had he felt that the facts of that particular case were not such as to take the case out of the Act of 1925 because of the provisions of the Act of 1922 with regard to perpetually renewable leaseholds, he would have or might have held that s. 149 (3) did apply to the contract for renewal, at any rate after the period of twenty-one years from the original tenancy agreement; but there is no note of the argument that was presented to the learned judge in that case, beyond the fact that counsel who appeared for the plaintiffs presented the argument. I am not in a position to know how it was dealt with in argument, and it was disposed of by the learned judge in the way in which I have indicated. I do not know whether he really applied his mind to the question which I have to decide today or not, and I think that there is nothing in that decision which precludes me from coming to what I should otherwise regard as being the proper conclusion at which to arrive.

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(1) [1946] 2 All E.R. 524; [1947] Ch. 117.

(2) [1946] 2 All E.R. at p. 527; [1947] Ch. at p. 122.

I was referred by counsel for the defendants to *Re Lockwood, Atherton* v. *Brooke* (3), a decision of HARMAN, J., in support of his argument that the terms of the subsection were such that I ought to strive to adopt some construction which gave operative effect to the part of the subsection dealing with contracts, but I find the present case very different from that which HARMAN, J., had to decide, for he there came to the conclusion that the result of the literal interpretation of the language in that case would have been so capricious and absurd and would have produced such an improbable result that he felt fully justified in striving to arrive at another conclusion, which he succeeded in doing.

In the present case I cannot say that I find anything capricious or absurd in the fact that the draftsman or the legislature has inserted in s. 149 (3) some words relating to contracts which may amount to no more than a glimpse of the obvious and as a statement of a fact which would follow from the preceding provision of the same subsection. I do not think that this can be by any means the only provision in Acts of Parliament which could be omitted without making any substantial or real difference to the effect of the rest of the statute. The subsection is quite consistent throughout, there is no repugnance, no absurdity, no hardship, and I think that the court is bound to give effect to the language of the subsection according to its terms.

By those terms the subsection is confined, as far as contracts are concerned, to contracts to create terms which, when created, will only take effect more than twenty-one years from the dates of the instruments creating them; that is to say, it invalidates contracts for the granting of leases which will, when granted, be reversionary leases, the postponement of the commencement of the term being for more than twenty-one years from the date of the lease.

Accordingly I shall answer question 1 of the originating summons by declaring that, on the true construction of the section, the provision for renewal contained in para. 6 of the sixth schedule to the lease is a valid provision.

Order accordingly.

Solicitors: *Pettiver & Pearkes* (for the plaintiffs); *Swepstone, Walsh & Son* (for the defendants).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

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(3) [1957] 3 All E.R. 520; [1958] Ch. 231.

Re UNITED RAILWAYS OF THE HAVANA AND REGLA WAREHOUSES, LTD.

[HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Denning and Lord Morris of Borth-y-Gest), March 14, 15, 16, 17, 21, 22, 23, May 5, 1960.]

Conflict of Laws—Contract—Proper law of contract—Lease of railway rolling stock—Trust agreement assigning railway rolling stock and lease to trustee as security for service of trust certificates.

Money—Currency—Rate of exchange—Damages—Contract or tort.

Before and during 1921, a railway company incorporated in England, which had for many years carried on a railway in Cuba, purchased or contracted to purchase, in the United States of America, rolling stock and other railway equipment. For the purpose of financing part of the sum involved the railway company entered in 1921 into a transaction for raising money in the United States of America by the issue of fifteen-year 7½ per cent. equipment trust certificates of $1,000 each. These were intended to be redeemed half yearly at a premium over a period of some fifteen years ending in 1936. The certificates were to be administered by a trust company, incorporated in the Commonwealth of Pennsylvania, by which the certificates were issued and against which the rights conferred on the certificate holders lay. As part of the financial arrangements the railway company sold all the railway stock and equipment already delivered and assigned the contracts for future delivery of the balance to a subsidiary company (called the " car company ") of the railway company incorporated in the State of Delaware. By an agreement (called " the lease ") executed in 1921 the car company let the rolling stock and railway equipment to the railway company for fifteen years, and by way of rental the railway company agreed to pay (in dollars) various sums which represented interest, and capital instalments, in respect of the equipment trust certificates. By an agreement (called the " trust agreement ") substantially contemporaneous with the lease the car company assigned to the trust company, as trustee for the certificate holders, all its interest in the railway stock and equipment and the rentals reserved by the lease. In 1922 the car company resold the railway stock and equipment to the railway company, subject to and with the benefit of the lease and trust agreement; and in 1924 the car company was dissolved. In 1931 the railway company ceased to make the rental payments under the lease needed to provide for the redemption of certificates, and thereafter no such payments were made, leaving 2,200 certificates unredeemed. In 1934, in which year Cuban legislation established a moratorium*, the railway company ceased to make the payments under the lease needed to provide interest on the outstanding certificates. Subsequently, in or about 1937, 1,869 of the outstanding certificates were purchased by the railway company at a price of $147·50 each, leaving 331 certificates outstanding in the hands of the public. In 1953, acting under Cuban legislation, the railway company sold to the Cuban state its whole undertaking (including the 1,869 certificates) and a sum of $13,000,000 in U.S. dollars was paid by the Cuban state to the railway company in U.S. treasury bills, the conversion of which into English currency was effected at a rate of about 2·80 dollars to the pound. By Cuban law the purchase price was received by the railway company free from all responsibility as regards liabilities existing in Cuba represented by debts, obligations and responsibilities arising out of the operation of the properties bought by the Cuban state. In 1954 the

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* See [1959] 1 All E.R. at p. 222, letter B.

A railway company went into liquidation in England. The Cuban government renounced all claims in respect of the 1,869 certificates*.

The trust company lodged a proof in the English liquidation for (under para. 2 (a)) the sterling equivalent (according to the rate of exchange prevailing at the date of commencement of the winding-up, viz., a rate of approximately 2·80 dollars to the pound) of an amount of United States B dollars due in respect of the 331 certificates, and, among other claims, for (under para. 2 (d)) the sterling equivalent (at a like rate of exchange) of an amount in United States dollars due in respect of the 1,869 certificates. The claims on the proof were quantified as the amount alleged to be needed to satisfy the certificate holders, not by the amount of arrears due under the lease†. The proof was rejected by the liquidators on the ground that by C Cuban law the railway company had been released by a novation of the railway company's liability on the acquisition of the railway by the Cuban state, and had been released also to some extent by Cuban moratorium law. On a summons by the trust company to reverse this decision of the liquidators the High Court made an order on Dec. 4, 1956, rejecting the proof under para. 2 (d) on the ground that by then it was established that no claim was D to be made in respect of the 1,869 certificates, and the rest of the summons was stood over. No appeal was brought against this order. Subsequently, the summons having been restored, the proof under para. 2 (a) was admitted, the trust company relying not only on a contention that the proper law of the lease was not Cuban law, but also on the sale to the Cuban state having been a conversion by the railway company giving rise to liability E in damages, the whole amount of which should be available to satisfy the total claim in respect of the 331 outstanding certificates. On appeal on the question of admissibility of the claim under para. 2 (a) of the proof, and on the question of the rate of exchange applicable, the liquidators contending that the relevant rates of exchange were those prevailing as and when a payment under the lease fell due but was not paid (which rates were F higher than 2·80 dollars to the pound),

Held: (i) in approaching the question what was the proper law governing the lease regard should be had not only to the terms of the lease but also to the trust agreement and the transaction as a whole, and the test to be applied was with the law of what country the transaction had its closest connexion; the proper law of the lease was accordingly that of the Commonwealth of G Pennsylvania, and, as the discharge of a contract was governed by the proper law of the contract, the railway company had not been freed from obligations to the trust company (as assignee of the car company) either by novation under Cuban law or by moratorium thereunder, and the trust company was, therefore, entitled to prove in respect of unfulfilled obligations of the railway company under the lease (see p. 355, letter D, p. 356, letters H A and B, and p. 365, letter G, post; cf. p. 335, letter D, p. 344, letter F, and p. 349, letter I, post).

Test stated by LORD SIMONDS in *Bonython* v. *Commonwealth of Australia* ([1951] A.C. at p. 219) applied.

(ii) the rate of exchange for conversion of the foreign currency in which the unfulfilled obligations of the railway company under the lease (which created debts due in foreign currency) were payable was that prevailing as and when each sum fell due and became unpaid (see p. 338, letter D, p. 346, letter E, p. 351, letter H, p. 356, letter E, and p. 367, letter C, post).

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* This was recognised by the court on Dec. 4, 1956, when the liquidator's rejection of para. 2 (d) of the proof lodged by the trust company, which paragraph related to the money needed to meet what might be due to the holders of the 1,869 certificates, was affirmed. These certificates had been delivered pursuant to the sale to the Cuban state. The order of Dec. 4, 1956, recited " . . . this court being satisfied that . . . the holders in due course of the [1,869] certificates . . . have renounced any claim to participate in the assets available for distribution in the winding-up . . .".

† In so far as the decision of the House of Lords turned on the form of proof, it is necessary to have regard to the exact terms of para. 2 of the proof. These are set out at p. 337, letters E to I, post, in the opinion of VISCOUNT SIMONDS, where observations on the form of this proof will also be found.

Ward v. *Kidswin* ((1661), Lat. 77) and *S.S. Celia* v. *S.S. Volturno* ([1921] 2 A.C. 544) applied.

(iii) (Lord Radcliffe and Lord Morris of Borth-y-Gest not concurring) the trust company could not now maintain a proof for damages for conversion of the rolling stock by the sale to the Cuban state in 1953 either (per Viscount Simonds and Lord Reid) because such a claim was precluded by the rejection of para. 2 (d) of the trust company's proof (see p. 339, letters C to E, and p. 349, letters A to C, post) or (per Lord Denning) because the trust company had by their proof elected to claim for breach of contract under the lease and a claim in conversion was inconsistent with the claim for breach of contract (see p. 354, letters C and H, post).

Per Viscount Simonds: the rule is settled that where a claim is in damages for breach of contract or for a tortious act the date of conversion [of the damages in foreign currency into English currency] is the date of that breach or that act (see p. 343, letter H, post); and (per Lord Radcliffe) it is not possible to base any distinction on whether the proper law of the contract is English or foreign (see p. 351, letter A, post).

Decision of the Court of Appeal ([1959] 1 All E.R. 214) affirmed in part.

[As to the proper law of a contract, see 7 Halsbury's Laws (3rd Edn.) 72, para. 137; and for cases on the law governing a contract being determined by the intention of the parties, see 11 Digest (Repl.) 420-425, *715-734*.

As to the conversion of money payable in foreign currency into English money, see 27 Halsbury's Laws (3rd Edn.) 6, para. 5; and for cases on the subject, see 35 Digest 172-176, *31-63*.]

Cases referred to:

Bonython v. *Commonwealth of Australia*, [1951] A.C. 201; 2nd Digest Supp.

British South Africa Co. v. *De Beers Consolidated Mines, Ltd.*, [1910] 2 Ch. 502; 80 L.J.Ch. 65; 103 L.T. 4; *revsd. on other grounds* sub nom. *De Beers Consolidated Mines, Ltd.* v. *British South Africa Co.*, [1912] A.C. 52; 11 Digest (Repl.) 376, *405*.

Celia, S.S. v. *Volturno, S.S.*, [1921] 2 A.C. 544; 90 L.J.P. 385; 126 L.T. 1; 15 Asp. M.L.C. 374; 35 Digest 174, *39*.

Deutsche Bank Filiale Nurnberg v. *Humphrey*, (1926), 272 U.S. Rep. 517.

Di Ferdinando v. *Simon, Smits & Co.*, [1920] 3 K.B. 409; 89 L.J.K.B. 1039; 124 L.T. 117; 35 Digest 175, *52*.

Evans v. *Davis*, (1878), 10 Ch.D. 747; 48 L.J.Ch. 223; 39 L.T. 391; 28 Digest (Repl.) 813, *609*.

Khoury, Syndic in Bankruptcy of Salim Nasrallah v. *Khayat*, [1943] 2 All E.R. 406; [1943] A.C. 507; 2nd Digest Supp.

Manners v. *Pearson & Son*, [1898] 1 Ch. 581; 67 L.J.Ch. 304; 78 L.T. 432; 35 Digest 176, *57*.

Scott v. *Bevan*, (1831), 2 B. & Ad. 78; 9 L.J.O.S.K.B. 152; 109 E.R. 1073; 35 Digest 174, *44*.

Société des Hôtels le Touqet-Paris-Plage v. *Cummings*, [1922] 1 K.B. 451; 91 L.J.K.B. 288; 126 L.T. 513; 35 Digest 173, *36*.

United Australia, Ltd. v. *Barclays Bank, Ltd.*, [1940] 4 All E.R. 20; [1941] A.C. 1; 109 L.J.K.B. 919; 164 L.T. 139; 2nd Digest Supp.

Vionnet (Madeleine) et Cie. v. *Wills*, [1939] 4 All E.R. 136; [1940] 1 K.B. 72; 109 L.J.K.B. 22; 161 L.T. 311; 2nd Digest Supp.

Ward v. *Kidswin*, (1661), Lat. 77; 82 E.R. 283.

Appeal.

Appeal by William Robert Tomkinson and Robin Hereward Bruce Wright, joint liquidators of the United Railways of the Havana and Regla Warehouses, Ltd. (an English company in voluntary liquidation) from an order of the Court of Appeal (JENKINS, ROMER and WILLMER, L.JJ.), dated Dec. 8, 1958, and reported [1959] 1 All E.R. 214, affirming an order of WYNN-PARRY, J., dated Nov. 19, 1957, and reported [1957] 3 All E.R. 641, that a proof lodged in the winding-up by the trustee for certain certificate holders, which had been rejected by the liquidators, should be admitted. The facts are set out in the opinion of LORD MORRIS OF BORTH-Y-GEST, p. 358, letter A, post.

John Megaw, Q.C., *K. W. Mackinnon, Q.C.*, and *Richard H. Hunt* for the appellants.

R. O. Wilberforce, Q.C., and *R. B. S. Instone* for the respondents.

Their Lordships took time for consideration.

May 5. The following opinions were read.

VISCOUNT SIMONDS: My Lords, I propose to state in summary form the facts of this long and complicated case. They are fully stated in the opinion of my noble and learned friend, LORD MORRIS OF BORTH-Y-GEST, which I have had the privilege of reading. It was necessary to do so in order to determine the question what is the law determining the liability of the appellants to the respondents in respect of certain agreements to which I shall briefly refer. I could add nothing to his exposition of the facts, and I am wholly in agreement with his conclusions of law on this question. I proceed on the footing that the relevant law is that of the Commonwealth of Pennsylvania and shall examine the questions which then arise: what is the sum in dollars owed by the appellants to the respondents, and at what rate must that sum be converted into sterling.

The appellants are the liquidators in the voluntary winding-up of an English company called the United Railways of the Havana and Regla Warehouses, Ltd., which I will call " the company ". The company for many years carried on a railway undertaking in the Island of Cuba. Before or during the year 1921, the company had purchased, or contracted to purchase, in the United States of America rolling stock and other railway equipment to an aggregate amount of over $14,000,000, and for the purpose of financing part of this amount decided to raise the sum of $6,000,000 in the United States of America. The finance was arranged in what appears to be a somewhat elaborate way. It no doubt had its own purpose. In February, 1921, the company caused to be incorporated in the State of Delaware a subsidiary company, the Cuban Rolling Stock Company, which has generally been referred to as " the car company " and to this company sold all the rolling stock and equipment already delivered and assigned the contracts for future delivery of the balance. Notwithstanding this sale, the company continued to use the rolling stock as part of its railway undertaking as it had before the sale. In April, 1921, the car company leased to the company the rolling stock and equipment already delivered, and agreed to lease the remainder when delivered for a period of fifteen years expiring on Feb. 14, 1936. The company agreed to pay as rental for the rolling stock and equipment (all of which I will call " the rolling stock ") *First*, half yearly on Feb. 14, and Aug. 14 in each year, the first payment to be made on Aug. 14, 1921, (a) a sum equal to 3¾ per cent. of the par value of certain certificates therein mentioned outstanding and unpaid on the same dates in each year during the term of the lease together with certain other sums which need not be particularised, and (b) a sum equal to the expenses incurred by the car company or its assigns in enforcing the covenants and terms of the lease and performance of the trust under which the said certificates were issued, and (c) a sum equal to certain taxes, duties and other charges therein mentioned; *Secondly*, half yearly on the same dates in each year beginning with Aug. 14, 1921, a sum of $206,000 for the first twenty payments and of $205,000 for the last ten payments. There were provisos for payment of these semi-annual sums in trust certificates as therein mentioned, and also for the retirement of such certificates but they are not relevant to the question that I am considering. The lease also contained covenants by the company for maintenance, replacement and insurance of the rolling stock and that there should be no assignment, transfer, or underletting of the rolling stock without the consent of the car company or its assigns. Further, there was provision in the event of default by the company in payment of rental or performance of its other obligations for the car company or its assigns to declare the lease terminated and to enter on the company's railroad and retake the rolling stock. Finally, the lease provided that the car company might forthwith assign to the Commercial Trust Company of Philadelphia as trustee all its right, title and interest in the rolling stock and all its claims, demands and remedies accruing under the lease.

Your Lordships will have observed that the lease refers to trust certificates and to an intended assignment to a trustee. These references require a brief explanation, if only because much of the confusion that has arisen in this case is due to them. The transfer contemplated by the last provision of the lease to which I have referred was, in fact, effected by a so-called trust agreement of the same date, the parties to which were the car company and the Commercial Trust Company of Philadelphia as trustee, whose successors in title are the respondents to this appeal. The car company thereby assigned to the trustee as trustee for the certificate holders thereinafter mentioned the lease and all its interest in the rolling stock and all rentals reserved under the lease. I venture to repeat and emphasise that the lease did not, nor did the trust agreement, impose any contractual liability to the certificate holders on the company. I, therefore, think it sufficient to say that the certificates were 6,000 " Equipment Trust certificates " of $1,000 each, and that it was to secure the repayment of them by 1936 together with certain premiums, interest and other sums that the company entered into the lease containing the several covenants that I have already described.

The next step was that, by an agreement dated Apr. 27, 1922, the car company resold the rolling stock to the company subject to and with the benefit of the lease and of the trust agreement. Shortly afterwards the car company was dissolved. In due course, 3,800 certificates were retired in accordance with provisions in the trust agreement and were cancelled. The company did not pay the last instalment of $206,000 which became due under the lease on Feb. 14, 1931, or any of the ten instalments of $205,000 which subsequently became due. The total of these unpaid instalments is $2,256,000. The company kept up the other payments which were included in the " rentals " payable under the lease down to and including those due on Feb. 14, 1935, but made no further payment. A large sum was due under these heads. In 1937 proceedings were instituted by the respondents against the company in the State of Maine. They were compromised on the terms (inter alia) of an offer by the company to purchase outstanding certificates at a price of $147·50 per certificate. This offer was accepted by holders of 1,869 certificates which, accordingly, came into the possession of the company. The certificates have not been cancelled. Thus there were only 331 certificates left in the hands of the public. The number is sometimes given as 333 but the difference is immaterial.

I need not refer to the subsequent Cuban legislation which would be relevant only if Cuban law governed the contract. It is sufficient to say that, in consequence of it, the company, on Dec. 1, 1953, sold the whole of its undertaking to the Cuban state which on the same day resold it to a Cuban company formed for the purpose called the Ferrocariles Occidentales de Cuba S.A. As a term of such sale to the Cuban state, the purchase price was to be received by the company free from all responsibility with respect to liabilities outstanding in Cuba represented by debts, obligations and responsibilities arising out of the operation of the properties acquired by the Cuban state. Under a further term, the company delivered to the Cuban state the 1,869 certificates which, as already stated, it had purchased.

A This was the state of affairs when, on Mar. 4, 1954, the company passed a special resolution for winding-up and appointed the appellants as liquidators. I am conscious that, though I have been able to omit much that is relevant only to the question of the proper law of the contract, yet I have troubled your Lordships by a recital of many facts which can have no bearing on the only question which is before the court in the winding-up of the company, viz., what is the B debt owed by the company to the respondents under the lease. I have done so only because not otherwise is the form of proof put in by the respondents explicable. That does not mean that it is in any way justifiable. On the question that now arises, I come to a different conclusion from that reached by WYNN-PARRY, J., and the majority of the Court of Appeal. On June 18, 1954, the respondents lodged their proof of debt in the winding-up.

C In order to simplify the issue, I will in the first place deal solely with the claim which is based on the failure of the company to fulfil its contractual obligations under the lease, and reserve for later consideration certain alternative claims. I will also ignore for the present two heads of claim relating to certain expenses incurred by the respondents which the company have contracted to pay, and will confine my attention to two claims which appear to relate to the D failure of the company to pay to the respondents eleven instalments of principal, the first of 206,000 dollars and the others of 205,000 dollars, and certain premiums and interest. I say " appear to relate " for, though I never before saw so confused and confusing a document as this proof, it is clear from its 4th paragraph (1) that the liability of the company in the sums claimed in para. 2 is assigned in the first place to its covenants under the lease. I can only do justice E to these claims by setting them out verbatim. They are as follows:—

> " 2 . . . (a) The sum of £264,076 0s. 1d. being the sterling equivalent on the said date [viz., the commencement of the winding-up] (calculated at the rate of \$2·80 to the £) of United States \$739,412·81 due and payable to the claimant in respect of \$333,000 in face value of United Railways of Havana fifteen year 7½ per cent. equipment trust certificates then outstanding F in the hands of members of the public as follows namely a sum equal to:—

Face value	\$333,000·00
Premium of 2½ per cent. on the said face value	\$8,325·00
Interest at the rate of 7½ per cent. per annum on the said face value from Aug. 15, 1934, to Feb. 14, 1936	\$37,462·50
G Interest at the rate of six per cent. per annum on the said face value from Feb. 15, 1936, to Mar. 4, 1954 ..	\$360,625·31
	\$739,412·81

> " (d) In addition thereto (subject as hereinafter mentioned) £1,480,570 H 5s. 7d. being the sterling equivalent on Mar. 4, 1954 (calculated at the rate of \$2·80 to the £) of United States \$4,145,596·78 due and payable to the claimant in respect of \$1,867,000 in face value of United Railways of Havana fifteen year 7½ per cent. equipment trust certificates which had been purchased by the company as follows, namely a sum equal to:—

Face value	\$1,867,000·00
I Premium of 2½ per cent. on the said face value	\$46,675·00
Interest at the rate of 7½ per cent. per annum on the said face value from Aug. 15, 1934, to Feb. 14, 1936 ..	\$210,037·50
Interest at the rate of six per cent. per annum on the said face value from Feb. 15, 1936, to Mar. 4, 1954	\$2,021,884·28
	\$4,145,596·78 "

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(1) See p. 348, letter I, post.

Your Lordships will observe that, ex facie, these claims are quantified not by the amount by which the company has fallen short of its obligations under the lease but by the amount which the respondents allege to be necessary to satisfy the certificate holders whose certificates have not been cancelled. But, since the certificate holders do not stand in any contractual relation to the company, it is at once clear that the form of proof is wrong and misleading, and I think that the proper course would have been to reject it in toto with liberty to the respondents to recast it if they thought fit. It is too late to do that now. All that we can do is to take these two claims amounting together to 4,885,009·59 dollars, to assume that they are referable, as appears from para. 4 of the proof, to the company's failure to fulfil its obligations under the lease, and ask, first, at what rate of exchange the dollars are convertible into sterling and, secondly, what is the result of the order made by Roxburgh, J., on Dec. 4, 1956, to which I will refer later. I emphasise that, at this stage, the two sums must be aggregated, for the liability of the company to the respondents, though divided in the proof, arises from a single source, viz., its breach of its obligations to them.

On this footing, I entertain no doubt that the proper rate of exchange is that which prevailed at the date when the several sums owing by the company to the respondents fell due and were not paid. The sum of 739,412·81 dollars being thus converted would (after a slight adjustment of the figures which has been agreed) represent £180,724 5s. 1d., and this is the sum which the appellants say is due to the respondents. It is, as they rightly contend, wholly irrelevant that the respondents might, if they had to satisfy the dollar claims of the certificate holders, have to convert into sterling at the rate of 2·80 dollars to the £. That is not a question which arises in the liquidation and is no concern of the company. What is true of the sum claimed under para. 2 (a) is equally true of that claimed under para. 2 (d), but for the reason that I shall presently state this need not be further considered. Here, then, are two sums the result of an artificial division, for which the respondents alone are responsible, both of them stemming from the company's liability to the respondents, both of them convertible into sterling not at 2·80 dollars to the £ but at the several rates prevailing when the several sums fell due and were not paid. Two sums there were and, if there had continued to be two sums, a situation would have arisen of which I cannot guess the solution. It may be that, if the respondents had persisted in their claim for the whole 4,885,009 dollars, the Cuban state or their successors as holders of the 1,867 or 1,869 certificates would have had something to say about the distribution of the fund in the hands of the respondents. I should by no means assume that they would assent to a course which would benefit the 331 (333) certificate holders. I will not make that or any other assumption. For the event did not happen. What did happen was, in my view, fatal to the respondents' contention.

The respondents' claim having been duly presented in the winding-up was rejected by the liquidators on Nov. 19, 1954. On Apr. 25, 1955, they took out a summons asking that the liquidators' decision rejecting their proof for (inter alia) the several sums of £264,076 0s. 1d. and £1,480,570 5s. 7d. might be reversed, and that the proof might be ordered to be admitted in full. At an earlier date, viz., on Nov. 14, 1955, the liquidators had themselves taken out a summons asking that they might be at liberty to apply certain sums in making a first interim return of capital to the holders of the consolidated stock of the company and towards redemption of its second income loan stock. These summonses appear to have come before Roxburgh, J., on the same day, and that learned judge made two orders on Dec. 4, 1956. By the first of them, which related to the rejection of proof, it was recited that it appeared that the holders in due course of 1,867 certificates whereof the denoting numbers were set forth in the schedules to the order had renounced any claim to participate in the assets available for distribution in the winding-up and that such renunciation alone was a sufficient ground for the rejection of that part of the respondents' proof of debt

A (namely, the claim in respect of the sum £1,480,570 5s. 7d. claimed in subpara. (d) of para. 2 of the proof which was based on or measured by reference to the said 1,867 certificates) the court did not think fit to reverse or vary the decision of the liquidators rejecting the said proof so far as it related to the said sum of £1,480,570 5s. 7d. and made no order on that part of the summons. The remainder of the summons was ordered to stand over, the costs so far incurred being B reserved. The respondents applied for leave to appeal from this order; it was refused, and they carried the matter no further. The second order made on the same day has no immediate relevance to the matter now under appeal, but it may be noted that the learned judge in fact authorised the liquidators to distribute out of the assets of the company a sum of £496,066 and a sum not exceeding £1,371,889 for the purposes mentioned in their summons. The respon- C dents asked for leave to appeal from this order also; it was refused and the respondents carried the matter no further.

I return to the first order. How is it possible, my Lords, to regard it as anything but a final and now irrevocable rejection of the proof to the extent of £1,480,570? It may be that the reason for rejection was wrong. I think it was. But it was due to nothing else than the manner in which the proof was framed. D For that, the respondents alone were responsible. It is possible that, too late, they saw the folly of it, but they did not appeal. In the result, all that remains is the claim under para. 2 (a). That is a sum of dollars which is not now challenged, except that the appellants contend that it has been converted into sterling at the wrong rate of exchange. When the respondents receive this sum, they must deal with it as the terms of their trust demand. With that, the court has no E concern in the winding-up of the company. It may be the failure to realise this fact that led WYNN-PARRY, J., and the majority of the Court of Appeal to a conclusion for which I see no justification. All that remains of the proof is the sum originally claimed less that part which has been rejected.

So far I have dealt with the case on the footing that the proof of debt is based on the failure by the company to perform its obligations under the lease. That F accords with para. 4 of the proof. But counsel for the respondents has urged that, if this claim fails in the respect that I have mentioned, they have an alternative claim for damages for conversion by the company of the equipment, which cannot suffer the same fate inasmuch as the conversion took place in 1953 and at that date the rate of exchange was already 2.80 dollars to the £. I find it impossible to accept this contention. I will assume, though there are probably G many difficulties in the way, that the claim in damages for conversion is valid, and further that such damages can, as WYNN-PARRY, J., held, be quantified at such a sum in sterling as when converted into dollars at the rate of exchange obtaining on Dec. 1, 1953, i.e., 2·80 dollars to the £ would produce 2,000,000 dollars. It is to be remembered that this claim is strictly alternative to the claim H with which I have already dealt. But though the ground of claim, the cause of action, is different, no other particulars are given than those in para. 2 (a), (c) and (d). They are, of course, irreconcilable with the new claim. But the claims, new and old, are subject to the order of Dec. 4, 1956. The proof of debt is rejected to the extent of £1,480,570. It is plain that nothing is left if a claim in damages for conversion is substituted for the original claim. It is not, in my opinion, I possible to construe the order as a rejection pro tanto of the proof of debt if, and only if, it is founded on one of the causes of action indicated in para. 4, and that it is to be disregarded if another cause of action is substituted.

I have so far deliberately ignored the claims under para. 2 (b) and (c). These are claims which appear to be well founded, subject to such inquiry as to quantum as may be necessary. Moreover, I do not think that the rate of exchange of 2·80 dollars to the £ can be successfully challenged, for the rate must be determined not at the date when the respondents incurred the several expenses which constitute the claim but at the date when demand was made on the company for payment. There was no evidence that demand was made before the 2·80 rate obtained.

Once more then I return to the claim under para. 2 (a) and the single question that remains is whether the 739,412 dollars therein mentioned should be converted as the respondents contend at the 2·80 rate or, as the appellants contend, at the rates prevailing when the several sums payable by the company in respect of principal, premium and interest fell due and were not paid. This was said to be an important question of principle on which this House has not hitherto pronounced. The question summarily stated is what sum in sterling is recoverable by a plaintiff suing in the courts of this country for a sum of money payable in foreign currency in a foreign country under an instrument of which the proper law is a foreign law. Admittedly, the claim must be for a sterling sum and the judgment must be in sterling. It is established by authority binding on this House that a claim for damages for breach of contract or for tort in terms of a foreign currency must be converted into sterling at the rate prevailing at the date of breach or tortious act; see, e.g., *S.S. Celia* v. *S.S. Volturno* (1). But, it was said, doubts had been expressed whether the same rule applied where the claim arose from a failure to pay a debt expressed in terms of foreign currency, and it was urged that, on principle, the plaintiff should recover sterling at the rate prevailing at the date of judgment or, alternatively, at the date of the writ or other initiating step of the proceedings. To this it was answered that, without undue refinement the two cases, damages and foreign debt (as I will call a debt in foreign currency), could not be distinguished, that an action to recover a foreign debt was on a sound analysis nothing else than an action for recovery of damages for breach of a contract to deliver foreign currency, that there was ample authority, ancient and modern, for this proposition, and that, in any case, convenience demanded that the same rule should obtain.

My Lords, I have no doubt what your Lordships' decision on this point should be. In the course of the argument it occurred to me to ask learned counsel what in old days was the form of action where the claim was for a foreign debt. The answer was found after some research. It was extremely enlightening if not decisive. In *Ward* v. *Kidswin* (2) decided as long ago as the second year of the reign of King Charles II, the exact point appears to have been decided. In that case (which is reported in Norman French), the plaintiff brought an action in detinet against the defendant declaring that on such and such a day the defendant in London bound himself to the plaintiff by bond that he would repay " such and such a sum of Hamburg money which is such and such English money ". Among other exceptions it was excepted that " the debt for Hamburg money was in detinet alone whereas money ought to be in debet and detinet ". On this point it was held: " There is express authority in 34 H.6.12 where the action brought in detinet is held to be good " and the report goes on:

> " And it was agreed by all (the judges) that in the case of foreign coin, such as Flemish, one must declare the value in English. Note that one can be charged for money as a receiver and bailee for goods or for Hamburg money, provided it is not current here: and the action is quite the same as for a box or a horse, etc. And in such case the action will be in detinet only unless it is for money made English coin . . . JONES, J. (held) that the action is properly brought in detinet alone for Hamburg money which is of no value and as if the action were brought for a piece of plate."

The money was in this case apparently contracted to be paid in London and the bond was an instrument governed by English law. The result could not have been different if it had been payable in Hamburg under a Hamburg bond.

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(1) [1921] 2 A.C. 544; 15 Asp. M.L.C. 374.

(2) (1661), Lat. 77.

A I have spoken of authority ancient and modern, and have given your Lordships an example of ancient authority. Let me pass over more than three hundred years and come at once to a case decided in 1943. In *Syndic in Bankruptcy of Salim Nasrallah Khoury* v. *Khayat* (3), the material question was at what rate according to the law of Palestine, which was conceded for this purpose to be the same as English law, should a sum of 2,000 gold Turkish pounds payable at Haifa be converted into local (i.e., Palestine) currency. I venture to quote extensively from a judgment of the Judicial Committee of the Privy Council which was delivered by LORD WRIGHT. He asked (4): B

> "At what dates must the rate of exchange be calculated? There can, their Lordships apprehend, be now no doubt as to the English law on this point. It is true that different views have been taken at different times and by different systems of law. Indeed, there are at least four different alternative rules which might be adopted. The rate of exchange might be determined as at the date at which payment was due, or at the date of actual payment, or at the date of the commencement of proceedings to enforce payment, or at the date of judgment. English law has adopted the first rule, not only in regard to obligations to pay a sum certain at a particular date, but also in regard to obligations the breach of which sounds in damages, as for an ordinary breach of contract, and also in regard to the satisfaction of damages for a wrongful act or tort." C D

Then, after citing the following words of LORD SUMNER from *S.S. Celia* v. *S.S. Volturno* (5):

> E " The agreed numbers of lire are only part of the foreign language in which the court is informed of the damage sustained, and, like the rest of the foreign evidence, must be translated into English. Being a part of the description and definition of the damage, this evidence as to lire must be understood with reference to the time when the damage accrues, which it is used to describe" ,

F the judgment proceeds (6):

> " This can be applied directly to a case where the damage claimed arises from a failure to pay a sum in foreign currency, like the Turkish gold pounds here. It is true that LORD SUMNER does not deal specifically with and seems to reserve the question of what is the rule where there is a contractual obligation for the payment of fixed or calculable sums in a foreign place and (their Lordships would prefer ' or ') in a local currency. He does, however, observe (7) that: ' Waiting to convert the currency till the date of judgment only adds the uncertainty of exchange to the uncertainty of the law's delays '. LORD BUCKMASTER (8) rejects summarily the idea that the date of the writ or of the commencement of the action is the proper date. His view, in their Lordships' opinion, is summed up by his statement (8) that, in regard to damages which have been: ' . . . assessed in a foreign currency the judgment here, which must be expressed in sterling, must be based on the amount required to convert this currency into sterling at the date when the measure was properly made, and the subsequent fluctuation of exchange, one way or the other, ought not to be taken into account.' " G H

I Then, after a felicitous reference to s. 72 (4) of the Bills of Exchange Act, 1882, which enacts that, in the case of bills of exchange, the amount of the foreign currency is to be translated into the United Kingdom currency according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable, their Lordships adopted that date as the proper date for the exchange rate of the Turkish gold pounds. In this case which, if not strictly binding on this House, is of the highest persuasive authority, two lines of thought which end in the same conclusion appear to be blended, the first that the breach of an obligation to pay a sum in foreign currency sounds in damages, and, therefore the rule of the *Celia* (9) applies, the second that, as an independent rule of law, the proper rate of exchange for failure to pay a debt in foreign currency is that obtaining on the date when payment should have been made. Both propositions find ample support. I do not propose to detain your Lordships by the citation of a large number of authorities. I am content to accept as a correct statement of law, whichever way the conclusion is reached, the propositions in r. 177 at p. 914 of the 7th Edn. of Dicey's Conflict of Laws, as follows:—

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(3) [1943] 2 All E.R. 406; [1943] A.C. 507.
(4) [1943] 2 All E.R. at p. 409; [1943] A.C. at p. 512.
(5) [1921] 2 A.C. at p. 555; 15 Asp. M.L.C. at p. 377.
(6) [1943] 2 All E.R. at p. 409; [1943] A.C. at p. 513.
(7) [1921] 2 A.C. at p. 558; 15 Asp. M.L.C. at p. 378.
(8) [1921] 2 A.C. at pp. 548, 549; 15 Asp. M.L.C. at p. 375.

> "(1) An English court cannot give judgment for the payment of an amount in foreign currency . . . (2) For the purpose of litigation in England: (a) a debt expressed in a foreign currency must be converted into sterling with reference to the rate of exchange prevailing on the day when the debt was payable . . ."

There are, however, certain landmarks in the case law on this subject which I cannot ignore. First, I must mention *Scott* v. *Bevan* (10), and I do so largely because it has from time to time been suggested and was strenuously urged by counsel that it does not decide a point which it obviously does. There, an action was brought in the King's Bench to recover the value of a given sum of Jamaican currency on a judgment obtained in that island. The facts are somewhat complicated. But it clearly emerges that it was argued on the one side that a conventional rate of exchange should be taken, on the other that the rate should be that actually prevailing at the date of the judgment in Jamaica, that, at the trial, Lord Tenterden, C.J., directed the jury to find in favour of the former view, that a rule nisi for a new trial was obtained on the ground that only that sum was recoverable in sterling which would equal the value of the sum payable under the Jamaican judgment in Jamaican currency at the rate of exchange prevailing at the date of that judgment, and that the rule was made absolute. It is true that Lord Tenterden himself continued to express some doubt, but this may be forgotten in the judgment of a court consisting besides himself of Littledale, Parke, Taunton and Patteson, JJ.

Next I would refer to *Manners* v. *Pearson & Son* (11), a case frequently cited for the judgment of Vaughan Williams, L.J., though I doubt whether on the question now in issue a different view was taken by Lindley, M.R., and Rigby, L.J. The question was as to the proper mode of taking an account ordered in an action brought in this country by a creditor to have an account taken of moneys payable abroad by the defendant in a foreign currency, i.e., whether it should be taken on the relative values of the English and foreign currencies as of the date of taking the account, or as of the dates when the debts became payable, or as of some other and what date or dates. Ignoring at first the particular form of action, i.e., an action for an account, Vaughan Williams, L.J., said (12):

> "It seems clear that, in an action in whatever form in the English courts for the recovery of a debt payable in foreign currency, the amount of the English judgment or order must be expressed in English currency, and that, unless the relative values of the respective currencies are fixed by statute or some authority binding the English courts or by the agreement of the litigants, the amount of the English judgment or order must be based on the quantity of English sterling which one would have to pay here to obtain in the market the amount of the debt payable in foreign currency delivered at

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(9) [1921] 2 A.C. 544; 15 Asp. M.L.C. at p. 374.

(10) (1831), 2 B. & Ad. 78.

(11) [1898] 1 Ch. 581.

(12) [1898] 1 Ch. at p. 592.

A the appointed place of payment—i.e., the amount payable according to the rate of exchange."

The learned lord justice goes on to explain that the rule is based on what I may call the commodity theory of a debt in foreign currency, echoing the judges in *Ward* v. *Kidswin* (13) three hundred years ago. He then stated that he saw no reason why the rule should not apply in an action for an account—the only B point, I think, on which he differed from his brethren. His judgment and, in particular, the passage that I have cited has been frequently approved, particularly in *Di Ferdinando* v. *Simon, Smits & Co.* (14), which was itself approved in the *Celia* (15).

I should not pass over *Madeleine Vionnet et Cie.* v. *Wills* (16), for in that case CLAUSON, L.J., states the law in words on which I cannot improve. He says (17):

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> " If this be the position, the only question open in this court would seem to be whether or not any distinction can in principle be drawn between the case of a claim in respect of breach of contract which results in relief by way of damages and a like claim which results in relief by way of judgment for a fixed sum. We can find no logical ground for such a distinction either in D reason or in any principle which can be deduced from the decided cases. Indeed, counsel supporting the judgment below was not able to formulate any such principle, still less to point to any decided cases from which any such principle could be deduced."

I may without disrespect say that learned counsel for the respondents on the present appeal, greatly though he assisted the House, suffered in this respect from E the same infirmity.

I could refer to many other cases, particularly to a group which arose in the liquidation of the British American Continental Bank in 1922 and 1923 (18) in which it was held that a claim in debt is on the same footing for the purpose of determining the rate of exchange as a claim for damages for breach of contract. But I do not think that any useful purpose would be served by doing so. I am F satisfied that nothing is to be found in them which could lead one to a different judgment. Reliance was also placed on the judgment of the Supreme Court of the United States in *Deutsche Bank Filiale Nurnberg* v. *Humphrey* (19). Any judgment of that court will be regarded with respect in this House, nor will anyone doubt that the conclusion to which the majority of the court, including HOLMES, J., came can be supported by weighty argument. It was that the date G when the suit is brought, not the date when the debt is payable nor the date of judgment, is the date at which the rate of exchange must be fixed. But I do not find in the judgment persuasive authority which would justify your Lordships in adopting a rule which has so long been rejected in the courts of this country. This leads me to some final observations in this too long opinion.

We are engaged in settling the law on a question in which any rule is artificial H and to some extent arbitrary. In other systems of law, different rules have been adopted, and there is no doubt that one system may benefit one creditor and another another. No rule can do perfect justice in every case. In this country, the rule is settled so as to bind all courts that, where the claim is in damages for breach of contract or for a tortious act, the date of conversion is the date of that breach or that act. It would, in my opinion, introduce the sort of refinement into I the law, against which I have striven and shall ever strive, if a different rule were adopted in the case of a foreign debt. In the one case, a contract for delivery of goods, in another for delivery of foreign currency, in another for payment of a foreign debt, in all alike precisely the same damage is suffered by a plaintiff who sues on the failure of the defendant to fulfil his obligation. It would be little credit to our law if a different measure of relief was meted out in these several cases.

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(13) (1661), Lat. 77.
(14) [1920] 3 K.B. 409.
(15) [1921] 2 A.C. 544; 15 Asp. M.L.C. 374.
(16) [1939] 4 All E.R. 136; [1940] 1 K.B. 72.
(17) [1939] 4 All E.R. at p. 138; [1940] 1 K.B. at p. 78.
(18) See [1922] 2 Ch. 575; [1922] 2 Ch. 589; [1923] 1 Ch. 276.
(19) (1926), 272 U.S. Rep. 517.

I come to the conclusion that the claim in para. 2 (a) of the proof can be admitted for no more than £180,724 5s. 1d., being the sterling equivalent for the dollar sums therein mentioned at the rate of exchange prevailing when they severally fell due. I have already intimated that the claims in para. 2 (b) and (c) must, subject to inquiry as to quantum, be admitted, and the claim under para. 2 (d) must be rejected. To sum up, the appeal, in my opinion, fails on the major question what is the proper law of the contract, but succeeds in so far as it seeks to reduce the proof of debt under para. 2 (a) of the proof to £180,724 5s. 1d. It fails in the attempt which was not seriously pressed to reduce the claim under para. 2 (b). The claim under para. 2 (c) has not been challenged and the claim under para. 2 (d) is rejected.

The question of costs remains. The appellants have so far been ordered in the Winding-up Court and the Court of Appeal to pay substantially all the costs of the respondents. Taking this into account, and the fact that they have succeeded in a considerable degree in this House and should have succeeded similarly in the courts below, their Lordships propose not to vary the orders already made in regard to costs, but to make no order as to the costs of the present appeal except that the costs of the appellants be their costs in the winding-up.

LORD REID: My Lords, the United Railways of the Havana and Regla Warehouses, Ltd. is an English company which went into voluntary liquidation on Mar. 4, 1954. The appellants are the liquidators, and this case arises out of a proof of debt lodged on behalf of the respondents. The only debt owed by the company to the respondents is the unpaid part of the rentals due under a lease of rolling stock in Cuba to which I shall have to refer later. The appellants seek to avoid liability for that debt by maintaining, first, that the proper law of the contract of lease is the law of Cuba and, secondly, that the law of Cuba discharges them in whole or in part of that liability. In my opinion, the proper law of the contract is not the law of Cuba; it is the law of the Commonwealth of Pennsylvania. I have had an opportunity of reading the speeches about to be delivered by my noble and learned friends, LORD DENNING and LORD MORRIS OF BORTH-Y-GEST, and I agree with the reasons which they give for this. Accordingly, the only remaining question is the amount for which the respondents are entitled to prove.

The company's debt is in United States dollars, and this must be converted into sterling. The question is at what rate or rates of exchange must this conversion be made. The sums due by the company ought to have been paid half yearly between 1931 and 1936. At that time the rate of exchange was over $4 to the £, at the date of liquidation it was only $2·80 to the £. The appellants say that the dates for conversion should be the date of the breaches, i.e., the dates at which the debtor ought to have paid his debt. The respondents say that the date should be at the earliest the date of liquidation, and we were informed that, if the earlier dates are taken, the appellants would have to pay about £80,000 less than if the later date is taken. For many years it has been generally accepted that conversion should be made at the rate of exchange current at the date when the debtor broke his contract by failing to make due payment. But I do not think that this House is bound by authority in this matter although the weight of authority in favour of taking the date of breach is very great. So I think it more satisfactory to re-examine the whole matter.

I take first a contract of which the proper law is the law of England under

A which one party is bound to deliver to the other in England either goods or a sum in a foreign currency. If I buy a cow (to take LORD WRENBURY's illustration in *S.S. Celia* v. *S.S. Volturno* (20)), and the seller fails to deliver it at the stipulated date, I must, if I still want a cow, go into the market and buy one at the market price at the date of breach. I ought, then, to recover as damages for that breach of contract the cost of that cow, and it is well settled that the B proper measure of damages is the market price of the goods at the date when the seller broke his contract. In the same way, if a party fails to pay or deliver a sum of dollars or francs at the stipulated date, I must, if I still want that currency, go into the market and acquire it at the rate of exchange current at the date of breach, and I can see no reason why the measure of damages should not again be the market price of that currency at the date of breach. If, in C either case, I do not choose to go and buy elsewhere the cow or the foreign currency which the seller failed to deliver, that cannot alter the measure of damages. I know at the date of breach what sum I shall ultimately be entitled to recover as damages, and a subsequent alteration of the market price of cows or francs will not affect my rights. I do not have to take the risk of the price falling, and I ought not to gain if the price rises. I do have to take the risk D that the pound sterling may be of less value when the damages are ultimately paid than at the date of the breach, for that is a general risk against which the law cannot protect any of us. And if the person who contracted to deliver the cow or the foreign currency is a foreigner, that is no reason why the measure of damages should be different. If a foreigner chooses to enter into an English contract he cannot expect special treatment. But, in theory, it might seem that E the rule should be different if the contract is a foreign contract. If a person in Pennsylvania buys a cow or buys francs for a price in dollars by a contract of which the proper law is the law of Pennsylvania and the seller fails to deliver, the buyer will, if he sues in the United States and assuming that the law there is the same as it is here, recover damages in dollars based on the market price in dollars of the cow or the foreign currency at the date of breach. But he F may have to sue in England; in that case, why should he not recover in England sufficient sterling to give him as many dollars as he would have got if he had sued at home.

The case against the existing rule may seem even stronger where the action is for repayment of money lent. If in America one person lends dollars to another and the loan is not duly repaid, the creditor simply sues there for the money and G no question can arise about the date at which damages are to be assessed, though interest may be due from the date of breach. But, if the creditor has to come to England to sue, the dollars will be converted into sterling as at the date of breach, although at that time neither party had any connexion with England. The original reason for the rule has no application in such a case. When dealing with an English contract it may be right to treat foreign currency as a H commodity but dollars lent in America are not a commodity and, if they are not repaid at the due date, there can be no question of an American going into the market and buying dollars to replace those which the debtor failed to deliver. Why, then, should the American creditor, if he has to come to England to sue, have his debt converted into sterling as at the date of the original breach. That seems the more anomalous because, if the I creditor had been able to obtain judgment in America for his debt and had brought the judgment here to enforce it, the debt would have been converted to sterling as at the date of the American judgment.

The reason for the existing rule is, I think, primarily procedural. A plaintiff cannot sue in England for payment of dollars and he cannot get specific performance of a contract to pay dollars—it would not be right that he should. So, at best, he could only have the dollars converted to sterling at the date of judgment. Owing to appeals or difficulties of enforcement, a long time may elapse between judgment and getting his money, and the rate of exchange may have altered substantially during that time. Indeed, fluctuations in the rate of exchange might result in the rate of exchange at the date of payment being nearer to the rate at the date of breach than to the rate at the date of judgment, though, no doubt, the probability is the other way. And there are practical difficulties in taking the date of judgment. The rate of exchange for United States dollars might, perhaps, be held to be common knowledge, but that is not so with regard to all foreign currencies. Evidence would have to be led, and the conversion would really have to take place as at the date when evidence was led. And there are other practical difficulties which I need not specifiy. Really the only practicable choice would seem to be between converting at the date of breach and converting at the date of raising the action in England. The latter alternative might, perhaps, be preferable and it was in fact adopted by the United States Supreme Court in 1926 in *Deutsche Bank Filiale Nurnberg* v. *Humphrey* (21). But the rate at the date of raising the action might be very different from the rate at the date of payment. Indeed, the objections to taking it are not very much less than the objections to taking the rate at the date of breach. Moreover, I doubt whether, in view of the great intricacy of some commercial transactions, it would be practicable to have two possible dates for conversion according to the nature of the contract. It would, I think, be wrong to take the date of raising the action in every case; to my mind, the date of breach is much better in the simple case of an English contract where the parties are in England and one fails to deliver foreign currency which he has contracted to deliver. So even if this were still an open question, I would have to come to the conclusion that, in every case where a plaintiff sues for a debt due in a foreign currency, that debt should be converted into sterling at the rate of exchange current when the debt fell due. That rule may in some cases be artificial, it may even be unjust, but it has been accepted for a long time, it is clear and certain, and no other rule could be relied on to produce a more just result; indeed, no other rule is really practicable. So the judgment which the respondents hold could not be supported on general principles.

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(20) [1921] 2 A.C. at p. 563; 15 Asp. M.L.C. at p. 380.

But the respondents maintain that, accepting the general rule, there are special reasons in this case why they are entitled to take the rate of exchange at the date of liquidation. Those reasons arise from unusual features in this litigation, and largely turn on the proper interpretation of their proof of debt. To understand them, one must have in mind the nature of the transactions which gave rise to the debt, and I shall state as briefly as I can the essential facts. In or before 1921, the company purchased rolling stock for their railway and they sought to raise $6,000,000 in the United States. Apparently it was desired to give the lenders security over the rolling stock and with this object an elaborate scheme was adopted. The company set up a subsidiary (the car company) and purported to sell the rolling stock to them and then to take it back on lease. The rentals under this lease were the sums necessary to pay interest and redemption of the $6,000,000. Then the car company's rights as owner of the rolling stock, including the right to receive the rentals, were assigned to predecessors of the respondents as trustees for the lenders of the $6,000,000 which was divided into 6,000 certificates each for $1,000. The trustees were bound to pay to the certificate holders the interest and redemption money out of the money which they received from the company under the lease but there was no direct obligation of the company to the certificate holders.

All went well from 1921 to 1930, but the company failed to pay to the trustees the sums due in 1931 and subsequent years. No attempt was made to enforce the security over the rolling stock, perhaps because, under the law of Cuba, that was difficult or impossible, and matters were at a standstill until, in 1953, the company sold their railway system, including the rolling stock, to the Cuban government for $13,000,000. By that time, 3,800 of the certificates had been redeemed, and of the remaining 2,200 the company had acquired 1,869 which passed into the hands of the Cuban government as part of the sale of the undertaking. The other 331 certificates remained in the hands of members of the public. After the company went into liquidation, the Cuban government intimated that they did not desire to claim in respect of their certificates. They were in any case bound to indemnify the company, so it would seem that they would have had to pay back to the company any sums which the respondents might pay to them out of money which the respondents received in the liquidation. But the 1,869 certificates were still in existence, and this seems to have put the respondents in some difficulty in framing their proof of debt.

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(21) (1926), 272 U.S. Rep. 517.

In their proof of debt, the respondents ought to have given particulars of the company's debt to them, i.e., the unpaid rentals under the lease, but they did not do so. Instead, they gave particulars of their debt to the certificate holders. But no objection was taken on this ground. So we must do the best we can with the proof as it stands. In fact the sums claimed under para. 2 (a) and (d) are together almost exactly the same as the sums which ought to have been claimed, i.e., the rentals due by the company with interest. (There is a discrepancy of the order of $1,000 but that can be regarded as negligible.) And, of course, the sums due by the company to the respondents were only payable for the purpose of enabling the respondents to pay to the certificate holders the sums set out in para. 2. So I think we can properly regard para. 2 as setting out, substantially correctly but in wrong form, particulars of the company's debt to the respondents. Unless we can so regard it, there are no particulars at all and the proof would be bad for that reason. But the respondents seek to put quite a different interpretation on para. 2. I find their argument difficult to appreciate, and I hope that I do it justice. As I understand it, they say that para. 2 has nothing to do with particulars of the company's debt to them; it is a statement of how they will use any money which is paid to them. That means that the proof contains no particulars at all of money owed by the company to the respondents beyond the reference in para. 4 to covenants in the lease. But the respondents say that no further particulars were necessary or at least that it is too late now to object to their absence.

I am unable to accept this interpretation. Paragraph 2 begins by stating that the company was at the commencement of the winding-up " and still is justly and truly indebted to the claimant in the following sums " which include heads (a) and (d). So I do not see how the respondents can now say that heads (a) and (d) are intended to be something other than particulars of the company's debt to them. Paragraph 2 (a) is a claim for a sum

> " due and payable to the claimant in respect of $333,000 [it should be $331,000] in face value of . . . certificates then outstanding in the hands of members of the public."

And para. 2 (d) is a claim for a sum

> " due and payable to the claimant in respect of $1,867,000 [it should be $1,869,000] in face value of . . . certificates which had been purchased by the company."

Again the emphasis is properly on what was " due and payable to the claimant ", and, strictly speaking, what was due and payable to the claimant was not due in respect of outstanding certificates, it was due under the lease. But, in a sense, it was due in respect of the certificates, because the respondents could only use any money they received to pay the certificate holders—any surplus would have been repayable to the company. In view of the probability that the Cuban government would make no claim, it may well have seemed convenient to divide the respondents' claim against the company in this way. The respondents could, I suppose, have drafted their proof of debt in the form of, first a claim for the money due to them with particulars, and then a statement of why they required the money or what they were going to do with it. But I cannot spell that out of the proof of debt which is before us. So I think that para. 2 must be interpreted as meaning that the respondents divided into two parts their claim to the money due to them; in para. 2 (a) they claimed 333/2200 parts of that money, and in para. 2 (d) they claimed the remaining 1867/2200 parts of that money.

I can now come to the crucial point in this branch of the case. The appellants as liquidators had rejected the whole of the respondents' proof of debt and the respondents appealed. In 1956, before this appeal was heard, the appellants sought to make an interim distribution to the stockholders of the company of cash in their hands. Their summons came before ROXBURGH, J., and he was satisfied that the Cuban government, as holders in due course of the 1,867 certificates, had renounced any claim to participate in the assets available for distribution in the winding-up. To put matters in order, it was then agreed by the parties to treat the appeal of the respondents against the rejection of their proof as being before ROXBURGH, J., and, on Dec. 4, 1956, he made an order in which the court, being satisfied that that renunciation was a sufficient ground for the rejection of that part of the proof of debt (para. 2 (d))

> " which is based upon or measured by reference to the said 1,867 equipment trust certificates, doth not think fit to reverse or vary the decision of [the present appellants] as such liquidators rejecting the said proof of debt so far as the same relates to the said sum "

claimed in para. 2 (d). The question is what is the effect of that order, against which there has been no appeal. The appellants say that order discharges the respondents' claim against them to the extent of 1867/2200 parts of the sums which were due to the respondents. The respondents deny that. They say, as I understand it, that their claim to the whole of the unpaid rentals still survives intact, that the order of ROXBURGH, J., did not touch that claim, but that it merely recognised that the Cuban government's claim against the respondents had been abandoned. The respondents are, therefore, entitled to take as much out of the sums ultimately payable to them in the liquidation as is necessary to meet in full the claims of the holders of the other 331 certificates, and, as those claims are in dollars, they can take as much sterling as is now necessary to produce the necessary sum in dollars or at least as much as would have been necessary at the date of liquidation. They could not, of course, take more than that because if they did they would simply have to pay it back again. That would mean, in effect, that the certificate holders' claims must now be converted into sterling as at the date of liquidation and not as at the dates when they ought to have been paid. The complicated order against which this appeal is taken appears to give effect to these contentions of the respondents.

It appears to me that this order can only be supported on the view that para. 2 (d) is not a claim to any part of the debt due by the company, the claim being found elsewhere, and that, therefore, its rejection by ROXBURGH, J., did not touch or in any way cut down the respondents' claim. I have already given my reasons for rejecting this view of the meaning and effect of the proof of debt, and so, in my judgment, the result of the order of ROXBURGH, J., is that the respondents are now only entitled to claim 333/2200 parts of the debt due to them.

Finally, the respondents relied on their claim in tort. Paragraph 4 of the proof of debt states that

> " The liability of the company to the claimant which is the subject-matter of the proof arises under or by virtue of a covenant [in the lease] . . . Alternatively the said liability arises by way of damages for breach of a covenant . . . or by way of damages for the conversion by the company of the said railway equipment."

Accepting the view that the sale of the company's undertaking to the Cuban government involved the tort of conversion as regards the rolling stock, that the damages amounted to $2,000,000, and that such damages must be converted into sterling at the date of the tort when the rate of exchange was $2·80, I do not think that this helps the respondents. Again, it is necessary to consider the effect of the order of Roxburgh, J. Either that order affects the claim in tort or it does not. If it does not, we would have to deal with this part of the case as if the order had never been made. But that has never been argued. The respondents seek to use the order as excluding the Cuban government from any right to participate in the distribution of the damages which they receive, but to deny that the order is effective to cut down their right to receive the whole of the damages. If the order is effective to cut down their right to damages in the same way as it cuts down their right to the rentals, then the claim in tort is of no value to the respondents because 333/2200 parts of the $2,000,000 damages is much less than 333/2200 parts of the unpaid rentals even allowing for the fact that they could have a more favourable rate of exchange for the damages. And, of course, the respondents cannot get both.

Their argument is that they are entitled to receive the whole $2,000,000 damages, that, by reason of the order of Roxburgh, J., the Cuban government's right to participate in that sum is gone, and that, therefore, they can apply it to meeting in full the claims in para. 2 (a), (b) and (c). It is amply sufficient to meet those claims, and so the respondents can use the same argument as before for taking $2·80 as the rate of exchange for the dollars necessary to meet the claims set out in para. 2 (a). But it appears to me that that argument is inconsistent with what I have held to be the proper construction of para. 2 of the proof of debt. I could understand an argument that para. 2 has nothing to do with the claim in tort—though I might not agree with it. But that would mean that the order of Roxburgh, J., has nothing to do with this claim. And, as I have said, that has not been argued and it would not suit the respondents so to argue. So it is admitted that para. 2 affects this claim. But, if so, it must have the same meaning as it had before, and I have stated my opinion that its meaning is that it divides the respondents' claim into two parts, and one of those parts has been finally rejected. I am, therefore, unable to agree that the respondents are still entitled, notwithstanding the order of Roxburgh, J., to claim the whole of the damages of $2,000,000.

Accordingly, I would allow this appeal in part. The respondents are entitled to claim the sums in dollars set out in para. 2 (a), but each item must be converted to sterling at the rate of exchange current when it became due.

LORD RADCLIFFE: My Lords, I had the privilege of being able to study the opinions of my colleagues before I came to prepare my own. I am so much in agreement with the conclusions come to, except on one minor point, not itself of any general importance, and the reasons given for those conclusions that I do not wish to contribute anything myself except one or two comments on the issues that have been debated before us.

The first and major question, no doubt, is that relating to the proper law of the contract to pay interest on the $6,000,000 loan and to repay the principal with the stipulated premium. As to this, I agree that, in the end, one is bound to accept the law of the Commonwealth of Pennsylvania as the governing law for this purpose. I share the view of Wynn-Parry, J., and the Court of Appeal, that although the obligations take the form of promises to pay "rent" in the "lease" of the rolling stock, the transaction must be looked at as a whole for the purpose of determining its proper law. So regarded, this is a case where a company whose head office is in London but whose business is that of running a public utility in Cuba comes to the New York capital market to borrow money to further its business operations. Once the money is raised, the creditors have done their part. The complex of transactions which make up or are attendant on the trust agreement and the lease is directed entirely to seeing that the money loaned is secured and in due course returned. When this is done by the company promising payment of interest and repayment of principal and premium in United States dollars, in New York and Philadelphia, and the watch-dog chosen for the protection of the lenders is a Pennsylvanian trust company, I have no doubt, myself, that the general inference from such a pattern ought to be that the proper law of the obligation is not that of the United Kingdom, where the debtor has his head office, nor that of Cuba, where the business is conducted and the rolling stock would be found, but either that of New York or of Pennsylvania. I do not think that the tests for determining the proper law of a contract can ever be comprehended under a single phrase, so various are the situations and considerations that have to be taken account of; but this is a case in which, in my opinion, the law of the place of performance ought to be regarded as of preponderating importance, and of those two possible places Pennsylvania, which is both the home of the trustee and the place where the capital is to be repaid, seems to me clearly the natural choice. I should arrive at a different conclusion if I thought that the parties had by their own choice subjected the obligation to the rules of the law of Cuba. I am satisfied, however, after reading the opinion prepared by my noble and learned friend, Lord Morris of Borth-y-Gest, that the clauses in the lease which are relied on in support of such a conclusion cannot be read as having that effect.

There are several points of argument which arise out of the proof itself. The one which is of general importance is the question at what date or dates should the dollars due under the unfulfilled covenants in the lease be converted into sterling for the purposes of the respondents' claim. On this point, I agree with the reasoning adopted in the opinion of my noble and learned friend, Viscount Simonds, and I am satisfied by his citation of the previous authorities that the course of English decisions (and, I should add, English legislation—see Bills of Exchange Act, 1882, s. 72 (4))—has led us fairly directly to the conclusion that conversion should be made at the rate of exchange ruling at the date when each covenanted payment fell due to be, but was not, made.

One of the difficulties of discussing this particular question is that English law has not got a well-settled nomenclature for its terms. I take it myself that any contract to settle a debt in the currency of the country in which the settlement is to be made is a contract for the payment of money in the eyes of our law, and this notwithstanding the fact that, if action is taken in England for breach of the contract, the remedy sought must be damages, not debt, and those damages expressed in sterling for the purposes of judgment. To speak of such contracts as being in English law contracts for delivery of a commodity seems to me merely to confuse the issue and needlessly to suggest that, for some reason best known to itself, our law regards a contract for the payment of debt in foreign money as if it were of a nature different from that which it obviously possessed. Also, again, I think, needlessly, such a description suggests that we admit of no distinction between a contract to pay money abroad in satisfaction of a debt on the one hand and a contract to deliver foreign currency in this country or abroad or a true exchange contract, which is a contract to exchange the currency of one country for the currency of another, on the other. Each of these transactions has some difference from the other and may for some purposes have different consequences: but the important point for the present purpose is that each of them has the common characteristic that, if sued on in England, it must be sued for in damages expressed in sterling as on a breach of contract. The damages, I should say, are for failure to tender or deliver, as may be, objects of value which, at the date of failure, had a sterling equivalent in international exchange.

If, then, we already have a settled rule that damages for tort and for breach of contract other than for payment of a foreign debt must be converted into sterling at the date of breach, I agree that there is no sufficient peculiarity in the obligation to pay money as distinct from other forms of contract that could justify the adoption of a different rule for the calculation of damages arising from its breach. Nor do I see how, in this connexion, it would be possible to base any distinction on the test whether the proper law of the contract is English or foreign, for there is no necessary correlation between the proper law that governs an obligation and the country or the currency in which the obligation is to be discharged. I share the theoretical objection to applying this rule to debts due in foreign currency. The effect of it is to express the creditor's rights in terms of sterling at a date earlier than that at which, assuming default, he has any means of obtaining the sterling and reconverting it into the currency which was due. If we treat currencies as inherently variable inter se—it exaggerates the difficulty to call them fluctuating—he may suffer in the process of obtaining his rights. It is true that this possibility of risk from currency variation is not confined to contracts stipulating for payments of money; but it probably strikes one with greater force when money itself is the subject of the obligation. One looks for a rule by which the creditor takes what risk there is, at any rate as long as possible, in terms of the currency for which he has stipulated by his contract. This argues for a date of conversion later than the date of breach. But neither the date of execution nor the date of judgment offers itself as a practical proposition in litigation, and the only real alternative to the date of breach is the date at which legal proceedings are begun in this country. The acceptance of this date has a certain attractiveness because it is the date which marks the creditor's decision to convert his claim in foreign money into a sterling judgment.

I do not, however, think that this consideration takes one nearly far enough to justify maintaining a separate rule for money payments. Even if one chose the date of suit as the date of conversion, that in its turn might fail to give a creditor what he ought to have had if the exchange value of the stipulated currency was reduced in the meantime. As I see it, there is no infallible system which can eliminate the fact that a debtor has by the nature of the contract an option at the expense of his creditor. He can pay on the due date, if he thinks it suits him, or delay payment if he thinks that, owing to the anticipated movement of the exchanges, that will suit him better. The creditor has no corresponding option; he cannot secure the money at the due date, if the debtor does not pay, and then he can only get what is due to him through the time process of legal proceedings. It would, I think, be some protection to him and would be a workable arrangement to give a creditor an option, if he sues his debtor here, to take either the date of breach or the date of the commencement of legal proceedings, as he chooses. But the fact is that there is no general reason why there should be any significant interval between breach and suit; and, in any event, the difficulties, though real enough in this case, are mainly theoretical. Under the procedure of most countries, I imagine, it would be possible to sue the debtor in the country of payment, obtain judgment there for the currency stipulated, and convert the judgment sum into sterling only when it is registered here for execution. So far, therefore, as the respondents' proof claims under para. 2 (a) for $331,000 with attendant interest and premium converted into sterling at the rate of $2·80 to the £, I think that the wrong rate of exchange has been taken for the conversion, and that the rate or rates ruling at the dates of breach must be substituted. This provides the figure of £180,724 5s. 1d. which, as I understand, commends itself to the majority of your Lordships as the correct figure for head (a) of this paragraph of the proof.

But the respondents' right to prove did not depend only on the covenants in the lease; it was founded alternatively, as para. 4 made at any rate sufficiently clear, on the wrongful conversion of their property involved in the December, 1953, sale of the rolling stock to the Government of Cuba. The damages for this wrong were assessed by WYNN-PARRY, J., at $2,000,000; applying, as one must, the $2·80 rate of exchange ruling at that date, there is, therefore, a sum due to the respondents which exceeds the sums for which they claim to prove under para. 2 (a) of the proof, even if the dollars mentioned in that item are converted at that rate and not at the earlier rates which have to be taken when the basis of proof is breach of covenant. What I have not been able to see is what has happened in the course of these tangled proceedings which prevents the respondents' proof being good for this amount.

I do not want to take up much time on this, since the majority of your Lordships are satisfied, though, perhaps, by rather different processes of reasoning, that, even in respect of a claim in conversion, para. 2 (a) cannot stand at a higher sterling figure than £180,724. The proof does raise great difficulties of interpretation by the form in which it was cast, and there are further difficulties caused by the order made in the proceedings before Roxburgh, J.; and, no doubt it is possible to put varying constructions on the outcome of what had to be done before everything could finally be brought to the judgment of the court. On the other hand, the respondents' position when they came to make their proof was an unusual one in two respects; they did not know, and could not find out, what responsibilities they were supposed to have towards the holders of 1,867 (or 1,869) of their certificates, and they also knew that any surplus of their security over what their beneficiaries could require from them would be due to the debtor itself. I do not feel it right, therefore, to read their proof more strictly against them than I am bound to, or to deduce more from the order of Roxburgh, J., than it actually says. So approached, the order does no more than confirm the elimination from the proof of para. 2 (d), and so that part of the total claim that related to $1,869,000, interest and premium; it left untouched para. 2 (a), consisting of the claim for $331,000 and the attendant interest and premium. If the latter claim arises in respect of a wrong for which the damages are convertible at the rate of $2·80 to the £, I should have thought that it was a valid claim for the purposes of proof and I have not found it possible to see how its quantum can be in some way reduced by the rejection of para. 2 (d) or, as one of your Lordships holds, excluded because the claim in conversion has become barred by the course of proceedings.

LORD DENNING: My Lords, I have tried to cut a way through the jungle of facts in this case. If we leave out subsidiary companies, successor companies, and the like, it can be reduced to two separate transactions: First, there was the transaction whereby the Railway Company in 1921 raised $6,000,000 from the respondents. This was, in effect, a hire-purchase transaction. The Railway Company was rather like a man who wants to buy a motor car but has not the means to pay for it. Just as he raises the necessary money from a finance company, so the Railway Company raised this $6,000,000 from the respondents. It assigned the rolling stock to the respondents for $6,000,000 (who paid it to the suppliers) and the respondents then let the rolling stock on a lease to the Railway Company for fifteen years. The rentals were so fixed that the whole $6,000,000 would be repaid within fifteen years, together with interest at 7½ per cent. per annum. When all the instalments were fully paid, the Railway Company was to become the owner of the rolling stock. Secondly, there was the transaction whereby the respondents in 1921 raised the $6,000,000 from the public. It issued 6,000 equipment trust certificates of $1,000 each. These were repayable over a period of fifteen years, together with interest at 7½ per cent. per annum. But they were repayable " only from and out of the rentals when paid as provided in the lease ". The respondents were to hold the rentals " for the benefit of the certificate holders ". In short, on trust for the certificate holders. If the Railway Company made default in paying the rentals, the respondents were entitled to retake possession of the rolling stock and sell it; and, in that event, the proceeds were to be used to pay off the certificate holders, and the " surplus, if any ", was to go back to the Railway Company.

The important thing to notice is that the rentals payable under the lease coincided with the sums payable to the certificate holders. The rentals were so fixed as to enable the respondents to meet the following outgoings, no more and no less, over the fifteen-year term:—(i) To pay the dividends to the certificate holders at the rate of 7½ per cent. (ii) To pay the expenses of the respondents. (iii) To redeem the 6,000 certificates at the rate of four hundred a year.

During the first 9½ years all went according to plan. The rentals were duly paid to the respondents, who duly paid the certificate holders their dividends and also redeemed 3,800 certificates, leaving 2,200 outstanding. During the next three years the Railway Company could not pay the rentals in full. It paid enough to cover the dividends on the certificates but nothing more. Thereafter the Railway Company paid nothing at all. The result was that when the fifteen-year term expired in 1936, the Railway Company owed the respondents rentals made up as follows:—(i) A sum equal to the dividends unpaid on the outstanding 2,200 certificates. This came to $247,500. (ii) The expenses of the respondents. (iii) A sum equal to the amount necessary to redeem the outstanding 2,200 certificates, that is, $1,000 apiece plus the appropriate premiums. This came to $2,256,000.

It might be thought that, when the Railway Company made default, the respondents would take steps to enforce payment of the rentals, by taking possession, but they were unable to do so because the Cuban state declared a moratorium. But the default in payment naturally struck down the value of the certificates. One of the significant facts in the case is that the Railway Company itself bought 1,869 certificates at $147·50 a certificate and held on to them, leaving only 331 in the hands of the public. So things remained for many years, with the Railway Company running the railway and paying nothing on the certificates. Ultimately, in 1953, the Cuban state bought the whole of the railway undertaking (including the 1,869 certificates) for $13,000,000. The Cuban state then transferred the railway undertaking, certificates and all, to a new nationalised company. The Railway Company received the price of $13,000,000 in U.S. treasury bills and brought it back to England, converting it to sterling at the rate of $2·80 to the £ sterling. On Mar. 4, 1954, the Railway Company went into voluntary liquidation. The respondents now seek to prove in the liquidation.

Much discussion has taken place on the form of the proof but, once the facts are properly understood, its meaning becomes clear. The principal ground of the claim, as I read it, was because the Railway Company had not paid the rentals due under the lease. The respondents claimed to be entitled to recover these rentals together with interest at six per cent. from the dates they became due. The complication in the claim arose because the respondents were a trustee for the certificate holders. The rentals, once received, had to be applied (i) in paying the certificate holders the sums due on their certificates, and (ii) in paying the reasonable expenses of the respondents. The rentals receivable were equal to the sums payable to the certificate holders, plus expenses. But as a trustee, the respondents were in this difficulty: they knew there were 2,200 certificates outstanding, but 1,869 of these had been bought in by the Railway Company itself; and the respondents did not know whether these 1,869 certificates were effective or not. So, in order to cover themselves in case they were effective, the respondents divided their proof into four parts which can be summarised as follows:—2. (a) The proportion of rentals payable in respect of 331 certificates, plus interest at six per cent. from the dates the rentals became due. (b) Expenses already incurred by the respondents. (c) Expenses to be incurred by the respondents. (d) The proportion of rentals payable in respect of 1,869 certificates, plus interest at six per cent. from the dates the rentals became due.

Although the proof of debt was divided into those four parts, nevertheless the liability of the Railway Company was clearly stated to arise " under and by virtue of a covenant " in the lease; and this was, no doubt, the covenant to pay rentals. Claims 2 (b) and 2 (c) were maintainable only under the covenant to pay rentals, and under no other head whatsoever. Indeed, the wording of item

2 (b) followed the very wording of the covenant in the lease, namely, "reasonable expenses incurred . . . in the performance of the trust under which the certificates were issued". Alternatively the liability of the Railway Company was also stated to arise under other heads, none of which needs special mention except the claim in conversion. The respondents alleged that "the said liability arises . . . by way of damages for the conversion by the company of the said railway equipment". This claim was necessarily made in the alternative. If the respondents succeeded in their claim for rentals, they could not possibly claim damages for conversion; for, as soon as the claim for rentals was satisfied, the Railway Company would be entitled to the railway equipment because it would then have paid for it. But I go further. The claim for rentals proceeded on the footing that the property in the railway equipment had passed to the Railway Company; whereas the claim for conversion proceeded on the footing that the property had never passed to the Railway Company. These were inconsistent rights; and once the respondents committed themselves unequivocally to the one, they could not afterwards resort to the other: see *Evans* v. *Davis* (22) and *United Australia, Ltd.* v. *Barclays Bank, Ltd.* (23) by LORD ATKIN. In the events that happened, I think that the respondents did commit themselves unequivocally to the claim for rentals. They did it by the form of their proof. Items 2 (a), (b), (c) and (d) were consistent, and consistent only, with a claim for rentals, and not with a claim for conversion. I can see that the Railway Company would be liable for those items as rentals; but I do not see how it can be said there was any liability for them in conversion. How could the amounts due under the trust certificates ever come into the calculation of damages for conversion? And how could the respondents ever claim their expenses under that head? The only possible damages in conversion would be for the value of the railway equipment, or rather of the respondents' interest in it, at the time of conversion. But no such sum was claimed in the proof at all. Likewise, the order made by ROXBURGH, J., which your Lordships have described, is applicable, and applicable only, to the claim for rentals and not to the claim for conversion. There is no difficulty in applying that order to the claim for rentals. The respondents claimed rentals divided into four items: 2 (a), (b), (c) and (d). All that the order did was to strike out item 2 (d) and to leave items 2 (a), (b) and (c) intact. But there is great difficulty in applying the order to the claim for damages for conversion. On the one hand, if that claim is confined (as I think it must be confined) to the sums claimed in 2 (a), (b), (c) and (d) of the proof, the claim is unintelligible, because there can be no possible claim in conversion on those heads, as I have already pointed out. On the other hand, if the respondents had put in their claim differently, as, for instance, if they had claimed $2,000,000 as being the value of the goods at the time of the conversion, ROXBURGH, J., might well have made a different order. He would, indeed, have had to do so; for such a claim could not be divided into items 2 (a), (b), (c) and (d) as the claim for rentals was. No part of it could be said to be "based upon or measured by reference to the" 1,869 certificates.

In the result, I think that it is impossible now to allow the respondents to claim in conversion for the value of the goods. They have committed themselves to a claim divided into four specific items 2 (a), (b), (c) and (d). Those items are intelligible in regard to a claim for rentals but not in regard to a claim for conversion. It was on the faith of that itemised division that ROXBURGH, J., made his order. The respondents cannot now go back and resort to a lump sum claim for conversion divorced from any such items. It would need an amendment of the proof which it is much too late to permit. I am far from saying that the respondents did wrong in framing the proof as they did. They were a trustee for the certificate holders; and the certificates were in terms payable "only from and out of the rentals". They were not payable out of any damages for conversion. So it was the duty of the respondents to claim the rentals and recover them, if they could, rather than seek damages for conversion. And that is what I hold the respondents have done. Likewise with the alternative claim for damages for breach of covenant not to assign. It must be rejected just as the claim in conversion.

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(22) (1878), 10 Ch.D. 747 at pp. 762, 763.

(23) [1940] 4 All E.R. 20 at p. 31; [1941] A.C. 1 at p. 30.

But if these alternative claims are to be considered as still available, then some attempt must be made to apply the order of ROXBURGH, J., to them; and the only way of doing it that I can see is to reduce them in the same proportions as the claim for rentals. Thus, taking the total damages of conversion at $2,000,000, the effect of ROXBURGH, J.'s order would be to reduce them to $302,727. That sum is so small that it would not suit the respondents at all to claim it. I propose, therefore, to confine my remarks to the claim for rentals under the lease. The Railway Company has no answer to this claim except to say that, under the laws of Cuba, this liability has been transferred from the Railway Company to the new nationalised company which has taken over the railway; and that, by Cuban legislation, the Railway Company has been discharged from liability. But this answer is of no avail to the Railway Company unless it can show that the lease itself is governed by the law of Cuba. It is a well-settled rule of private international law that the validity of a discharge by legislation depends on what is the proper law of the contract; and this is the case, no matter whether the debt has already accrued due at the time of the legislation or is still a future debt. A discharge in accordance with the proper law is valid; but a discharge which is not in accordance with the proper law is invalid. What, then, is the proper law of contract here? It is agreed on all hands that it is either the law of the Commonwealth of Pennsylvania or the law of the Republic of Cuba; but it is said that Pennsylvania must stand on its ground without any help from the State of New York. I do not think that this is the correct approach. The real choice is, I think, between the law of one of the United States of America and the law of the Republic of Cuba. The reason is because, for all practical purposes, there is no material distinction between the laws of the several States of the United States as between themselves, whereas there is a great distinction between the law of Cuba and that of the States. So approaching the problem, it seems to me clear that the lease here was part and parcel of a composite transaction of which the primary aim was the raising of money in the United States on the security of railway equipment in Cuba. The contract was made in the United States, the money was raised there and was paid out there; and it was to be repaid there both as to principal and interest. The security alone was in Cuba. On these facts, as in the case of a mortgage, it can fairly be said that the debt " is considered to be the principal, and the securities are considered as adjuncts, depending for their existence, on the existence of the debt ": see *British South Africa Co.* v. *De Beers Consolidated Mines, Ltd.* (24). So considered, it seems to me that, in the absence of any express clause determining the proper law, the transaction should be governed by the law of the country of the lender. A borrower who comes from a foreign country seeking a loan must expect to conform to the laws of the country to which he comes; for otherwise he is unlikely to get the loan. The fact that the security is situate abroad is only material as necessitating the observance of the foreign law in the pledging and enforcement of the security.

I do not regard cl. 11 and cl. 12 of the lease (25) as clauses which determine the proper law. They are concerned only with special incidents relating to the security. Clause 11 deals with the formalities of registration and the like such as may be necessary to protect the trustee's title. Clause 12 means that, if there is occasion to resort to the courts in Cuba (as, for instance, to enforce the security), the parties must go to the tribunals of the City of Havana rather than those in any other part of the island. The parties do not by this clause, or any other clause, agree that the lease itself is to be governed by the laws of Cuba; and, in the absence of an express clause to this effect, the test is simply with what country has the transaction the closest and most real connexion: see *Bonython* v. *Commonwealth of Australia* (26). Applying this test, I think the proper law of the transaction, including the lease, is the law of one of the United States, and out of those States the choice should fall on the Commonwealth of Pennsylvania because it has on balance the closest connexion with the transaction. This being so, it is plain that the legislation in Cuba could not take away the right of the respondents to receive payment in the United States of the rentals due under the lease; and the Railway Company was at all material times under an obligation to pay the rentals to the respondents in full in dollars in the United States of America, together with interest at six per cent. from the time they became due.

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(24) [1910] 2 Ch. 502 at p. 516.

(25) The terms of these clauses are set out at p. 362, letters A to D, post.

Now the respondents come to the courts in England to recover the sums in arrear and unpaid. And if there is one thing clear in our law, it is that the claim must be made in sterling and the judgment given in sterling. We do not give judgments in dollars any more than the United States courts give judgments in sterling. But the question is, at what date is the rate of exchange to be taken? Is it to be the date when the rentals fell due? or the date of the winding-up? If the respondents had sought to recover judgment in the United States, they would, I presume, have been able to sue there for a *debt* in dollars. But they cannot sue here in *debt*. There is no sterling debt. Their claim must be in *damages*. They must claim damages for breach of contract because of the non-payment of dollars in the United States. As such, the claim is indistinguishable in principle from any claim for breach of contract. The rate of exchange is to be taken at the time when the breach took place. This is, I think, a rule of positive law established by decisions of this House and of the Judicial Committee of the Privy Council; but, as it has been subject to some criticism, I would like to attempt some explanation of it.

The origin of the rule, as I understand it, lies in the fact that, for long years, sterling was regarded as a stable currency " of whose true-fixed and resting quality there is no fellow in the firmament " (27). Sterling is the constant unit of value by which, in the eye of the law, everything else is measured. So long as sterling is regarded as stable whilst other currencies go up and down, it would seem that justice is best done by taking the rate of exchange at the date of the breach. The creditor is entitled to be put into as good a position as if the debtor had done his duty and paid the debt on the due date; and he is only truly put into such a position if the debt is converted into sterling at that date; rather than at a later date when the foreign currency has depreciated or appreciated. The question is whether the rule is still to apply when sterling loses the value which it once had. We have seen in recent years how it has depreciated. It has departed from the gold standard; the pound has been devalued; and there has been much inflation. It may be said that, in these conditions, the rule is apt to produce an injustice to a creditor in the United States who is owed money in dollars; because, if he comes to our courts after devaluation, he does not recover sufficient sterling to compensate him for his loss. But I am afraid that, if he chooses to sue in our courts instead of his own, he must put up with the consequences. Our courts here must still treat sterling as if it were of the same value as before; for it is the basis on which all our monetary transactions are founded. Thus, within this country itself, a man who stipulates for a pound, must take a pound when payment is made, whatever the pound is worth at that time. Just as an English creditor in this country suffers from the depreciation of the pound, so, also, does a foreign creditor who comes to this country seeking payment in sterling. He must take it that in England we have always looked on a pound as a pound whatever its value in other countries; and, if we award him damages calculated in sterling at the time of the breach, we are awarding him what, in the eye of the law, is full compensation for the breach.

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(26) [1951] A.C. 201 at p. 219.

(27) The words quoted were used by Julius Caesar in comparing his own constancy to that of the northern star; see JULIUS CAESAR, Act III, Scene 1.

It is worth noticing that, as we look on sterling, so also do the courts of the State of New York look on the dollar. They have, I believe, the rule that a claim for debt or damages in foreign money must be converted into dollars at the rate of exchange prevailing at the date of the breach. In this respect the New York courts follow their own course rather than the decision of the Supreme Court of the United States of America, and I think that we should do likewise. It is better suited to a commercial community. Any other rule would mean that the sum payable would depend on the delays of parties or of courts. That cannot be right. And I would point out that it is often open to creditor or debtor to safeguard himself from any adverse consequences of the rule. Take the case where sterling depreciates. For instance, a debt is payable in dollars in the United States, it is unpaid, and afterwards sterling depreciates. The creditor can, after devaluation, bring an action in the United States and recover judgment in dollars. He can then sue in England on that United States judgment and the rate of exchange will be taken not at the date of the original contract debt, but at the date of the United States judgment: see *Scott* v. *Bevan* (28), and s. 2 (3) of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, (29). Take next the case where the foreign currency depreciates. For instance, when a debt is payable in francs in France, it is unpaid, and afterwards francs depreciate. The creditor may bring an action in England, but the debtor can forestall it by paying the debt in France in depreciated francs; and then, when the debtor is sued in England, he can claim that he has discharged the debt by the proper law of the contract: see *Société des Hôtels le Touquet-Paris-Plage* v. *Cummings* (30).

In this case the respondents did not take any steps in Cuba or the United States to get judgment for rentals in dollars. I take it there were good reasons for this; so that this is the only country in which they can get redress. But, coming here, they must accept the rule of our law that we can only give judgment in sterling, and at sterling calculated at the rate of exchange when the rentals should have been paid. If the proof had remained intact for the full rentals payable in respect of the 2,200 certificates, that would clearly be true. It is no less true when the proportion payable in respect of 1,869 is struck out, leaving only the proportion in respect of 331 payable. The rates of exchange for this proportion must be the rates ruling when the rentals accrued due. When the respondents receive the amount so calculated, they will have received a sum which, in the eye of our law, is full satisfaction of the claim for rentals and interest; and they should receive no more, no matter how the claim is framed. It is true that, when the respondents wish to turn the sum back into dollars, they may find that they have not enough dollars to pay the certificate holders in full; but that cannot be helped. There are always risks incident to foreign investment. One of the risks is that the lender may have to go to another country to recover his money; and when he does so he must recover in the currency of that country, and not in that of his own. It is for risks such as these that he stipulates for a high rate of interest; and his disappointment at the rate of exchange will, I hope, be mitigated by the substantial interest which he will receive.

I would allow the appeal on the question of quantum but dismiss it on the question of liability.

LORD MORRIS OF BORTH-Y-GEST: My Lords, in the voluntary liquidation of United Railways of the Havana and Regla Warehouses, Ltd., which may conveniently be referred to as "the company", a proof of debt was lodged on June 18, 1954, by the respondents. The proof was rejected by the liquidators. The resultant litigation, embracing many issues of law, has been concerned with two main questions: First, whether any proof of debt ought to be admitted, and second, if so for what amount.

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(28) (1831), 2 B. & Ad. 78.

(29) 3 HALSBURY'S STATUTES (2nd Edn.) 1165.

(30) [1922] 1 K.B. 451.

The company, which was incorporated in England in 1898, operated for many years a railway undertaking in the Island of Cuba. For the purposes of its operations, the company, in and prior to the year 1921, purchased rolling stock and equipment in the United States of America. The purchases were of an amount which in total exceeded $14,000,000. For the purpose of financing part of this amount, the company desired to raise $6,000,000 in the United States. Certain elaborate arrangements were made which were said to follow in the main the pattern of what was described as " the Philadelphia Plan ". There was an issue of certificates which were called " United Railways of the Havana fifteen-year 7½ per cent. equipment trust certificates ". The respondents are the present trustee of such issue. The certificates were of $1,000 each. Six thousand certificates were issued.

By a certain agreement dated Feb. 15, 1921, the nature of which calls for careful examination and which I will later call " the lease ", the company contracted to make money payments which were calculated in amounts so that the sums borrowed and represented by the certificates would be repaid by the year 1936, and so that there should be provision for interest payments. The benefit of that agreement became vested in the original trustee for the certificate holders. There came a time when the company defaulted and, in regard to capital instalments, there was owing by the company the sum of $2,256,000. At a much later date (i.e., on Dec. 1, 1953), the company sold the whole of the railway undertaking, including all the rolling stock, to the Cuban state for the sum of $(U.S.)13,000,000. That amount was paid to the company in U.S. treasury bills. There was a provision in the deed of sale that the price was received by the vendors free of all responsibility as regards liabilities existing in Cuba represented by debts, obligations and responsibilities arising out of the operation of the properties which the Cuban state had bought. It was following on the sale to the Cuban state that the company, on Mar. 4, 1954, went into voluntary liquidation. The proof of debt to which I have referred was then lodged. The proof was lodged by the trustee for certificate holders and included sums representing the face value of outstanding certificates together with sums said to be due by way of interest and sums representing the trustee's expenses. One way in which the liability of the company was said to arise was under and by virtue of a covenant contained in the agreement of Feb. 15, 1921. Among the reasons assigned by the liquidators for the rejection of the proof was that the agreement of Feb. 15, 1921, was governed by Cuban law and that, under Cuban law, a novation had taken place as a result of which the company's liability to the trustee was discharged or was transferred to the Cuban state. It was alternatively contended that the effect of Cuban law, as the proper law of the contract, was to reduce the liability of the company to the respondents by reason of the effect of Cuban Moratorium Laws. In the courts below, it was also contended by the liquidators that the agreement of Feb. 15, 1921, was governed by Cuban law because the situs of the debt was in Cuba. That contention was not advanced in your Lordships' House. If, however, the proper law of the agreement was the law of Cuba, then it was submitted that the effect of the deed of sale of Dec. 1, 1953, was to bring about a novation with the result that the trustee could not thereafter look to the company but would be obliged to look only to the Cuban state. On the other hand, if the proper law of the agreement was not the law of Cuba, then, on the undisputed facts, there could be no doubt that the company was to some extent indebted to the trustee at the commencement of the winding-up. On that footing, there are important questions as to the extent of the indebtedness and as to the amounts for which the trustee can properly prove. It therefore becomes necessary to decide whether the law of Cuba was the proper law of the agreement of Feb. 15, 1921. If it was, then questions arise as to the resultant effect of the application of Cuban law.

My Lords, the agreement of Feb. 15, 1921, was one of the agreements into which the company entered as part of the arrangements for raising money. The company needed to raise money for the purpose of financing the extensive purchases that they were making. The money was not raised in Cuba but in the United States of America. It followed that provision had to be made so that the American lenders should receive interest and, in due course, the return of their money. The procedure which was adopted was of no little complication. In the first instance, the company brought into being a subsidiary company, which for convenience may be called " the car company ". It was incorporated in the State of Delaware. Then, on Mar. 25, 1921, the company sold its rolling stock and railway equipment to the car company. Prior to the sale, most of the rolling stock and equipment which the company was purchasing from manufacturers in the United States of America had been delivered, but there were contracts outstanding for the future delivery of further rolling stock and railway equipment, and these contracts were assigned and transferred to the car company. By way of confirming the sale and carrying the same into effect, the two companies executed what was called a bill of sale before a notary public in New York on Apr. 11, 1921. There then followed two agreements which were actually executed on Apr. 18, 1921, but which were made to bear date Feb. 15, 1921. They were executed in New York before the same notary public. One agreement was between the car company and the company. This was the agreement which may, for convenience, be called " the lease ". The other agreement was between the car company and the Commercial Trust Company of Philadelphia, then the trustee for the certificate holders. That agreement may conveniently be called " the trust agreement ".

By the lease, the company leased from the car company the rolling stock and railway equipment which it had sold to the car company. The car company agreed to lease to the company the further new rolling stock and railway equipment which were to be delivered by United States manufacturers under contracts assigned by the company to the car company. The lease was for a period of fifteen years expiring on Feb. 14, 1936. By way of rentals, the company agreed to pay various sums which, in fact, represented the interest payments and capital instalments in respect of the equipment trust certificates. By the trust agreement, the car company assigned to the trustee, as trustee for the certificate holders, all the right, title and interest of the car company in and to the railroad equipment and rolling stock and assigned the indenture of lease and all the rentals reserved under it and all the rights and remedies of the car company. It was provided that the trustee would deliver trust certificates to the car company or on its order in par value of $6,000,000. The certificates were then issued through underwriters. The car company agreed that the proceeds resulting from the sales of them would be utilised in payment of indebtedness incurred in connexion with the purchase of the equipment covered by the sale by the company to the car company and the subsequent lease from the car company to the company. There was a later agreement, dated Apr. 27, 1922, made between the car company and the company, a resale agreement, under which the car company resold the rolling stock and railway equipment to the company; the resale was subject to and with the benefit of the lease and the trust agreement. In 1924 the car company was dissolved.

The result of these rather elaborate arrangements was that 6,000 certificates were issued, and the company became obliged to make stipulated payments to the trustee. Furthermore, the lease, which recited that the car company proposed to assign its interests to the trustee, contained provisions designed to give security for the benefit of certificate holders. The rights of the certificate holders were recorded in the certificates. They recorded that each bearer or registered holder was entitled to one share of $1,000 par value in United Railways of Havana fifteen-year 7½ per cent. equipment trust in accordance with the provisions of the trust agreement. The certificates also recorded the terms on which, at particular dates, the certificates were subject to retirement. The certificates then provided as follows:

> " Unless retired as above, this certificate will be retired by payment of the par value hereof and a premium of 2½ per cent. hereon on Feb. 15, A.D. 1936, upon the surrender hereof at the office of Commercial Trust Company, in the City of Philadelphia, and in the meantime dividends hereon will be payable at the office of Central Union Trust Company of New York, in the City of New York, upon surrender of the dividend warrants attached hereto. Par value, premium and dividends are payable in gold coin of the United States of America of the 1921 standard of weight and fineness, but only from and out of the rentals when paid as provided for in the lease of certain railroad equipment and/or rolling stock made by Cuban Rolling Stock Company to United Railways of the Havana and Regla Warehouses, Ltd., bearing date Feb. 15, 1921, and assigned by Cuban Rolling Stock Company by assignment bearing date Feb. 15, 1921, to the trustee; which rentals are payable to the trustee for the benefit of the holders of this and other certificates amounting at par to six million dollars ($6,000,000); to which agreement and lease reference is hereby made for a statement of the rights of the holders of such certificates and the terms and conditions of the issue thereof."

It will be seen that the provisions of the lease were all-important to certificate holders and that the trustee's obligations to pay were " only from and out of the rentals when paid ". Before Feb. 14, 1931, 3,800 certificates out of the six thousand were redeemed in accordance with provisions contained in the trust agreement. There remained at that date 2,200 certificates outstanding. At a later date, i.e., in 1937, the trustee brought proceedings against the company in the State of Maine. As a result of terms of agreement which were made by way of settlement of those proceedings, the company later acquired by purchase outstanding certificates to the number of 1,869. Those certificates were not delivered to the trustee for cancellation. They remained with the company, and when the company sold its whole undertaking to the Cuban state in 1953 those certificates were delivered to the Cuban state. The remaining outstanding certificates were 331 in number.

My Lords, it will have been seen that the company had no direct liability towards the certificate holders. The company had liabilities under the lease and these enured for the benefit of the trustee as the assignee of all the rights of the car company. Unless extinguished or reduced by the operation of Cuban law, the liabilities of the company to the trustee which existed at the commencement of the winding-up could be ascertained by reference to the lease. The inquiry whether the law of Cuba was the proper law of the lease makes it necessary to examine the provisions of the lease in some detail. The first clause provided for the payments which the company had to make, and it is of importance to observe that payments had primarily to be made in Philadelphia though interest payments had to be made in New York. The opening wording was as follows:

> " The lessee shall and will pay to the lessor or its assigns at the office of Commercial Trust Company, hereinafter called the trustee, in the City of Philadelphia, Pennsylvania, or at the office of Central Union Trust Company of New York, in the City of New York when payment in New York is hereinafter specifically required, as rental for the said railroad equipment and/or rolling stock without deduction for any taxes, duties, charges or assessments, which the lessee may be required to pay or withhold under the laws of the United States of America or of any other country:
>
> " I. Half yearly on Feb. 14, and on Aug. 14 in each year, the first payment to be made on Aug. 14, 1921,

> "(a) A sum payable in New York equal to 3¾ per cent. of the par value of certain certificates not exceeding $6,000,000 issued under an agreement bearing even date herewith between Cuban Rolling Stock Company, and Commercial Trust Company, trustee, and outstanding and unpaid on Feb. 14 and Aug. 14, respectively in each year, during the term of this lease, and an amount equal to the accrued dividends on the certificates purchased by the trustee during the preceding six months under the provisions of the said agreement; less such sums derived from investments by the trustee of undistributed rentals in its hands, as reported from time to time by it to the lessee as applicable to the payment of dividend warrants on the aforesaid certificates."

There followed a sub-paragraph imposing an obligation to pay a sum equal to all reasonable expenses incurred by the car company or its assigns in enforcing the covenants and terms of the lease, and in the performance of the trust under which the certificates were issued. A further sub-paragraph imposed an obligation to pay a sum equal to the taxes and duties on the property leased or on any income therefrom or on the rental payments. The company further agreed to make half-yearly payments, on Feb. 14 and Aug. 14 in each year. These were to begin on Aug. 14, 1921, and were to continue until Feb. 14, 1936. The first twenty payments were to be of $206,000 each and the last ten were to be of $205,000 each. The payments were to be made in gold coin of the United States of America of the 1921 standard of weight and fineness. It was provided, however, that the company could be allowed on stated terms to make payment of any instalment by delivery up of certificates. To do that, the company would have to make purchases of certificates. The concluding words of the First Clause were as follows:

> "In lieu and in satisfaction of all further rentals accruing hereunder, the lessee may at its option on Aug. 14, 1921, or on any rental date thereafter, on not less than forty days' prior notice in writing of its intention so to do given to the Commercial Trust Company, trustee, pay rental in such amount as the lessee shall be advised in writing by the trustee shall enable the trustee to call for retirement and to retire on the dividend date next ensuing all outstanding United Railways of Havana fifteen-year 7½ per cent. equipment trust certificates by the payment of the par value thereof and a premium of ten per cent. thereon and retirement."

My Lords, a consideration of these various provisions relating to the payments to be made by the company by way of rental for the equipment and rolling stock shows clearly that, though the payments were called rentals, they were related to, and calculated by reference to, the amounts needed to pay the interest and the principal due on the certificates. The company was under obligation to keep the railroad equipment and rolling stock insured in some approved American or United Kingdom insurance company; the equipment and stock were to be maintained in good order and to be marked so as to show the name of the trustee. The company covenanted not to assign or underlet without the consent of the car company and its assigns, and there was a provision that, if the company made default in payments, the lease could be terminated, in which event all instalments of rentals became due and payable and the car company could take possession of the rolling stock.

Pursuant to one of the recitals, there was a clause by which it was agreed that the car company could forthwith assign, transfer and set over to Commercial Trust Company of Philadelphia, as trustee, all the car company's rights and interests in and to the railway equipment and rolling stock and all the car company's claims, demands and remedies. When the company should have fully paid all the rents then the equipment and stock were to be reassigned to the car company.

There were two clauses the effect of which was much debated. They were in the following terms: A

> "Eleventh.—It is the intention of the parties to this lease to enter into and execute this lease in accordance with the provisions of the laws of the Republic of Cuba to the end that this lease may be deposited or filed and/or registered thereunder, and the Railway Company agrees to so deposit and/or register or file the same, and to record the same in such States or Territories of the United States as may be required by law, and to perform any other act required by law that may be necessary to protect the trustee's title. B
>
> "In case it becomes necessary that this lease be translated into the Spanish language in order that it may be filed and/or registered in the proper offices in the Republic of Cuba, then and in that event it is understood and agreed that the English text shall govern in case of any conflict between the English and Spanish texts. C
>
> "Twelfth.—The parties hereto submit themselves to the jurisdiction of the tribunals of the City of Havana, in the Republic of Cuba, for all notifications, summonses and other judicial or extra judicial formalities to which this lease shall give rise, with express renunciation of their own jurisdiction if different." D

My Lords, in approaching the question whether Cuban law should be regarded as the proper law of the lease, it is of relevance to have in mind the terms of the trust agreement which was made between the car company and the trustee—the Commercial Trust Company of Philadelphia. That agreement was made in New York simultaneously with the lease and, though executed on Apr. 18, 1921, it also bore date Feb. 15, 1921. In the execution of the financial plan which was adopted, its terms were complementary to those of the lease. One of the recitals records the main purpose as follows: E

> "And Whereas, the car company has purchased the said railroad equipment and/or rolling stock particularly mentioned in the lease and has agreed to apply in part payment therefor the proceeds of six million dollars ($6,000,000) par value of equipment trust certificates, to be issued under the terms of this agreement, and known as certificates of the United Railways of Havana fifteen-year 7½ per cent. equipment trust, and the car company has agreed to sell, assign, transfer and set over unto the Commercial Trust Company, of Philadelphia, as trustee for the holders of said certificates, the lease and all its right, title and interest in and to the said railroad equipment and/or rolling stock upon certain conditions and considerations mentioned in said lease, and all its rights and remedies under contracts for the construction or acquisition of said railroad equipment and/or rolling stock, with the manufacturers thereof, or otherwise, and all claims, demands and remedies of it, the car company, accruing or to accrue under the lease, and all the rentals therein reserved;" F G H

Pursuant to that recital, the car company made assignment to the trustee, and the trustee agreed to execute and then to deliver the trust certificates to the car company. There were provisions recording the powers of the trustee which included powers of sale if the trustee retook possession of the railroad equipment and rolling stock. It was provided that: I

> "The trustee shall apply the proceeds of the lease, sale, or other disposal of the said railroad equipment and/or rolling stock, as well as the moneys derived from the sale of the said United States of America government obligations, to the payment after deduction of the expenses of the trust and all taxes which the trustee may by law be required to pay in respect of the trust property or the certificates or the dividends thereon—
>
> (i) Of the dividend warrants then due, and accrued.
>
> (ii) Of the par value of and aforesaid premium on all the then outstanding

> certificates in full, if such moneys and proceeds shall be sufficient, and if not, then pro rata; and shall pay the surplus, if any, to the car company, its successors or assigns."

There was a provision in the Seventh Clause that if the Railway Company made default and if it were thought "necessary or convenient for the purpose of enforcing and carrying out all the terms and stipulations of the lease and of this agreement under the laws and statutes of the Republic of Cuba" then, under certain stipulated circumstances, the trustee was to assign and to hand over to a substituted trustee authorised to act or to do business in Cuba. The Tenth Clause was in these terms:

> "Upon payment by the Railway Company to the trustee of the last semi-annual payment of $205,000, on Feb. 14, 1936, or upon payment of rental sufficient to retire all outstanding certificates at par and a premium of ten per cent. thereon and accrued dividends, and upon retirement of the certificates and payment of the dividends thereon, the trustee shall pay or cause to be paid to the order of the car company all moneys held by the trustee and remaining over and above the moneys required for payment of the certificates issued hereunder or any dividends thereon and when it, the Railway Company, shall have fully paid all the rents as provided in the lease, the said railroad equipment and/or rolling stock shall be reassigned by the trustee to the car company."

The Eleventh Clause corresponded with the Eleventh Clause of the lease, save that the last few words of the clause in the lease were not repeated in the trust agreement. In the trust agreement, there was no clause corresponding to the Twelfth Clause of the lease.

The company failed to make payment of the rental instalment due on Feb. 14, 1931, and did not make payment of any subsequent instalments. The unpaid instalments, which may reasonably be regarded as instalments of capital, amounted in total to $2,256,000. The company paid the interest instalments due under the lease down to Aug. 14, 1934. The trustee did not exercise or seek to exercise any right to declare the lease terminated or any right to retake the railroad equipment and rolling stock.

On a consideration of the lease and its terms, it was held by WYNN-PARRY, J., that the proper law was the law of the Commonwealth of Pennsylvania. He formed the same view in regard to the trust agreement. In the Court of Appeal, JENKINS and ROMER, L.JJ., held that, while Cuban law was intended to be applicable to certain aspects of the lease and of the trust agreement, nevertheless the proper law of both was that of Pennsylvania. As an alternative, they mentioned the law of Philadelphia, but it does not appear why it was considered that such alternative could exist. WILLMER, L.J., took a different view on this issue. He arrived at the conclusion that the law of Cuba was the proper law of the lease.

On behalf of the appellants, it was submitted that cl. 12 of the lease should be regarded as providing for the general exclusive jurisdiction of the Republic of Cuba, and as pointing conclusively to the view that the proper law of the contract was the law of Cuba. Alternatively, it was submitted that, if cl. 12 did not point conclusively to that view, it remained a very significant factor which tended to the acceptance of such view. Further, it was said that cl. 11 either denoted that the law of Cuba was expressly chosen or was another significant factor which supported the view that the law of Cuba was the proper law. The lease, it was said, related to property in Cuba and to courses of action to be adopted in Cuba, whereas the Pennsylvanian elements were peculiarly lacking. My Lords, these submissions and others closely linked with them, though impressively developed, have not led me to any different general conclusion from that reached by WYNN-PARRY, J., and the majority in the Court of Appeal. Though the provisions of cl. 11 and cl. 12 call for special examination, it is desirable to survey the nature and purpose of what was being done. When the transactions and agreements are examined in order to seek their essential central elements, it is, I think, apparent that the company was, in effect, borrowing money that it needed and was agreeing to repay with interest and was reinforcing its contractual monetary obligations by arrangements designed to ensure that its property would be available as security. The money which the company needed was raised in the United States of America. Thereafter what was of prime consequence to certificate holders was that they should receive their interest and in due course the return of their capital. The most important obligations, therefore, into which the company entered were their obligations to pay money. The payments which, in reality, were instalment repayments of capital and which, in total, were to amount to $6,170,000, were to be made in the City of Philadelphia, Pennsylvania, and were to be made at the office of the trustee. If, then, the question is posed as to what is the law "by reference to which the contract was made or that with which the transaction has its closest and most real connexion" (see the words used by Lord Simonds in *Bonython* v. *Commonwealth of Australia* (31)—I would answer—the law of Pennsylvania. The lease was entered into between the company (an English company) with the car company (a company incorporated in Delaware) with the knowledge and intention that the latter company was to assign it to the trustee in Philadelphia so that its provisions would avail for the benefit of numerous certificate holders. It would not be in the nature of things that those primarily concerned would have intended or would have wished that their rights should be determined by the law of Cuba. It would seem to be unlikely that the parties to the lease would, without either express statement or positive election, have submitted themselves to a system of law outside the United States of America.

No final view can, however, be formed until full consideration has been given to the many elements which involve and suggest links with the law of the Republic of Cuba. In particular, it must be decided whether cl. 12 of the lease is so framed as to place the contract exclusively under the law of Cuba. My Lords, if that had been the aim and intention of the contracting parties, they would, I conceive, have employed different language. They could have agreed to submit all disputes to the jurisdiction of the Republic of Cuba. Clause 12 is a submission

> "for all notifications, summonses and other judicial or extra judicial formalities to which this lease shall give rise, with express renunciation of their own jurisdiction if different."

The submission was to the tribunals of the City of Havana in the Republic of Cuba. Though the words used are apt to cover legal proceedings, I cannot think that there would have been any bar to suing the company in England for the amount of any money instalment that remained unpaid. The company was, in fact, sued in the State of Maine, United States of America, in 1937. Clause 12 appears in the first place to effect that the tribunals of the City of Havana, as opposed to other tribunals in Cuba, are exclusively to have jurisdiction if there are proceedings in Cuba. The evidence of Dr. Gorrin, the Cuban lawyer, supported this view. It may be in the second place that the company agreed to submit to the jurisdiction of the tribunals of the City of Havana in the event of the company being sued in Cuba in proceedings to which the lease might give rise. But that does not involve that only in Cuba could there be proceedings between the parties, nor does it involve that they were making the law of Cuba the proper law of the contract so that the whole agreement was subjected to Cuban law. For the protection of the interests of certificate holders, it might, in some circumstances, be necessary to invoke the assistance of the Cuban courts, but the contemplation of such circumstances would not involve that the agreement as a whole was to be governed by Cuban law. The provisions of cl. 11 are less helpful to the appellants. The clause appears to proclaim its own purpose. The purpose is to protect the title of the trustee. Accordingly, the intention of the parties was proclaimed to be to execute the lease in accordance with Cuban law " to the end that " the lease could be deposited or registered or filed according to the law of Cuba where the property was. It was clearly desirable to provide that all proper steps should be taken to ensure that the trustee (to whom there was to be an assignment) should have security. But the attainment of the expressed purpose of protecting the trustee's title did not involve that the law of Cuba was to be the proper law of the contract.

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(31) [1951] A.C. 201 at p. 219.

It would seem to be probable, though this would not necessarily be the case, that the proper law of the lease and of the trust agreement would be the same. The trust agreement was an essential part of the mechanism that was being devised for the operation of securing money for the company. Under the trust agreement, the car company assigned the lease, and all rights in and to the railroad equipment and rolling stock, and all its rights under contracts with manufacturers and rights accruing under the lease and all the rentals. The assignment was to the trustee " as trustee for the holders of " the certificates. The trust agreement was made in New York between a corporation of the State of Delaware and a corporation of the Commonwealth of Pennsylvania. It would seem unlikely that the parties to the agreement would have contemplated that its proper law would be the law of Cuba even though it would be necessary to have an agreement that would be valid under Cuban law in order to pass title in the equipment and rolling stock to the trustee. But all the provisions as to the application by the trustee of the payments that he was to receive would seem to point to a close and real connexion with Pennsylvania. The omission of a clause in the trust agreement in the terms of the Twelfth Clause of the lease is explained by the absence of any need for it. The Seventh Clause of the trust agreement provides that, in the event of default by the company and if it were thought necessary or convenient for the purpose of enforcing and carrying out all the terms and stipulations of the lease and of the trust agreement under the laws and statutes of the Republic of Cuba, then the trustee might, in his discretion, and on request of the holders of a majority in amount of outstanding certificates, should, assign to a substituted trustee " authorised to act or doing business in the Republic of Cuba ". The language of the clause does not seem to be the language that would have been employed if the parties had selected the law of Cuba as being the law of the agreement. Nor does it follow that, though the parties contemplated that there might be occasion to go to the Cuban courts in whose jurisdiction the rolling stock (the security for certificate holders) was physically located, they would have contemplated that the law of Cuba was to be the proper law of their contract.

For the reasons which I have indicated, which accord with those given by the majority in the Court of Appeal and substantially with those given by WYNN-PARRY, J., I agree with the view that, though Cuban law was clearly intended to be applicable to certain aspects of the lease and of the trust agreement, the proper law of both those agreements was that of the Commonwealth of Pennsylvania.

In the proof lodged by the trustee it was claimed, in para. 2, that, at the commencement of the winding-up, the company was and continued to be justly and truly indebted to the trustee in certain sums. The first sum was the sterling equivalent of $739,412·81. That was a sum calculated in reference to 333 certificates. The sum included the face value of the certificates, premium, interest at 7½ per cent. on the face value from Aug. 15, 1934, to Feb. 14, 1936, and interest at the rate of six per cent. on the face value from Feb. 15, 1936, to the commencement of the winding-up. The number of certificates should be corrected to 331. The next sum mentioned was the sterling equivalent of $31,296·56, which was stated to be the aggregate amount of the reasonable expenses incurred by the trustee in the performance of the trust down to Mar. 4, 1954. The next sum mentioned was £20,000 as the sterling equivalent of the estimated expenses which the trustee would incur in the performance of the trusts between Mar. 4, 1954, and the date when they would have been fully performed. The last sum mentioned was the sterling equivalent of $4,145,596·78 which was a sum calculated in the same manner as the first sum but in reference to 1,867 certificates. The number can now be taken as 1,869. These certificates were those to which I have earlier referred. They were the certificates acquired by the company and passed on by them to the Cuban state. The sterling equivalents were calculated at the rate of $2·80, being the rate at the commencement of the winding-up.

My Lords, if the proof had not been amplified or explained by later paragraphs, its basis would have been difficult to follow. As has been seen, the company was not liable on the certificates though its liability was for the most part measured by reference to the certificates. The company was under obligation to pay the rental sums as set out in the lease. The trustee, as assignee from the car company, was entitled to receive those rental sums. The only sums, therefore, in respect of which the trustee could assert liability in the company were the rental sums which the company had contracted to pay which included sums to cover the trustee's expenses. In the proof which the trustee lodged, it was stated, in para. 4, that

> " The liability of the company to the claimant which is the subject-matter of this proof arises under or by virtue of a covenant by the company with Cuban Rolling Stock Company contained in an agreement dated Feb. 15, 1921, but executed on Apr. 18, 1921, between the said Cuban Rolling Stock Company of the one part and the company of the other part the benefit whereof including the ownership of the said railway equipment was by a trust agreement dated Feb. 15, 1921, but executed on Apr. 18, 1921, assigned by the said Cuban Rolling Stock Company to the said original trustee of whom the claimant is the successor in title."

The claim was alternatively stated to arise by way of damages for breach of a covenant not to assign which was contained in the lease or by way of damages for conversion by the company of the railway equipment.

My Lords, the position as between the company and the trustee was clear. Both the company and the trustee knew what was the extent of the failures by the company to make the rental payments that the company should have paid. The company knew that the obligation of the trustee to certificate holders was to pay the latter from and out of the rentals when paid. Both the company and the trustee knew that, if the trustee received from the company more than enough to pay all that the certificate holders were entitled to receive, then any surplus was to be paid to the car company or its assigns. For this purpose, the company were the assignees of the car company. The result was that in any proof of debt the trustee could not assert that he should receive from the company more than the trustee needed to satisfy the certificate holders and to discharge the trustee's expenses. As the trustee had not been paid the sums which the company owed, and as the liability of the trustee to certificate holders only arose when he was paid, it seems to me that it was correct for the trustee to take the rate of exchange ruling at the commencement of the winding-up for the purpose of converting into sterling the dollar amounts that he wished to receive. So converted, the trustee claimed to prove for £264,076 plus £11,177 plus £20,000 plus £1,480,570. The first and the last of these sums included interest at the rate of six per cent. on the face value of certificates down to the commencement of the winding-up as from the date when the certificates should have been repaid (Feb. 15, 1936)—which was the date when the final rental payment should have been paid by the company to the trustee. The liquidators did not challenge the right of the trustee to pay six per cent. interest to certificate holders as from February, 1936, to the date of the winding-up nor the right of the trustee to prove for such interest at the rate of six per cent. even though there was no contractual obligation in the company to pay this interest to the trustee. If these figures of claim had remained, it would have been necessary for the liquidators to see whether the total liabilities of the company did, in fact, overtop the total of the amounts that the trustee claimed. If the company was indebted to a larger extent, then the excess over the trustee's claim would not be the subject of proof. If the company's liabilities were less than the total of the amounts that the trustee claimed, then the proof could only be admitted to the extent of the company's liabilities.

The dates of the various defaults by the company and the amounts of the defaults have not been in dispute. Instalments due on and after Feb. 14, 1931, amounted in total to $2,256,000. But, in assessing the total liabilities of the company, dollar amounts must be converted to sterling. Should the conversions be at the rate ruling at the date of the commencement of the winding-up or should they be made at the rates ruling on the respective dates on which the respective instalment payments or interest payments ought to have been made? I am clearly of the opinion that it should be the latter. I have had the privilege of reading in advance the opinion of my noble and learned friend on the Woolsack, and I am in agreement with the reasoning therein contained by which this conclusion is supported. On an acceptance of this basis, the result, we are told, would be that the indebtedness of the company as converted into sterling would be considerably less than the total of the four sterling amounts that I have mentioned. On this basis, the liquidators would, apart from the overriding main legal contentions, have been obliged to admit the proof only to the extent of the total sterling amount of the company's indebtedness. The trustee would then, presumably, have used the money he received to discharge his expenses and to apply the remainder pro rata amongst outstanding certificate holders.

Some figures prepared by the appellants showed that, if the various dollar obligations of the company were converted to sterling at the rates ruling at the respective dates when the separate payments had become due, the amount owing by the company would have been about £1,201,188. This sum includes the six per cent. interest payments to which I have referred. There would also have been an amount owing for expenses. It will be seen, therefore, that there would not have been enough, leaving out the trustee's expenses, to meet claims of certificate holders to the extent of £264,076, plus £1,480,570. If, of course, in reference to the various liabilities of the company, the rate of exchange had been taken which was ruling at the date of the commencement of the winding-up, then, instead of the figure of £1,201,188, there would have been a very considerably higher figure. But that, in my judgment, would not have been correct. But it is necessary to see how the position developed. The trustee explained in his lodgment of proof that he believed that the 1,867 certificates were retired in the books of account of the company in or about the year 1948. He further explained that, as the certificates had not been physically surrendered by the company to the trustee and so had not been cancelled in the records, the trustee had, accordingly, included in his proof an amount which was related to these certificates. There was, however, material from which it could be said that the Cuban state, as the holders of the 1,867 certificates, had renounced any claim. The liquidators of the company had considerable funds in their hands and wished to make an interim return of capital. They applied to ROXBURGH, J., for liberty to do so. In connexion with this application, the trustee's originating summons for a reversal of the rejection of his proof was, by consent, brought on for hearing before ROXBURGH, J. The substance of the matter was that if, in fact, the Cuban state was not going to assert any claim in respect of the certificates which had come to their hands and if, therefore, from the trustee's proof there could be eliminated the item of £1,480,570, then, while making provision for the possible allowance in full of the remainder of the proof, the liquidators would be justified in making an interim return of capital. ROXBURGH, J., was satisfied on the evidence that the holders of the 1,867 certificates had renounced any claim to participate in the assets available for distribution in the winding-up and that such renunciation alone was a sufficient ground for rejecting that part of the trustee's proof of debt (i.e., the £1,480,570) which was based on or measured by reference to the 1,867 certificates. Roxburgh, J., therefore, made an order affirming the rejection of the proof of debt so far as it related to the sum of £1,148,570 and ordered that the remainder of the summons should stand over.

My Lords, the effect of that was that, when the matter came before Wynn-Parry, J., the trustee could not claim to prove for more than £264,076 plus £11,177 plus £20,000. Once the questions relating to the 1,867 certificates were out of the way, the trustee did not wish to do so. But the issue as to the amount that the trustee needed to receive in order to satisfy the outstanding certificate holders left untouched the liabilities of the company. The only result, in my view, of the order of Roxburgh, J., was that, whereas previously a proof of debt as against the company might have been admitted for the full amount of what the company owed (it being immaterial that that amount might not be enough to pay certificate holders in full), the position after the order of Roxburgh, J., was that the company would be relieved of part of its liability because the trustee did not need to draw on the full amount of that liability in order to meet the claims of outstanding certificate holders and to cover his expenses. The six per cent. interest payments would thereafter only be referable to the remaining 331 certificates. But the money instalments due under the lease were payable irrespective of the number of certificates that might be outstanding. The same observation applies to the payments due in respect of the trustee's expenses. There was no relation between the claim of a certificate holder as against the trustee and the amount of any instalment due under the lease. The trustee was only liable to certificate holders out of rentals when paid. It seems to me that the trustee is entitled to point to the total indebtedness of the company (calculated in sterling by reference to rates of exchange ruling when particular instalments were payable) and to claim either that amount or such lesser amount as is sufficient to enable him to pay the amount of his expenses and to satisfy certificate holders whose claims are outstanding and which fall to be honoured when the trustee is paid.

On the view that I have formed, the order of Roxburgh, J., never purported to relieve the company of its contractual obligations or to assess them or to deal with them. The order merely provided that, on the hearing of the summons of the trustee for a reversal of the liquidator's rejection of the proof, the trustee should be limited to asserting his claim to the item of £264,076 together with his two claims for expenses. My Lords, he seeks to do no more. On the figures prepared by the appellants, and taking the conversion rates referable to the dates when instalments should have been paid and leaving out of account any question of six per cent. interest on the face value of the 331 certificates, the sterling equivalent of the unsatisfied contractual liabilities of the company would be very much more than the sum claimed by the trustee.

My view of the matter makes it unnecessary to deal with the alternative ways of showing liability in the company, i.e., by way of damages for conversion or of breach of covenant not to assign.

For the reasons that I have given, I agree with the learned judge and with the majority in the Court of Appeal, and I would be in favour of dismissing this appeal to your Lordships' House.

Appeal allowed in part.

Solicitors: *Norton, Rose & Co.* (for the appellants); *Herbert Smith & Co.* (for the respondents).

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

JOLLYE *v.* DALE.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Gorman and Ashworth, JJ.), May 4, 1960.]

Road Traffic—Notice of intended prosecution—Time—Notice given one and a half hours after the alleged offence was committed—Whether it was given at the time the offence was committed—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5 *c.* 43), *s.* 21.

At 5.30 p.m. a police constable signalled to J., who was driving a motor car, to stop. J. did not stop. He was followed by police officers, who stopped him at 6 p.m. He was suspected to be under the influence of alcohol, and was taken to the police station, but the police doctor certified that he was fit to drive. After the doctor had left, between 7 and 7.15 p.m., J. was warned orally by the police that he would be reported for the question of prosecuting him for reckless, careless or dangerous driving to be considered. J., having been convicted of dangerous driving, appealed on the ground that he was not warned at the time of the offence as required by s. 21 (a) of the Road Traffic Act, 1930.

Held: in the circumstances of the present case the warning had been given " at the time the offence was committed " within the meaning of those words in s. 21 (a) of the Road Traffic Act, 1930.

Jeffs v. *Wells* ((1936), 100 J.P. Jo. 406) applied.

Appeal dismissed.

[As to notice of prosecution, see 31 HALSBURY'S LAWS (2nd Edn.) 680, para. 1008.

For the Road Traffic Act, 1930, s. 21, see 24 HALSBURY'S STATUTES (2nd Edn.) 594.]

Case referred to:

Jeffs v. *Wells*, (1936), 100 J.P. Jo. 406.

Case Stated.

This was an appeal by Leonard Frederick Jollye by way of Case Stated by the justices for the county of Hertford, sitting at Hemel Hempstead, before whom he was convicted on June 13, 1959, on an information preferred by Frank Dale, the respondent, that on Apr. 6, 1959, he drove a motor car in a manner dangerous to the public contrary to s. 11 of the Road Traffic Act, 1930, as amended by s. 26 of the Road Traffic Act, 1956. The following facts were found. A police constable saw the appellant driving his car in Berkhamsted High Street on Apr. 6, 1959, at about 5.30 p.m. At traffic lights in the High Street the police constable signalled to the appellant that he wished him to stop. The appellant did not stop and the police constable, with others, later followed the car which was stopped at Leverstock Green, Hemel Hempstead, at 6 p.m. and the appellant was there apprehended. The police constable suspected that the appellant was under the influence of alcohol and took him to Hemel Hempstead Police Station where they arrived at 6.10 p.m. The appellant was there examined by a police doctor, who certified that the appellant was fit to drive. The doctor left the police station at about 7 p.m. After the medical examination and between 7 p.m. and 7.15 p.m. the appellant was warned by the police constable in the presence of a police inspector and a police sergeant in the following words: " I am reporting you for the question to be considered of prosecuting you for one or more of the following offences, reckless, careless or dangerous driving ". At about 7.30 p.m. the appellant returned to his car at Leverstock Green where he was again warned by the police constable in the presence of the same police inspector and sergeant in the same terms as before. Apart from these two oral warnings, no notice of intended prosecution was given to the appellant in respect of the information, and the summons was not served on him until May 12, 1959.

It was contended by the appellant that the oral warnings referred to did not comply with the requirements of s. 21 of the Road Traffic Act, 1930, in that the appellant was not warned " at the time the said offence was committed ", that the question of prosecuting him for the offence would be taken into consideration, because the first warning was not given until after 7 p.m., the alleged offence having been committed at or about 5.30 p.m. and the appellant having been apprehended at 6 p.m. It was contended by the respondent that the said warnings did comply with the requirements of s. 21 in that they were given as soon as the police reasonably could be expected to give them after the commission of the alleged offence.

The justices found that the earliest opportunity at which a warning could have been given to the appellant was when he was stopped by the police constable at Bedmond Road, Leverstock Green, at 6 p.m. They were, however, of the opinion that the oral warnings referred to did comply with the requirements of s. 21 of the Road Traffic Act, 1930, in that the police constable gave the warning at the earliest time reasonably possible after the offence. They considered that the police constable, who was then of the opinion that the appellant was under the influence of alcohol, acted correctly in not administering the warning at the time when the appellant was first apprehended. They accordingly proceeded to hear the case and found the appellant guilty.

The question for the opinion of the court was whether the said warnings complied with the requirements of s. 21 of the Road Traffic Act, 1930.

D. A. Lloyd for the appellant.

E. A. Machin for the respondent.

LORD PARKER, C.J.: The point raised by way of defence in the first instance was that there had not been compliance with the provisions of s. 21 of the Road Traffic Act, 1930, in regard to warnings. That argument did not succeed before the magistrates, who held that a proper warning had been given. They then proceeded to hear the case, and they found the appellant guilty, fined him £20, ordered him to pay £7 7s. costs, and disqualified him from driving for six months. The sole question in this appeal is whether the magistrates were right in holding that there had been compliance with the provisions of s. 21. [His Lordship stated the facts and continued:]

Section 21, which has given rise to a number of difficulties, provides, so far as it is material to this case:

> " Where a person is prosecuted for an offence . . . of . . . dangerous driving [as this man was] he shall not be convicted unless either—(a) he was warned at the time the offence was committed that the question of prosecuting him . . . would be taken into consideration; or . . . (c) within . . . fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence."

I only refer to sub-para. (c) in order to say that the police took no action under that sub-paragraph at all. The sole question is whether they gave a warning " at the time the offence was committed ". It is said here on behalf of the appellant that a warning given an hour and a half after the commission of the offence at a place some miles away from the place of the offence cannot be said to have been given at the time of the offence.

It is not altogether easy to lay down any definition of what is meant by the words " at the time the offence was committed ". It cannot mean the exact moment when the offence is committed because the occasions when it would be possible to give a warning at that time would be very, very rare indeed. It seems to me that " at the time of the offence " must be looked at in a general way and that it is not limited to the point of time when the offence was committed.

Support for that view is gained from the only case which has come before this court on this point, *Jeffs* v. *Wells* (1). It appeared that in *Jeffs* v. *Wells* (1) the defendant had driven into the back of a stationary car. That was at 11.45 a.m., and there was no policeman present. The police were sent for and arrived half an hour later. The police took statements and at 12.20, thirty-five minutes later, gave an oral warning. The magistrates said that that was not at the time of the offence. This court said that it was. LORD HEWART, C.J., said:

> " We are clearly of opinion that this appeal must be allowed. It is impossible for the words of the statute to mean that the warning shall be given at the very moment of the collision or at the next moment after it. I think that every one of the contentions of the appellant was sound, and that the justices were wrong in point of law."

I should have said that the contention there was that the warning was good because it had been given at the earliest time reasonably possible after the arrival of the police and while the defendant and the vehicles concerned were still at the scene of the alleged offence. AVORY, J., in agreeing, said:

> " I am not sure whether the justices, although I am anxious to do justice to their view, thought that in this particular case thirty-five minutes was too long after the offence was committed. In any view, it seems that the warning was given at the earliest time reasonably possible after the arrival of the police and while the parties were still at the scene of the accident."

For my part, I have some difficulty in saying that the test is whether the warning was given as soon as reasonably possible because one can envisage cases, in particular where the police have to pursue an alleged offender for a long distance, when the earliest opportunity might be hours later and at a point many miles distant. I do not think that a warning given after such a lapse of time and after the vehicles had travelled a long distance could in any proper sense be said to be given at the time of the offence. At the same time, *Jeffs* v. *Wells* (1) is authority for this, that in every case it is a question of degree and therefore a question of fact; and if it be a question of fact, it is not a matter with which this court can interfere provided always that there is evidence which would support the finding. Here, the magistrates have found, true using the test "as soon as reasonably possible ", that this warning was given at the time of the offence. The evidence which led them to come to that conclusion was, as I have said, that the police did not catch up with the defendant until 6 p.m., half an hour later, that at that time he appeared to be under the influence of drink, that it would be quite incorrect for the police to warn him then and that they did warn him as soon as the doctor certified that he was fit to drive a car. Here there is a finding with which this court cannot interfere. It is said that that was the first time when it was reasonably possible to give the warning. Even if that is not the true test, it was at any rate given within such a time which, on the facts of this case, can be said to be the time of the offence, and on those grounds I would dismiss this appeal.

An argument was addressed to the court on the proviso (2), and in particular it was said that in this case the accused by his own conduct had contributed to the failure to comply with the requirement. Having come to the conclusion that the requirement was satisfied, I find it unnecessary to consider the proviso, though as at present advised, I do not think that it has any application to this case.

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(1) (1936), 100 J.P. Jo. 406.

(2) The proviso to s. 21 of the Road Traffic Act, 1930, reads:

" Provided that—(i) Failure to comply with this requirement shall not be a bar to the conviction of the accused in any case where the court is satisfied that—(1) . . . (2) the accused by his own conduct contributed to the failure . . ."

GORMAN, J.: I agree, and I have nothing to add.

ASHWORTH, J.: I also agree.

Appeal dismissed.

Solicitors: *Amery-Parkes & Co.* (for the appellant); *Ottaways*, St. Albans (for the respondent).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

BANKES *v.* SALISBURY DIOCESAN COUNCIL OF EDUCATION INCORPORATED AND ANOTHER.

[CHANCERY DIVISION (Russell, J.), March 24, 25, 28, 29, April 13, 1960.]

Education—School—Reverter—Land conveyed for school site in 1840*—Scheme under Endowed Schools Act,* 1869, *in* 1949*—School closed in* 1956*—Whether land held on resulting trust for grantor—Schools Sites Act,* 1836 (6 *&* 7 *Will.* 4 c. 70)*—Schools Sites Act,* 1841 (4 *&* 5 *Vict. c.* 38), *s.* 15*—Endowed Schools Act,* 1869 (32 *&* 33 *Vict. c.* 56), *s.* 9, *s.* 45, *s.* 46, *s.* 47*—Education Act,* 1944 (7 *&* 8 *Geo.* 6 *c.* 31), *s.* 86.

Trust and Trustee—Corporation sole—Trust imposed on corporation sole—Land conveyed to corporation sole and others as school site—Resulting trust on closure of school.

By a conveyance made in 1840, which recited that it was expedient that a school should be established in the parish of Studland for educating the poor children of the parish, the lord of the manor of Studland conveyed land under the Schools Sites Act, 1836, to two individuals and a corporation sole, the rector of the parish, and their successors, habendum to the same persons " and their successors . . . upon trust to permit the same to be used as a site for the erection thereon of a school-house for instructing the poor children of the said parish " and it was thereby agreed that " in case the said school-house shall not be erected or being erected it shall be found impracticable by the said trustees for the time being by reason of a failure in the contribution or funds for the erection or support thereof or by any other means whatsoever to carry the intention . . . into effect then and in such case the bargain and sale hereby made shall be void ". On Dec. 21, 1949, a scheme relating to certain Church of England educational foundations, made by the Minister of Education under the Endowed Schools Act, 1869, was approved by Order in Council. This scheme included the school in question. By s. 9 of the Endowed Schools Act, 1869, commissioners were empowered by schemes to alter any educational endowment and to make new trusts and provisions affecting any such endowment. " Endowment " was defined in the Act as " every description of property, real, personal, and mixed, which is dedicated to such charitable uses as are referred to in this Act, in whomsoever such property may be vested, and in whomsoever name it may be standing, and whether such property is in possession or in reversion, or a thing in action ". Paragraph 2 of the scheme stated that every Act of Parliament, letters patent, statute, deed, instrument or trust affecting the foundation was repealed and the provisions of the scheme were substituted therefor. Paragraph 3 stated " The Salisbury Diocesan Council of Education Incorporated, is hereby appointed to be the governing body of the foundations, and all land held in trust for the foundations . . . is hereby vested in the governing body ". By para. 4 the governing body was authorised to sell or let the land. It was accepted that the land in question was held in trust for the Studland School foundation and that the legal estate in fee simple was, by cl. 3, vested in the Salisbury Diocesan Council of Education Incorporated. On Jan. 9, 1956, the school was permanently closed.

Held: on the closing of the school the land was held on a resulting trust for the successor in title of the grantor under the conveyance of 1840 for the following reasons—

(i) the provision for avoidance of the conveyance operated whenever the land ceased to be used for the purposes of a school, and

(ii) the conveyance, being to a corporation sole as one of the three grantees, and his successors, operated to pass a fee simple, as there was no principle that a conveyance to a corporation sole could not take effect when a trust was imposed, and

(iii) the scheme of 1949 had not extinguished the resulting trust which would arise if the land ceased to be used for a school, since the repeal effected by the scheme was only co-extensive with the educational purposes of the conveyance of 1840 and did not nullify the subsequent resulting trust for the grantor.

[As to reverter of land conveyed as a school site on failure of purposes, see 13 Halsbury's Laws (3rd Edn.) 703, 704, para. 1434.

As to a corporation's ability to hold property on trust, see 9 Halsbury's Laws (3rd Edn.) 72, para. 142.

For the Schools Sites Act, 1841, s. 15, see 8 Halsbury's Statutes (2nd Edn.) 341; for the Endowed Schools Act, 1869, s. 9, s. 45, s. 46, s. 47, see ibid., 299, 313; and for the Education Act, 1944, s. 86, see ibid., 216.]

Cases referred to:

Thompson's Settlement Trusts, Re, Thompson v. *Alexander*, [1905] 1 Ch. 229; 74 L.J.Ch. 133; 91 L.T. 835; 13 Digest (Repl.) 269, *945*.

Tufnell v. *Constable*, (1838), 7 Ad. & El. 798; 3 Nev. & P.K.B. 47; 7 L.J.Q.B. 106; 112 E.R. 670; 24 Digest (Repl.) 674, *6631*.

Action.

This was an action by the plaintiff, Henry John Ralph Bankes, Lord of the Manor of Studland in the county of Dorset, by writ dated Feb. 4, 1958, for a declaration that the first defendant, the Salisbury Diocesan Council of Education Incorporated, held the property known as the Studland Church of England School on trust for the plaintiff. The second defendant was the Attorney-General. The plaintiff also claimed an account of rents and profits of the property since Jan. 9, 1956, and payment, by the first defendant, of the amount found due on taking such account. The property had been conveyed by indenture dated Sept. 25, 1840, by the plaintiff's predecessor in title on trust as a school site under the Schools Sites Act, 1836[*], subject to a provision for avoidance if it should be found impracticable (among other contingencies) to carry into effect the intention of the grantor. The school, which was duly erected, ceased to be carried on as a school on Jan. 9, 1956. The facts and contentions appear in the judgment.

G. A. Rink, Q.C., and *A. L. Stott* for the plaintiff, Mr. H. J. R. Bankes.

Nigel Warren, Q.C., for the first defendant, the Salisbury Diocesan Council of Education Incorporated.

B. J. H. Clauson for the second defendant, the Attorney-General.

Cur. adv. vult.

Apr. 13. **RUSSELL, J.**, read the following judgment: This case raises several points of some difficulty. The point of the action is this, that the plaintiff asserts that by reason of the closing of a school in Studland, Dorset, in 1956, the first defendant—in which the legal estate in fee simple is admittedly vested by reason of a scheme under the Endowed Schools Act, 1869—is trustee of the premises for the plaintiff. By that defendant (supported by the second defendant, the Attorney-General) it is contended that the plaintiff has no beneficial interest in the property, which is held on exclusively educational and charitable trusts.

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[*] This Act was repealed by the Schools Sites Act, 1841.

The plaintiff's claim is based on a resulting trust under a conveyance by his predecessor in title in 1840, which it is said took effect when the use of the premises as a school ceased in 1956. The defendants admit that if any such claim can be supported the plaintiff is the person entitled.

The first question is whether, on the construction of the 1840 deed, once the school premises were built and the school opened, there could any longer be a possibility of a resulting trust. If not, then the plaintiff must fail.

The 1840 deed is in these terms. It is expressed as an indenture made Sept. 25

> " between William John Bankes . . . Lord of the Manor of Studland . . . of the one part and the said William John Bankes, Thomas George Robson . . . Steward of the said Manor of Studland and the Reverend Charles Michael Turner of Studland, Clerk, Rector of the said parish of the other part.
>
> " Whereas it is expedient for the benefit of the said parish of Studland that a school should be established in the parish for educating the poor children there in the principles of the Christian religion according to the doctrines and discipline of the United Church of England and Ireland and in useful knowledge and for that purpose to erect a convenient school-house and other necessary buildings, and whereas the said William John Bankes had consented to convey the piece of land hereinafter particularly described for the site of the said school-house and other necessary buildings in manner hereinafter mentioned, Now this indenture witnesseth that in execution and performance of the said desire and by way of free gift of the said William John Bankes for the purposes aforesaid he, the said William John Bankes, by these presents to be enrolled as required by the statutes in such case made and provided doth bargain, sell and confirm unto the said Thomas George Robson and Charles Michael Turner and their successors stewards of the said manor and rectors of the said parish of Studland with the lord of the said manor [and it describes the parcel] And also all the estate right title interest claim and demand whatsoever both at law and in equity of him the said William John Bankes into out or upon the said piece or parcel of land hereditaments and premises or any part or parcel thereof with the appurtenances to have and to hold the said piece or parcel of land hereditaments and premises hereby bargained and sold or intended so to be with their appurtenances unto the said Thomas George Robson and Charles Michael Turner to the use of the said William John Bankes, Thomas George Robson and Charles Michael Turner and their successors lords and stewards of the said manor and rectors of the said parish upon trust to permit the same to be used as a site for the erection thereon of a school-house for instructing the poor children of the said parish in useful knowledge and in the principles of the Christian religion according to the doctrines and discipline of the United Church of England and Ireland And it is hereby declared and agreed by and between the said parties hereto that in case the said school-house shall not be erected or being erected it shall be found impracticable by the said trustees for the time being by reason of a failure in the contribution or funds for the erection or support thereof or by any other means whatsoever to carry the intention of the said William John Bankes into effect then and in such case the bargain and sale hereby made shall be void."

For the defendants the following points were made. The object of the deed was the establishment of the school. There is no evidence that W. J. Bankes supplied all the moneys to build the school, and some evidence to suggest that he did not. It is unlikely, therefore, it is said, that subscriptions for the building would be forthcoming on terms that within possibly a short time the donor of the plot would become entitled to the plot and any building thereon. There were many stages, it is said, before " establishment " when a reverter would sensibly operate: and that makes it unnecessary and unlikely that reverter at some remote future moment was intended. The phrase used was, it is pointed out, not that there should be reverter but that the deed should be void, and, moreover, void if the intention of the grantor could not be " carried into effect "; and it is said there was nothing to show that his intention was other than simply that the school should be erected, established and launched. It was further argued that the reference to the trustees " for the time being " does not necessarily involve any definite extension in time of the avoidance clause: there might be a change in the trustees before the school was " established ".

These are arguments of considerable weight but they do not persuade me that the avoidance clause was other than indefinite in time. That the conception of a reverter unlimited in time is in such cases consistent with the collection of money for the building of a school is made plain by the Schools Sites Act, 1841. The reference to support of the school or school-house cannot be explained unless the reverter or resulting trust is unlimited in time.

In my judgment on the true construction of the 1840 deed the avoidance clause is not limited in time and operates whenever the property ceases to be used as a school. I cannot think that the reference to the failure to carry into effect the intention of the grantor for lack of funds for the support of the school-house or for any other reason is limited to the provision at the outset of a fund sufficient to keep the building in order or a teaching staff on duty. In my view it is intended and to be construed as imposing a continuing condition of the suspension of the avoidance (and therefore of the reverter by resulting trust) that the property should continue to be used as a school, and the dedication to educational charity is, in my view, so limited.

If, as I have held, the avoidance or reverter clause or resulting trust has no time limit in its operation—which it is not denied is a legal possibility—the next question is related to the possibility that a possessory title for educational charity to the property was acquired so as to extinguish the rights of those entitled under the resulting trust.

Hereunder the first question is: What title was conferred, and on whom, by the 1840 deed? The relevant parts of the 1840 deed for this purpose are as follow. I have already read them, but I will repeat them here:

> " Now this indenture witnesseth that in execution and performance of the said desire and by way of free gift of the said William John Bankes for the purposes aforesaid he, the said William John Bankes, by these presents to be enrolled as required by the statutes in such case made and provided doth bargain sell and confirm unto the said Thomas George Robson and Charles Michael Turner and their successors stewards of the said manor and rectors of the said parish of Studland with the lord of the said manor [the parcel] . . . to have and to hold the said piece or parcel of land hereditaments and premises hereby bargained and sold or intended so to be with their appurtenances unto the said Thomas George Robson and Charles Michael Turner to the use of the said William John Bankes, Thomas George Robson and Charles Michael Turner and their successors lords and stewards of the said manor and rectors of the said parish upon trust."

By the ordinary law it is plain that this language was not sufficient to confer a fee simple in the entirety, lacking, as it did, the appropriate words of limitation. It is accepted by the plaintiff that ordinarily a conveyance in 1840 to individuals A., B. and C. on trusts would in law confer an estate which would not outlast the death of the survivor. To convey the fee simple would require a reference to their heirs as words of limitation. In this connexion the plaintiff relies, among other things, on the provisions of the Schools Sites Act, 1836, as dispensing with the need for words of limitation.

Before coming to that Act it will be convenient to tabulate certain propositions which were accepted against themselves on behalf of the defendants and the plaintiff in the course of the argument. These admissions have made it unnecessary for me to consider much of the ground which was covered in argument.

First, for the defendants it was accepted that W. J. Bankes was in 1840 tenant for life of the property in question by virtue of a settlement dated June 2, 1821; and further, that the 1840 conveyance was made by virtue of and pursuant to the Act of 1836, though not expressly referring to it.

Secondly, for the defendants it was accepted that if the Act of 1836 operated to dispense with the need for words of limitation to convey the fee simple no possessory title adverse to the plaintiff would have been acquired.

Thirdly, for the defendants it was accepted that if the effect of the 1840 conveyance was to confer on the rector as corporation sole a fee simple interest in one-third as a tenant in common as trustee, and no more than life interests on W. J. Bankes and Robson as trustees, no possessory title would have been acquired in destruction of the interests of the plaintiff under the resulting trust.

Fourthly, for the plaintiff it was accepted that if the effect of the 1840 deed was to confer no legal interest extending beyond the death of the survivor of the three persons named therein, a possessory title in favour of charity must have been acquired such as to destroy the claim of the plaintiff under the resulting trust.

It is to be observed that the 1840 deed referred in the habendum to Charles Turner and his successors, rectors of the parish of Studland. These are in any event words of limitation appropriate to a corporation sole. As will later appear I consider (contrary to the defendants' submissions) that there is nothing impossible in law in the conception of a conveyance of land to an ecclesiastical corporation sole on trust; consequently the point that I have mentioned thirdly as being accepted by the defendants makes it strictly unnecessary for me to consider whether the Act of 1836 dispenses with the need for words of limitation. But I will consider and deal with that question. I should perhaps have said that of course the reference in the 1840 deed to the successors of the lord of the manor and the steward of the manor cannot be words of limitation, nor can they be more than an indication of the grantor's wishes as to the identity of future trustees.

Before referring to the Schools Sites Act, 1836, it is pertinent to observe that if it dispenses with the need for a reference to heirs as words of limitation it was a significant breach in the walls of real property tradition, going even further than the Conveyancing Act of 1881, albeit in a limited sphere. So far as I am aware such a breach, if it was made, has not been noticed in the text-books. It is true that this particular statute did not hesitate to authorise a gratuitous conveyance by bargain and sale; but nevertheless I think that clear language must be found if it is also to abandon the requirement of words of limitation.

The leading purpose of the Schools Sites Act, 1836—and I quote from the preamble—was

> " to promote the education of poor children in the principles of true religion and useful knowledge, and to afford additional facilities for the erection of school rooms to be used for that purpose."

Section 1 made it lawful for any lord of the manor

> " to convey to the incumbent and churchwardens of any parish in which a school for the education of poor children is intended to be erected, or to the trustees of any such school "

enough common or waste land in the parish to provide a site for such a school. The section further provided that

> " the conveyance of such part of the common or waste grounds by the lord . . . of the manor wherein the same shall be situate shall be a good and sufficient conveyance for the purpose of vesting the fee simple and inheritance thereof in the parties to whom the same shall be conveyed, for the purpose hereinbefore specified, as fully and effectually as if every person having right of common . . . had joined in and executed such conveyance."

The section so enables the lords of the manor, whether they are seised in fee simple, fee tail or for life, whether they are corporations aggregate or sole, and whether feme covert, minor or lunatic (with appropriate consents).

The 1840 conveyance was not under this section but under s. 2, which enacted that it should be lawful

> "for all persons being seised in fee simple, fee tail, or for life . . . to convey any portion of land of which they may respectively be seised, including copyhold land . . . in the same manner, to the same persons, and for the same purpose as hereinbefore authorised with respect to common or waste ground."

This section also included femes covert, minors and lunatics, and as to copyhold land the lord's consent was required. Section 3 ends with the following sentence,

> "and all conveyances made by virtue and according to the provisions of this Act shall be valid and effectual in law to all intents and purposes for vesting the fee simple and inheritance of the land conveyed thereby in the parties to whom the same shall be conveyed for the purpose hereinbefore specified."

Section 5 required all conveyances authorised by the Act to be by bargain and sale enrolled, and provided that they might be so made for valuable consideration or as a free gift. Section 6 limited the area of land to half an acre.

The greater part of s. 3 is directed to giving similar powers to ecclesiastical bodies, and it was submitted by the defendants that the final sentence, which I have quoted above, is limited in its operation to that section; but the language is, I think, too general for that submission to be correct. I see no reason why validating words should be attached to conveyances under s. 1 and s. 3 but not to those under s. 2; nor do I see any justification for reading the final sentence of s. 3 as though it were worded, "made by virtue of this section and according to the provisions of this Act."

It is plain that the purpose of the Act was to enable conveyances in fee simple to be made by persons who, however much they designed to do so, were not in a position to do it. It is obviously an Act to cure defects under the ordinary law in the person conveying, and not defects under the ordinary law in the conveyance. This is additionally reflected in s. 4, which dealt with the cases where schools had already been built on land whose owners (in the broad sense) were not able to make a valid and effectual conveyance thereof. The validating words are, in my judgment, sufficiently thus explained without going further. There is no reason why a new and special meaning should be attached to the words "to convey" or "the conveyance" in ss. 1, 2, 3 or 5, namely, that the conveyance, however worded and however lacking in the appropriate words of limitation, should confer a fee simple. The reference to a fee simple in s. 2 does not, in my judgment, invalidate that approach to the construction. In the course of argument on this point reference was made to the Schools Sites Act, 1841, which replaced and repealed the Act of 1836. It was pointed out that the statutory form of conveyance, albeit permissive, provided for the appropriate words of limitation (1). Section 15 was also considered. It is not altogether easy to follow, but it does nothing to persuade me that the Act of 1836 must be construed as abolishing the need for the appropriate words of limitation in a conveyance thereunder—certainly not where the conveyance was not to the incumbent and churchwardens.

As previously indicated, the defendants next contended that although in the case of the rector's one-third the words of limitation appropriate to the conveyance of a fee simple to a corporation sole were used in the 1840 deed—that is to say, "and his successors"—yet there was something in the character of such a corporation sole which made it incapable in law of receiving a fee simple interest in land on trusts such as this, or, indeed, otherwise than as part of the endowment of the benefice; and it was said more especially if the interest was a tenancy in common.

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(1) See Schools Sites Act, 1841, s. 10.

In support of this submission reference was made to BLACKSTONE'S COMMENTARIES (1778) (8th Edn.), Vol. 1, Ch. 18, p. 469, where it is said:

> " Before we proceed to treat of the several incidents of corporations, as regarded by the laws of England, let us first take a view of the several sorts of them; and then we shall be better enabled to apprehend their respective qualities.
>
> " The first division of corporations is into aggregate and sole. Corporations aggregate consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue for ever: of which kind are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church. Corporations sole consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the king is a sole corporation; so is a bishop; so are some deans, and prebendaries, distinct from their several chapters; and so is every parson and vicar. And the necessity, or at least use, of this institution will be very apparent, if we consider the case of a parson of a church. At the original endowment of parish churches, the freehold of the church, the churchyard, the parsonage house, the glebe, and the tithes of the parish, were vested in the then parson by the bounty of the donor, as a temporal recompense to him for his spiritual care of the inhabitants, and with intent that the same emoluments should ever afterwards continue as a recompense for the same care. But how was this to be effected? The freehold was vested in the parson; and, if we suppose it vested in his natural capacity, on his death it might descend to his heir, and would be liable to his debts and incumbrances; or, at best, the heir might be compellable, at some trouble and expense, to convey these rights to the succeeding incumbent. The law therefore has wisely ordained that the parson, quatenus parson, shall never die, any more than the king; by making him and his successors a corporation. By which means all the original rights of the parsonage are preserved entire to the successor: for the present incumbent, and his predecessor who lived seven centuries ago, are in law one and the same person; and what was given to the one was given to the other also."

It does not seem to me that this quotation really supports the submission at all. It merely states generally the purposes for which such a corporation is incorporated in the eye of the law. It does nothing to suggest that a conveyance of land to such a corporation sole is in law a nullity if a trust is imposed on the estate or interest conveyed. Still less does it suggest that although the conveyance is not a nullity equity will decline to enforce the trust of the property and will leave the land as mere augmentation of the endowments of the benefice.

For the defendants reference was made also to a passage in COKE ON LITTLETON (2); but, as was pointed out for the plaintiff, that passage was no more than a reference to the particular problems affecting personalty in relation to successive ownership by the successive constituents of a corporation sole.

I accept the submission for the plaintiff that no authority or principle has been advanced to show that a conveyance of land in 1840 to a corporation sole—whether of this or any other character—cannot take effect in law when a trust is imposed by the grant; or to show that although it takes effect in law equity will not recognise or enforce the trust. To the contrary, indeed, are general statements. I refer to 9 Halsbury's Laws of England (3rd Edn.), p. 72, para. 142, where it is plainly stated:

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(2) Book 1, p. 9a.

> "As a general rule a corporation, aggregate or sole, may hold property upon trust, either alone or jointly, with one or more individuals";

and to the same effect in the same work (2nd Edn.), Vol. 33, p. 161, para. 269,

> "A corporation, whether aggregate or sole, may be a trustee, but cannot without a licence in mortmain hold real property in trust which it could not without such licence hold for its own benefit."

The suggestion that was made that a corporation could, in the eye of equity, retain property which in law was conveyed to it while ignoring a trust thereof was a suggestion which was once abruptly dismissed by Lord Hardwicke, as was recorded in *Re Thompson's Settlement Trusts, Thompson* v. *Alexander* (3).

In *Tufnell* v. *Constable* (4), a testator had covenanted with the vicar and his successors that his estate would cause a certain sum to be invested in government annuities in the corporate name of the vicar and in the corporate names of the churchwardens and in the corporate name of the Archdeacon of Colchester, to be held and applied by such vicar, churchwardens and archdeacon for the time being on trusts for the support of parish schools—such as the present one—and for charitable purposes involving relief of poverty in the parish. Among the many points taken by the executors it was argued that corporations sole cannot take personalty in their corporate character or by perpetual succession; but it was never suggested additionally that they could not be trustees at all for such charitable purposes.

Grant, in his work on Corporations, makes the general statement (at p. 109) that a corporation, with exceptions in the cases of colleges at universities, may hold lands in trust for anyone, and even for purposes quite private; and (at p. 648) expressly refers to a case of land held by a parson as corporation sole in trust for charitable purposes.

The last lap of this case is therefore to be approached with this in mind, that regardless of where the whole legal estate in the land might from time to time rest, that legal estate was, immediately prior to its vesting in the first defendant by virtue of a scheme in 1949 next to be mentioned, undoubtedly subject to trusts (a) to permit its user for a school until it ceased to be used as such for any reason: and (b) for the plaintiff beneficially under a resulting trust on such cesser. The final question is whether the 1949 scheme operated to extinguish that resulting trust and to deprive the plaintiff of the beneficial entitlement to the land and, of course, the buildings thereon, which was otherwise undoubtedly his when in 1956 they ceased to be used as a school.

The statutory origin of the 1949 scheme was the Endowed Schools Act, 1869. That Act followed a commission of inquiry into the education given in schools such as this, which (as the Act recited) recommended various changes in management and education, and in the application of educational endowments, with reorganisation where necessary. By s. 9:

> "The commissioners . . . by schemes . . . shall have power, in such manner as may render any educational endowment most conducive to the advancement of education (5), to alter, and add to any existing, and to make new trusts directions and provisions in lieu of any existing, trusts directions and provisions which affect such endowment, and the education promoted thereby, including the consolidation of two or more such endowments . . ."

By s. 4 "endowment" was defined:

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(3) [1905] 1 Ch. 229.

(4) (1838), 7 Ad. & El. 798.

(5) The enactment is printed as amended by the Education (Miscellaneous Provisions) Act, 1948, s. 2 (1), s. 11 and Sch. 1, Part 2.

> "In this Act, unless the context otherwise requires, the term 'endowment' means every description of property, real, personal, and mixed, which is dedicated to such charitable uses as are referred to in this Act, in whomsoever such property may be vested, and in whomsoever name it may be standing, and whether such property is in possession or in reversion, or a thing in action." A

B Counsel for the plaintiff submitted that in the present case the endowment was not the fee simple in the land in perpetuity but only for a period which would determine when it was no longer used as a school; the land could not be regarded as an endowment, and therefore could not be dealt with under the scheme as such, in respect of any subsequent period. There is nothing, he pointed out, in principle to prevent an endowment being for a period less than perpetuity.

C Under the Act the procedure leading to a scheme was this. A draft scheme was to be prepared, published and circulated, objections could be made, ultimately it required approval by Her Majesty in Council. It is to be noted that by s. 39 any person directly affected by a scheme who felt aggrieved by the scheme on specific grounds might appeal to the Privy Council to reject the scheme; the second of those specific grounds was on the ground "Of the scheme not saving D or making due compensation for his or their vested interest as required by this Act". This, which is the only reference to vested interest and compensation, obviously refers back to s. 13 of the Act which, without reading, I can state certainly did not include a case such as that of the plaintiff. When considering whether the statute authorised the extinction of the plaintiff's beneficial interest without compensation this seems to me significant. To this must be added the E general principle of construction that property rights should not be regarded as taken away by statute without compensation unless the language used plainly so provides (6). It is, moreover, pertinent to observe that when, under the Education Act, 1944, it was decided to override by these schemes the legal right of reverter under the Schools Sites Act, 1841—which was a right similar in substance to the plaintiff's in the present case, although, of course, different in law—provision for express overriding normally with compensation was made (7). F Thus far, in my judgment, the statutory power to make schemes did not authorise the overriding or extinction of the resulting trust under the 1840 deed.

However, ss. 45 to 47 of the Act of 1869 were in the following terms:

> "45. A scheme shall not of itself have any operation, but the same, when and as approved by Her Majesty in Council, shall from the date G specified in the scheme, or, if no date is specified, from the date of the Order in Council, have full operation and effect in the same manner as if it had been enacted in this Act.
>
> "46. Upon a scheme coming into operation, every Act of Parliament, letters patent, statute, deed, instrument, trust, or direction relating to the subject-matter of the scheme, and expressed by such scheme to be repealed H and abrogated, shall, by virtue of the scheme and of this Act, be repealed and abrogated from the date in that behalf specified, or if no date is specified, from the date of the scheme coming into operation, and all property purporting to be transferred by such scheme shall, without any other conveyance or act in the law (so far as may be), vest in the transferees, and so far as it cannot be so vested shall be held in trust for the I transferees.
>
> "47. The Order in Council approving a scheme shall be conclusive evidence that such scheme was within the scope of and made in conformity with this Act, and the validity of such scheme and order shall not be questioned in any legal proceedings whatever."

It must therefore be accepted that the answer to the final question in this case depends on the true construction of the scheme, although that construction may and must be approached in the light of the general principles to which reference has already been made and, I think, also with an unwillingness to find, except from clear language, that the scheme has exceeded the bounds of its statutory authority.

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(6) See 31 HALSBURY'S LAWS (2nd Edn.) 646. (7) Education Act, 1944, s. 86.

The scheme in question was approved by the King in Council on Dec. 21, 1949, having been framed by the Minister of Education, and not by commissioners, by reason of intermediate legislation (8) to which I need not refer. The scheme is headed: " Counties—Dorset, Wiltshire and Devon. Diocese—Salisbury. Foundations—Certain Church of England Educational Foundations ". It is said to be a

> " Scheme Framed by the Minister of Education under the Endowed Schools Acts, 1869 to 1874, as applied by an order of the Minister dated 7th April, 1949, made under s. 86 (1) of the Education Act, 1944, as amended by the Education Act, 1946."

Paragraph 1 has the cross-heading " Foundations to which Scheme Relates " and is in these terms:

> " (1) This scheme relates to the Church of England Educational Foundations specified in the schedule to this scheme, hereinafter referred to as ' the Foundations ', in the Diocese of Salisbury, in the Counties of Dorset, Wiltshire and Devon."

The schedule contains a very great number of schools of this type, and in the left-hand column of the schedule will be found the name of the school or the foundation or charity in question, and in the case of this school it appears on p. 6 as " Studland Church of England School "; then, in the right-hand column, " Comprised in a deed of Sept. 25, 1840 ". Throughout this schedule one will commonly find that phrase used, " Comprised in a deed of " the particular date. In some instances other phrases are used and one finds, for example, lands such as Archbishop Wake's Charity, " Founded by the Will of William Wake . . . and now represented by the following sums of stock ". I should add that one of these schools in this list at least, namely, the Milton Abbas Church of England School, was in fact a school which was built on a site given under the Schools Sites Act, 1841, and in respect of that school at least a specific order was made under the section of the Act of 1944, to which I have made reference, extinguishing the reverter rights under the 1841 statute.

Paragraph 2 of the scheme is headed " Repeal and Substitution " and starts thus:

> " Every Act of Parliament, letters patent, statute, deed, instrument or trust affecting the foundations is hereby repealed and the provisions of this scheme are substituted therefor."

There is a proviso to which I will refer in a moment. This passage in the scheme, of course, relates back to s. 46 of the Act of 1869. It is quite true that in one sense the 1840 deed, which is described in the schedule as " comprising " the foundation, is a " deed or instrument . . . affecting the foundation ", but " affecting " must be construed in some limited sense—a fact which is obvious when one considers the alternative of repealing every Act of Parliament affecting in any way the foundations or any of them. What is the criterion of such limitation? It seems to me that in the light of the whole legislation it must be, in relation to property and property rights, that only those parts of any deed and only those trusts which directly concern the educational foundation as such are repealed or abrogated. I see no justification for saying that this provision (or the parallel provision in the statute of 1869 itself) is aptly worded to repeal or abrogate a trust in favour of a private individual to take effect on a contingency or an event; such a trust affects him and not the foundation in the sense in which that word " foundation " is here used.

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(8) See 13 HALSBURY'S LAWS (3rd Edn.), p. 725, para. 1466, note (u).

It was suggested that a resulting trust " affects " the foundation in that it deprives it in the event of endowment. I prefer the view that the only trusts " affecting " the foundation are those which confer on it an endowment for a period lasting as long as the school continues in operation as a school.

The substance of the matter is that just before the scheme the land was vested in trustees on two trusts: (a) to permit the school to be carried on thereat for an indefinite period; (b) for the plaintiff absolutely and beneficially when and as soon as the school closed down. Had the document been expressed in that form it is in my judgment reasonably plain that neither s. 46 of the Act of 1869 nor cl. 2 of the scheme would have repealed or abrogated trust (b).

The proviso to para. 2 of the scheme is in the following terms:

> " Provided that until the premises of a foundation regulated by this scheme are sold or let, as hereinafter provided, that foundation shall be administered by the governing body hereinafter appointed in accordance with the trusts subsisting immediately before the coming into operation of this scheme."

In the present case this simply means that the first defendant is directed, pending sale or letting of the land, to permit the land to be used for a school.

It is to be noted that by para. 2 the provisions of the scheme are to be " substituted " for that which is repealed, and it is not to be expected that the substitute should embrace a wider property interest than that which is repealed.

Paragraph 3, headed " Appointment of Governing Body ", is in these terms:

> " The Salisbury Diocesan Council of Education Incorporated, is hereby appointed to be the governing body of the foundations, and all land held in trust for the foundations, except such land as is at the date of this scheme vested in the Official Trustee of Charity Lands or is already vested in the governing body, is hereby vested in the governing body; and the former trustees of the foundations and all other persons capable of being bound by this scheme shall do all such acts as may be necessary to transfer to the governing body any stocks, shares, funds and securities belonging to the foundations which are not at the date of this scheme invested in the name of the Official Trustees of Charitable Funds."

It is accepted that the land now in question was, in 1949, " land held in trust for " the Studland School Foundation and that the legal estate in fee simple was, by this paragraph, vested in the first defendant. But, it is claimed, that paragraph does nothing to affect the beneficial trusts which remained (a) to permit the land to be used for the school; (b) for the plaintiff absolutely and beneficially when and as soon as it was no longer so used.

Paragraph 4 of the scheme, headed " Sale or letting of premises ", is in these terms:

> " The governing body is hereby authorised to sell any of the premises of the foundations, subject in each case to the approval of the purchase price by the Minister of Education, or to let the same according to the general law applicable to the letting of property by trustees of charitable foundations."

Paragraph 5 (1) deals with the application of the net income of any lettings. The cross-heading is "Application of Capital Assets and Income ":

> " (1) After payment of any expenses of administration the governing body may apply the net rents and profits of any of the premises of the foundations, or of any part thereof for the time being unsold, and any other income of the foundations in or towards the maintenance of any school maintained as a voluntary aided school in the Diocese of Salisbury in which religious instruction is given in accordance with the doctrines of the Church of England.

> " (2) After payment of any expenses of administration the governing body may, subject to the further order of the Minister of Education in each case, apply the net proceeds of the aforesaid sales and any other capital moneys of the foundations in or towards the improvement, enlargement or erection of any such school which is, or is to be, maintained as a voluntary aided school."

It is argued for the defendants that this power of letting and sale, coupled with the directions for dealing with the resultant money, necessarily overrides the beneficial interest of the plaintiff, The land, it is said, is the premises of the foundation; the power of sale is not limited by time or circumstances; there is no scope for dealing with the proceeds of sale by paying it to the plaintiff—all is earmarked by statute for administration expenses and educational charity. I do not consider that to be correct. In the present case, as soon as the school closed down in 1956 it ceased, by force of the resulting trust or reverter, to be " premises of the foundation ", those resulting trusts having been those on which the land, since 1949, had inter alia been held by the first defendant. The power of sale under the scheme consequently in my judgment no longer existed, nor did the provisions, of course, for the disposal of the proceeds of sale.

The matter is not an easy one, but the statute and scheme, which make no provision for compensation, do not, I consider, in clear terms override and extinguish the resulting trust in favour of the plaintiff.

I ought to add that para. 9 of the scheme is in the following terms, under the cross-heading " Questions under Scheme ",

> "Any question as to the construction of this scheme, or as to the regularity or validity of any acts done or about to be done under this scheme, shall be determined conclusively by the Minister of Education upon such application made to him for the purpose as he thinks sufficient."

Inasmuch as any scheme made by the executive with the approval of Her Majesty in Council is, by the statute, not open to challenge as ultra vires, and has itself the force of statute, the inclusion of such a paragraph as this might not be universally acclaimed. However, it is common ground among the parties that since the Minister has not made, and has not been asked to make, any determination in this matter, the jurisdiction of the court to determine the rights of the plaintiff is not ousted.

I therefore conclude that the plaintiff has successfully surmounted the various hurdles set in his path, and will declare that since the closure of the school on Jan. 9, 1956, the first defendant has held the land the subject of the 1840 grant in trust for the plaintiff absolutely and beneficially.

Declaration accordingly.

Solicitors: *Gregory, Rowcliffe & Co.* (for the plaintiff); *Darley, Cumberland & Co.*, agents for *Jonas & Parker*, Salisbury (for the first defendant); *Treasury Solicitor* (for the second defendant).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

NOTE. A

R. *v.* LIVERPOOL JUSTICES, *Ex parte* ROBERTS.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Salmon, JJ.), May 10, 1960.]

Certiorari—Costs—Party not appearing—Costs not awarded against party who does not appear. B

[As to awards of costs on applications for certiorari, see 11 HALSBURY'S LAWS (3rd Edn.) 81, para. 149.]

Motion.

Kenneth Thomas Roberts applied for an order of certiorari to bring up and quash an order made by Liverpool justices sitting at Dale Street on May 20, 1959, convicting him of a charge of exceeding the speed limit. C

On Mar. 25, 1959, the applicant appeared before the justices and evidence was given for the prosecution. After examination, cross-examination and re-examination of a police officer, the proceedings were interrupted by a clerk from another court, who had arrangements to make about other cases. After D he had left the court, before the applicant's case had been presented, the chairman announced that the magistrates found the case proved. It was pointed out that the applicant's case had not been heard and the matter was adjourned until May 20, 1959. On that day the applicant's solicitor took the view that the matter was concluded at the previous hearing when the chairman had said they found the case proved. The justices imposed a fine and ordered the E applicant's licence to be indorsed and a conviction was entered. The court granted an order of certiorari. Costs were asked for against the prosecution. The court adjourned to consider its decision and gave judgment later the same morning.

R. Stock for the applicant.

The respondents did not appear and were not represented. F

LORD PARKER, C.J., delivered the judgment of the court and continued: Counsel for the applicant, who has now successfully applied for certiorari, asks for costs. So far as costs against the magistrates are concerned, it has been the practice not to grant costs against magistrates or tribunals merely because they have made a mistake in law but only if they have acted improperly, that is to G say, perversely or with some disregard for the elementary principles which every court ought to obey, and even then only if it was a flagrant instance. In the present case the court is satisfied that the denial of justice here was a pure mistake and was not a flagrant instance; indeed, counsel has not asked for costs against the magistrates. He asks for costs only against the prosecution. So far as that is concerned, it is the recollection of all the members of this court H that the general practice is not to award costs against a party who does not appear to resist an application of this sort. That is not to say that there may not be cases where the court thinks it right to order that party to pay costs if, for instance, he has materially contributed to the error giving rise to the application. Accordingly, following that usual practice, the court in the present case refuses costs.

Solicitors: *J. B. Izod*, agent for *Arthur D. Dean & Co.*, Manchester (for the applicant).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

R. *v.* HIS HONOUR JUDGE SIR DONALD HURST, *Ex parte* SMITH.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Gorman and Ashworth, JJ.), May 5, 1960.]

Certiorari—County court—Jurisdiction—Certiorari to quash—Directions of county court judge made without jurisdiction—Appeal against decision of electoral registration officer—Non-compliance with C.C.R., Ord. 43, *r.* 8—*County Courts Act*, 1959 (7 *&* 8 *Eliz.* 2 *c.* 22), *s.* 107, *s.* 115 (1).

Elections—Registration appeals—Procedure—Non-compliance with rules—Names of ninety-six persons placed on electoral register—Appeal by objector to county court only in regard to six names—Procedure in regard to selected appeals not followed—No jurisdiction of county court to direct registration officer to remove remaining ninety names from register—Representation of the People Act, 1949 (12, 13 *&* 14 *Geo.* 6 *c.* 68), *s.* 45 (1) (*c*), *s.* 45 (4)—*C.C.R., Ord.* 43, *r.* 8.

Notwithstanding s. 107 and s. 115 (1)* of the County Courts Act, 1959, certiorari will lie to remove into the High Court and quash a decision of a county court judge if he has acted without jurisdiction (see p. 389, letter G, post).

G., an elector, objected to the inclusion in the register of electors for Oxford of the names of ninety-six members of Ruskin College, Oxford (including the applicant), his objection being based on the ground of their "residence". The objections were disallowed by the electoral registration officer, and G. appealed from his decision to the county court, under s. 45 (1) (c) of the Representation of the People Act, 1949, in regard to six members of the college (not including the applicant). Neither the applicant nor the other eighty-nine members of the college were made parties to the appeal, and no notice was served on them under C.C.R., Ord. 43, r. 8 (1)†, informing them that the appeal was to be heard as a test case. On Feb. 9, 1960, the county court judge allowed the appeal against four of the respondents and dismissed it against the other two. On Feb. 12, 1960, the judge, in order to remove any misunderstanding of the effect of his judgment, gave directions in which he said that he had dealt with the appeals before him as a test case, and that he intended the effect of his decision to be that none of the names of the persons objected to by G. before the registration officer (with the exception of the two persons against whom the appeal was dismissed) should appear on the electoral register to be published on Feb. 15, 1960. The registration officer, acting under s. 45 (4)‡ of the Act of 1949, thereupon removed from the register the names of the applicant and the other eighty-nine members of the college, as well as the names of the four in regard to whom G. had successfully appealed. On motions by the applicant for an order of certiorari to quash the directions of the county court judge and an order of mandamus requiring the registration officer to add to the electoral register the names of the applicant and the other eighty-nine members of the college,

Held: the county court judge had no jurisdiction to give the directions of Feb. 12, 1960, because (a) neither the applicant nor the other eighty-nine members of the college were parties to the appeal, and (b) the procedure prescribed by C.C.R., Ord. 43, r. 8 (e.g., by the selection of one appeal), had not been followed; accordingly the directions would be quashed, and an order of mandamus would issue to the electoral registration officer to insert the applicant's name in the register.

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* The terms of s. 107 and s. 115 (1) are printed at p. 389, letters D and E, post.

† The provisions of r. 8 are printed at p. 388, letter I, post.

‡ The terms of s. 45 (4) are printed at p. 387, letter I, post.

[**Editorial Note.** The decision in the present case that certiorari lies to A
quash the judgment of a county court, that is to say, an inferior court of civil jurisdiction, seems to resolve a question on which there has been, it is thought, no decisive authority for very many years. That certiorari might lie for this purpose may be inferred from the judgment of WILLIAMS, J., in *Kemp* v. *Balne* ((1844), 1 Dow. & L. 885 at p. 887), but the contrary view was supported by the judgment of PARKE, B., in *Lawes* v. *Hutchinson* ((1835), 3 Dowl. 506 at p. 508). B
Applications for certiorari after judgment in a county court have been entertained, though not granted, in recent times and in *R.* v. *Worthington-Evans* ([1959] 2 All E.R. at p. 459, letter D) the Divisional Court accepted the view that certiorari to quash would lie in a proper case, though the court did not in fact grant it. See, generally, 11 HALSBURY'S LAWS (3rd Edn.) 128, note (d) and 130, note (g). C

As to certiorari to county courts, see 9 HALSBURY'S LAWS (3rd Edn.) 331, para. 799; and 11 HALSBURY'S LAWS (3rd Edn.) 127, 128, para. 235.

As to registration appeals, see 14 HALSBURY'S LAWS (3rd Edn.) 42-46, paras. 75-83.

For the Representation of the People Act, 1949, s. 9 (1) (c) and s. 45 (1) (a), see 8 HALSBURY'S STATUTES (2nd Edn.) 585, 615. D

For the County Court Rules, 1936, Ord. 43, r. 3 (2), r. 8, see the COUNTY COURT PRACTICE, 1960, p. 1386.]

Cases referred to:

Bradlaugh, Ex p., (1878), 3 Q.B.D. 509; 47 L.J.M.C. 105; 38 L.T. 680; 42 J.P. 583; 16 Digest 441, *3070*.

Gilmore's Application, Re, [1957] 1 All E.R. 796; sub nom. *R.* v. *Medical Appeal Tribunal, Ex p. Gilmore*, [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498; 3rd Digest Supp. E

R. v. *Worthington-Evans, Ex p. Madan*, [1959] 2 All E.R. 457; [1959] 2 Q.B. 145; [1959] 2 W.L.R. 908.

Motions for certiorari and mandamus. F

Counsel for Samuel Adolphus Smith, the applicant, moved (i) for an order of certiorari to remove into the High Court and to quash directions given by His Honour JUDGE SIR DONALD HURST, at Oxford County Court, orally on Feb. 12, 1960, and in writing on Mar. 4, 1960; and (ii) for an order of mandamus requiring the electoral registration officer for the City of Oxford to add to the electoral register for the city published on Feb. 15, 1960, the names of the applicant G
and the other members of Ruskin College, Oxford, affected by the directions of the learned county court judge.

By a decision given on Dec. 31, 1959, the electoral registration officer disallowed the objections of Mr. P. G. Gower regarding the registration of ninety-six members of Ruskin College, including the applicant. Mr. Gower appealed to the county court judge from the decision of the registration officer in regard to H
six of the ninety-six persons (not including the applicant), and, by an order dated Feb. 9, 1960, the judge allowed the appeal in regard to four of the six persons and dismissed it in regard to the other two. By the directions given orally on Feb. 12, 1960, and in writing on Mar. 4, 1960, the judge said that he had dealt with the case before him as a test case, and indicated that he intended the effect of his decision to be that none of the names of persons objected to by Mr. I
Gower before the registration officer should appear on the register with the exception of the two persons in regard to whom Mr. Gower's appeal was dismissed. The registration officer removed from the register published on Feb. 15, 1960, all the ninety-four names (including that of the applicant), as directed.

The grounds of the applications for certiorari and mandamus were (among other grounds): (i) that the appeal to the county court by Mr. Gower named as respondents only six persons and did not include the applicant or the other members of Ruskin College mentioned in the directions, who accordingly were

A not parties to the appeal; (ii) that no notice of selected appeal had been served on the applicant or on any of the other eighty-nine members of the college by the registrar of Oxford County Court in accordance with C.C.R., Ord. 43, r. 8 (1), or at all; and (iii) that, in the circumstances, the judge had no jurisdiction to order the exclusion of the names of the applicant and the other eighty-nine members of the college from the electoral register, and that, after the order of B Feb. 9, 1960, the judge was functus officio in the matter.

S. Tumim for the applicant.

David Trustram Eve for the electoral registration officer.

J. R. Cumming-Bruce as amicus curiae.

LORD PARKER, C.J.: In these proceedings counsel moves on behalf of C one Samuel Adolphus Smith for an order of certiorari to quash a decision of His Honour JUDGE SIR DONALD HURST in the Oxford County Court so far as it consists of certain directions given by him on Feb. 12, 1960. He also applies for an order of mandamus to the electoral registration officer for the City of Oxford to put the applicant's name, Samuel Adolphus Smith, in the register of electors.

It is a curious case, and it arises in this way. There are a number of students of D Ruskin College, some ninety-six in all, who claim that they qualify to have their names put on the register. A claim was made by a Mr. Gower against the registration by the officer of those ninety-six names. That claim was made under s. 9 (1) (c) of the Representation of the People Act, 1949. Section 9 (1) reads:

> "With a view to the preparation of the registers, the registration officer E shall . . . (c) except in Northern Ireland, determine all claims for registration duly made by any person, and all objections to any person's registration duly made by another person appearing from the electors lists to be himself entitled to be registered."

Having heard and considered the matter, the registration officer decided that the names of all those ninety-six persons, which included the applicant's in this F case, should be and remain in the register. Mr. Gower, not satisfied with that decision, appealed, as he was entitled to do, under s. 45 (1) (a) of the Act of 1949, to the Oxford County Court. His appeal, however, only related to six names out of the ninety-six. Those six names did not include the name of the applicant. He and the other eighty-nine were not made parties to the appeal.

On Feb. 9, 1960, the appeal was heard. The registration officer and Mr. Gower G were both represented. The question at issue in the appeal was as to the meaning of "residence" for the purposes of qualifying to be on the register (1), and the county court judge decided that four out of those six were resident outside the City of Oxford and not entitled to be on the register, whereas he held that two of them were resident in Oxford and entitled to be on the register. On that day an order was drawn up allowing the appeal of Mr. Gower in respect of those four H and dismissing the appeal in so far as it related to the two. The register was due to be published shortly after that on Feb. 15, and it was clear that the judge and the registration officer were both anxious that the matter should be put in order and the register published. On Feb. 12 the solicitors representing Mr. Gower and the registration officer appeared before the judge, no doubt to elucidate what was to be done as the result of the order which had been drawn up on Feb. 9. I The registration officer was clearly very concerned about it because, under s. 45 (4) of the Act of 1949, it was his duty to give effect to the decision. Section 45 (4) reads:

> "Notice shall be sent to the registration officer in manner provided by rules of court of the decision of the county court or of the Court of Appeal on any appeal by virtue of this section, and the registration officer shall

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(1) See s. 1 and s. 4 of the Representation of the People Act, 1949; 8 HALSBURY'S STATUTES (2nd Edn.) 578, 580.

> make such alterations in the electors lists or register as may be required to A give effect to the decision."

The county court judge thereupon gave directions on Feb. 12 (although, I think, they were not signed until Mar. 4), in these terms:

> "I give directions to remove any misunderstanding of the effect of my judgment given Feb. 9, 1960, as follows:—From the statement of the B registration officer it is clear to me that the case was dealt with by him as a test case, covering objections raised by Mr. Gower to ninety-six names of persons at Ruskin College and The Rookery. That the appeals before me were similarly a test case—my decision being sought on the point of principle covering all ninety-six names. That I so dealt with it, and indicate that I intend that the effect of my decision is, that none of the names of persons C objected to by Mr. Gower before the registration officer should appear on the register to be published on Feb. 15, 1960, with the exception of Brian George Ball and Francis Richard Adams."

Mr. Ball and Mr. Adams were the two people in respect of whom the appeal had failed and whom the county court judge thought to be rightly in the register. In the directions he is accordingly saying, in effect, to the registration officer: D "My intention was that you should remove from the register not merely the four in respect of whom the appeal has succeeded, but all the other ninety", the other ninety including the name of the applicant in these proceedings. The registration officer obeyed those directions and removed all the ninety from the register which was published on Feb. 15.

Counsel for the applicant points out that those ninety persons were in no E way parties to the appeal, and his submission is that in those circumstances the directions of the county court judge in regard to them were made without jurisdiction. He says, secondly, that, if they can be said to be parties to the appeal in any form, then at any rate the procedure envisaged under the County Court Rules was not complied with. Thirdly, he points out that the effect of this is that all the ninety, including the applicant, have been removed from the F register without the facts of each case ever being considered—in other words, without it being decided whether the tests of qualification laid down by the county court judge apply or do not apply in their cases.

That the applicant was not a party to the appeal is clear. The county court judge apparently thought, and with some reason, that the whole procedure from the beginning had been in the nature of a test case, and in giving those directions G he assumed that, although the applicant was not a party to the appeal, arrangements had been made whereby he was in some way bound by the result, and in the same way with regard to the other eighty-nine. It is quite clear, however, that that was not so, and not only that, but the procedure envisaged under the County Court Rules was not complied with. C.C.R., Ord. 43, r. 3 (2), provides:

> "The respondents to the appeal shall be the registration officer and the H party (if any) in whose favour the decision of the registration officer was given."

Accordingly, each one should be made the subject of an appeal. It is then provided by C.C.R., Ord. 43, r. 8:

> "(1) Where two or more appeals involve the same point or points of law, I the judge may direct that one appeal shall be heard in the first instance as a test case, and thereupon the registrar shall send to the parties to the selected appeal and to the parties to the other appeals and to the registration officer a notice . . .
>
> "(2) If within five days of the service of such notice on him any party to an appeal other than the selected appeal gives notice to the registrar that he desires the appeal to which he is a party to be heard, the registrar shall give notice . . . to the other parties to the appeal that the appeal will be heard,

A

> " (3) If the registrar receives no such notice within the time so limited, the parties to the appeal shall be bound by the decision on the selected appeal without prejudice to their right to appeal to the Court of Appeal, and an order similar to the order made in the selected appeal shall be made without further hearing."

B That is providing machinery for test cases or representative actions, whatever one calls them. The first step in each case is that the parties whose names are in dispute are all to be parties to appeals. Then it can be ruled, when there are a number of appeals, that one should be treated as a selected appeal. No such machinery was employed in this case. It seems to be clear that in the result the applicant and, indeed, the other eighty-nine, have been removed from the register without their individual cases in regard to residence being considered.

C That being so, it seems to me that the directions of Feb. 12 were clearly given without any jurisdiction, and prima facie the applicant is entitled to an order of certiorari to quash those directions. It has, however, been pointed out that s. 107 of the County Courts Act, 1959, provides:

D

> " Subject to the provisions of any other Act relating to county courts, no judgment or order of any judge of county courts, nor any proceedings brought before him or pending in his court, shall be removed by appeal, motion, certiorari or otherwise into any other court whatever, except in the manner and according to the provisions in this Act mentioned."

By s. 115 (1) it is provided:

E

> " The High Court or a judge thereof may order the removal into the High Court, by order of certiorari or otherwise, of any proceedings commenced in a county court, if the High Court or judge thereof thinks it desirable that the proceedings should be heard and determined in the High Court."

F Looking at those two sections it is to be observed that the only remedy by way of certiorari dealt with is in regard to the removal of the proceedings from one court into another and not for the purposes of quashing. Notwithstanding that, I am quite satisfied that certiorari will lie in this case. The leading case on the matter is *Ex p. Bradlaugh* (2), where MELLOR, J., put the principle in these words (3):

G

> " It is well established that the provision taking away the certiorari does not apply where there was an absence of jurisdiction. The consequence of holding otherwise would be that a metropolitan magistrate could make any order he pleased without question."

H To the same effect is a number of cases including, coming to quite recent times, *R.* v. *Worthington-Evans, Ex p. Madan* (4) and *Re Gilmore's Application* (5). I am quite satisfied that certiorari will lie against a county court judge if he has acted without jurisdiction, notwithstanding the sections of the County Courts Act, 1959, to which I have referred. Accordingly, it seems to me that in this case it would be right for the court to grant the order to quash the directions given by the county court judge on Feb. 12.

I So far as the registration officer is concerned, unfettered, if I may use that term, by those directions, he would in the ordinary way not have removed the applicant's name from the register, and I think that the applicant accordingly is entitled to the almost consequential relief of an order of mandamus to the registration officer to put the applicant's name in the register. For these reasons I would order certiorari and mandamus to issue.

GORMAN, J.: I agree, and I desire to add nothing.

ASHWORTH, J.: I also agree.

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(2) (1878), 3 Q.B.D. 509.

(3) (1878), 3 Q.B.D. at p. 513.

(4) [1959] 2 All E.R. at p. 459; [1959] 2 Q.B. at p. 152.

(5) [1957] 1 All E.R. at p. 804; [1957] 1 Q.B. at p. 588.

S. Tumim: Your Lordship's judgment grants certiorari in relation to " the directions " of the county court judge, and mandamus with regard to the name of the applicant. The relief claimed was as regards the names of the members of the college referred to in the directions, which includes the further eighty-nine persons who are in the same position as the applicant. A

LORD PARKER, C.J.: This is a single application on behalf of Adolphus Smith: he is the only person on whose behalf you are moving. All that we can do, therefore, in these proceedings is to quash the directions generally, as having been given without jurisdiction. The order of mandamus that we make is that the applicant's name shall be inserted in the register. No doubt, the registration officer without any order of mandamus will, when unfettered by the directions of Feb. 12, insert all the names in the register, but it is not for us to order that. B C

Orders of certiorari and mandamus granted.

Solicitors: *Field, Roscoe & Co.*, agents for *Reeves & Co.*, Oxford (for the applicant); *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Oxford (for the electoral registration officer); *Treasury Solicitor.*

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*] D

E

PRACTICE DIRECTION. F

QUEEN'S BENCH DIVISION.
PROBATE, DIVORCE AND ADMIRALTY DIVISION.

Jury—Trial by—Opening of pleadings by junior counsel for plaintiff or petitioner —Practice to be discontinued. G

Representations have been made to us by the Bar Council that the practice whereby in jury actions the junior counsel for the plaintiff or the petitioner opens the pleadings serves no useful purpose and might with advantage be discontinued. After consulting the judges of our respective Divisions, we are in agreement with this view and accordingly direct that henceforth the practice should be discontinued.

PARKER OF WADDINGTON, C.J.
MERRIMAN, P.

May 12, 1960.

FELIX *v.* GENERAL DENTAL COUNCIL.

[PRIVY COUNCIL (Lord Keith of Avonholm, Lord Jenkins and Lord Morris of Borth-y-Gest), April 4, May 11, 1960.]

Dentist—Professional misconduct—" Infamous or disgraceful conduct in a professional respect "—Overcharging and wrongful certification under national health service—Question of infamous conduct one of mixed fact and law—Degree of culpability—Dentists Act, 1957 (5 *&* 6 *Eliz.* 2 *c.* 28), *s.* 25 (1) (*b*).

To make good a charge of " infamous or disgraceful conduct in a professional respect " under the Dentists Act, 1957, s. 25 (1) (b), in relation to a matter such as the keeping of prescribed dental records, there must, generally speaking, be some element of moral turpitude or fraud or dishonesty in the conduct complained of, or such persistent and reckless disregard of the dentist's duty in regard to records as can be said to amount to dishonesty for this purpose (see p. 400, letter C, post).

The appellant, who was a dentist registered under the Dentists Act, 1957, and whose name was included in the National Health Service list, was charged before the Disciplinary Committee of the General Dental Council with charges of wrongfully claiming fees for fillings which had not been done and with one charge of wrongfully certifying that sixteen fillings were required to render a patient dentally fit when thirteen of these were not necessary. The appellant admitted two charges of claiming fees for fillings which had not been done, but denied that it was done with any fraudulent or dishonest intent or with a view to obtaining remuneration to which he was not entitled; and he attributed the mistakes made to carelessness on his own part and on that of his young receptionist, to whom he entrusted the keeping of his records of the treatment carried out for the patients concerned without adequate supervision or checking. With regard to the charge of wrongful certification, it was not in dispute that the appellant had carried out three fillings, and as to the remainder he maintained that some of them were old fillings which needed replacement while the others required, or were likely to require, attention. Expert witnesses, who gave evidence for the council before the disciplinary committee, admitted that the question of the need for treatment was one of opinion and did not aver that the appellant's opinion could not honestly have been held. On appeal from a finding of the disciplinary committee that the appellant was guilty of infamous or disgraceful conduct in a professional respect,

Held: the cases of overcharging fell short of the degree of culpability required to constitute infamous or disgraceful conduct in a professional respect and, on the evidence, there should not be imputed to the disciplinary committee an implied finding that the appellant had not honestly held the opinion that the treatment, alleged to have been wrongfully certified, was needed; the question whether a dentist's conduct amounted to infamous or disgraceful conduct in a professional respect was a mixed question of fact and law, open to review by an appellate tribunal, and the appellant had been wrongly found guilty.

Appeal allowed.

[As to grounds for disciplinary proceedings in the case of registered dentists, see 26 HALSBURY'S LAWS (3rd Edn.) 94, para. 213; and as to appeals, see ibid., p. 104, para. 236; and for cases on the subject, see 34 DIGEST 561, 562, *205-209*.

For the Dentists Act, 1957, s. 25, see 37 HALSBURY'S STATUTES (2nd Edn.) 696.]

Cases referred to:

Allinson v. *General Council of Medical Education & Registration*, [1894] 1 Q.B. 750; 34 Digest 562, *206*.

Benmax v. *Austin Motor Co., Ltd.*, [1955] 1 All E.R. 326; [1955] A.C. 370; [1955] 2 W.L.R. 418; 3rd Digest Supp.

Appeal.

Appeal by Dudley Ernest Lyncoln Wager Felix from a determination of the Disciplinary Committee of the General Dental Council made on Nov. 12, 1959, that the appellant had been guilty of infamous or disgraceful conduct in a professional respect, and that his name be erased from the dentists' register. The facts are set out in the judgment of the Board.

N. G. L. Richards, Q.C., and *N. J. L. Brodrick, Q.C.*, for the appellant.

J. P. Widgery, Q.C., and *P. T. S. Boydell* for the respondents.

LORD JENKINS: This is an appeal under s. 29 of the Dentists Act, 1957, from a determination of the Disciplinary Committee of the General Dental Council, made on Nov. 12, 1959, under s. 25 and s. 26 of the same Act, that the appellant had been guilty of infamous or disgraceful conduct in a professional respect and that his name be erased from the register.

The appellant is a native of Sierra Leone, and received his early education there. He is, and was at all material times, a dentist registered under the Dentists Act, 1957, and his name is, and was at all material times, included in the Bristol National Health Service list. He is twenty-nine years of age, and, having qualified as a licentiate in dental surgery at Glasgow in 1955, began practising on his own account in August, 1957. The determination under appeal was the outcome of an inquiry held by the Disciplinary Committee on Nov. 11 and 12, 1959, with respect to the following charge against the appellant:

> " That being a registered dentist:
>
> " (1) Having accepted Miss Ann Mathews of 623 Portway, Shirehampton, Bristol, in or about February, 1958, as a patient under the National Health Service (General Dental Services) Regulations, you wrongfully claimed fees for three fillings which had not been done.
>
> " (2) Having accepted Mrs. Alkmina Moger of 2 Hallards Close, Lawrence Weston, Bristol, in or about April, 1958, as a patient under the terms of the said regulations, you wrongfully claimed fees for two fillings when only one filling had been done.
>
> " (3) Having accepted Mrs. Beryl Dennis of ' Appletreewick ', Barracks Lane, Shirehampton, Bristol, in or about April, 1958, as a patient under the terms of the said regulations:
>
> (i) you wrongfully certified on form E.C.17 that sixteen fillings were required to render the patient dentally fit, when in fact thirteen of these fillings were unnecessary;
>
> (ii) you wrongfully claimed fees for four fillings when only three fillings had been done.
>
> " And that in relation to the facts alleged you have been guilty of infamous or disgraceful conduct in a professional respect."

In the course of the inquiry, para. (2) of the charge was amended by the insertion of the words " in one tooth " between the words " two fillings " and " when only . . .". At the conclusion of the inquiry, the Disciplinary Committee determined (a) that the facts alleged against the appellant in each paragraph of the charge had been proved; (b) that, as regards para. (1) (Miss Mathews) and para. (3) (i) and (ii) (Mrs. Dennis), the appellant had, in relation to the facts proved, been guilty of infamous or disgraceful conduct in a professional respect; but (c) that, as regards para. (2) of the charge (Mrs. Moger), the appellant had not, in relation to the facts proved, been guilty of such conduct; and on these findings the Disciplinary Committee directed that the name of the appellant should be erased from the register.

To make the details of the charge intelligible, it is necessary to refer briefly to two forms on which a dentist on the National Health Service list is required to record with respect to each patient the treatment needed in order to make the patient dentally fit, and the work actually done. These forms are prescribed by the National Health Service (General Dental Services) Regulations, 1954 (S.I. 1954 No. 742). Under para. 5 in Part 1 of Sch. 1 to these regulations, a dentist is required to keep a dental record in respect of each patient, in which he records the treatment given and the date or dates on which it is given. He is also required to keep in respect of each patient the dental estimate form (E.C.17) as to which instructions are given in para. 7 of the same part of the same Schedule. This form is somewhat complicated. For the present purpose, it is enough to say that a new patient should be required to sign Part 10 signifying his or her willingness to undergo treatment, the dentist being then required to examine the patient and record the condition of the teeth on a chart (Part 1 of the form) and also to set out in column 1 of Part 2 the whole of the treatment in his opinion required to make the patient dentally fit, and, if the patient is not willing to undergo the whole of such treatment to set out in column 2 of Part 2, particulars of such part of that treatment as the patient is willing to undergo. The dentist should also insert in column 1 of Part 2 his charges for the treatment proposed in accordance with a prescribed scale. Then (subject to approval of the estimate by higher authority when required by the regulations, which did not require it in the cases now under review) the dentist proceeds to do (as the case may be) the whole of the work specified in column 1 of Part 2, or so much of that work as is specified in column 2. On completion of the work, the dentist certifies such completion in Part 7 of the form, specifying the amount claimed for it, and the patient certifies in Part 11 that, to the best of his or her belief, the work has been done. Finally, the completed form is submitted by the dentist for payment, and its accuracy is obviously of great importance.

The appellant admits that he accepted the three ladies named in the charge as his patients under the terms of the National Health Service (General Dental Services) Regulations as alleged in the charge, and that, in the case of Miss Mathews (whose treatment began on Feb. 28, 1958), he submitted form E.C.17 claiming fees for sixteen fillings when only thirteen had been done; and that, in the case of Mrs. Dennis (whose treatment began on Apr. 15, 1958), he submitted form E.C.17 claiming fees for four fillings when only three had been done; and that, in the case of Mrs. Moger (whose treatment began on or about Apr. 21, 1958), he submitted form E.C.17 claiming fees for two fillings when apparently only one had been done. But in the case of Mrs. Moger (as appears from the amendment to para. (2) of the charge), the claim was made in respect of two fillings in one tooth, and the appellant explained in his evidence at the inquiry that the treatment in this instance began with two cavities, which merged into one in the course of the appellant's operations, and that the need for a corresponding alteration in form E.C.17 was overlooked. It would seem that the Disciplinary Committee accepted this explanation as affording sufficient ground for acquitting the appellant of infamous or disgraceful conduct in the case of Mrs. Moger. Be that as it may, they did, in fact, so acquit him, and, accordingly, this part of the charge must not be held against him in the present appeal. The three cases with which their Lordships have so far dealt, now reduced to two by the Disciplinary Committee's decision in the case of Mrs. Moger, may conveniently be referred to as the cases of " overcharging ". The appellant's defence in regard to them is to the effect that, while he admits the fact of overcharging, he denies that it was done with any fraudulent or dishonest intent or with a view to obtaining remuneration to which he was not entitled; and attributes the mistakes admittedly made to carelessness on his own part and on that of his receptionist, to whom he entrusted the keeping of his records of the treatment carried out for the patients concerned without adequate supervision or checking.

There remains the more serious matter raised in para. (3) (i) of the charge to the effect that the appellant wrongfully certified on form E.C.17 with respect to Mrs. Dennis that sixteen fillings were required to make the patient dentally fit when, in fact, thirteen of such fillings were unnecessary. As regards this head of charge (which may conveniently be referred to as the case of wrongful certification), the appellant admitted that, on June 10, he submitted form E.C.17 in respect of Mrs. Dennis certifying that sixteen fillings were required to render the patient dentally fit; but it was not in dispute that he had, in fact, filled three of them, and as to the remaining thirteen he has throughout maintained the opinion that old fillings in ten of them which had been previously filled were defective and needed replacement, and the other three were charted as suspect and requiring (or likely to require) attention.

Prior to the present inquiry, the matters complained of in the charge had been investigated by an entirely different body, namely, the local Dental Service Committee constituted under the National Health Service (Service Committees and Tribunal) Regulations, 1956 (S.I. 1956 No. 1077). There were, in fact, two such investigations, the first of which, held on July 23, 1958, dealt with the matters concerning Mrs. Dennis now alleged in para. (3) (i) and (ii) of the charge. The recommendations of the Dental Service Committee on that occasion were to the following effect:—(i) That the Minister of Health be asked to authorise the Executive Council to withhold the sum of £500 from the appellant's remuneration. (ii) That until further notice the appellant should, before commencing any treatment, other than an examination or emergency treatment, be required to submit for prior approval to the Dental Estimates Board estimates in respect thereof. (iii) That the appellant be paid fees only in respect of the work found to have been satisfactorily completed. The second investigation by the Dental Service Committee was held on Oct. 13, 1958, and dealt with the matters alleged in para. (1) and para. (2) of the present charge. The recommendations made by the Dental Service Committee on that occasion were to the following effect:—(i) That the Minister be asked to authorise the Executive Council to withhold the sum of £500 from the appellant's remuneration. (ii) That the appellant be severely censured and warned that, in the event of a further breach of the terms of service, the council might consider making representations to the tribunal (namely, the tribunal constituted under s. 42 of the National Health Service Act, 1946) that his continued inclusion in the Bristol Dental List would be prejudicial to the efficiency of the service. The Minister of Health subsequently approved the recommendation of July 23, 1958, but in respect of the recommendation of Oct. 13, 1958, reduced the amount to be withheld from £500 to £200.

In the course of the present inquiry, reference was made to the investigations held by the Dental Service Committee, and to the outcome of those investigations in the shape of the recommendations to which their Lordships have alluded, and documents relating to these investigations have been included in the record prepared for the purposes of the present appeal. It is not in dispute that these investigations were held by the Dental Service Committee and that these recommendations resulted; but this, in their Lordships' view, carries the matter no further. The appellant's conduct was admittedly careless, and it is, perhaps, not surprising that the Dental Service Committee should have regarded it as involving breaches of the appellant's terms of service as a dentist on the National Health Service list, and as calling for severe measures. But the question which the Disciplinary Committee had to decide in the present inquiry was whether, in relation to the matters complained of in the charge as proved or admitted before them, the appellant had been guilty of infamous or disgraceful conduct in a professional respect.

The outcome of the Dental Service Committee's investigations having been communicated to the General Dental Council, the registrar to that body, by letter dated July 30, 1959, informed the appellant that he was liable to be summoned before the Disciplinary Committee on a charge of infamous or disgraceful conduct in a professional respect within the meaning of s. 25 of the Dentists Act, 1957, on grounds set out in the letter which raised the cases of Mrs. Dennis, Mrs. Moger and Miss Mathews and of another patient whose case has not been pursued in the present proceedings, and asked the appellant for any explanation or observations that he might wish to make. That letter elicited a reply from the appellant dated Aug. 1, 1959, which contained the following passages on which Mr. Widgery (appearing as solicitor to the council) placed some reliance:

> " I am filled with much humiliation and mortification by this, as I have never in my life been so bluntly accused of stealing. Indeed, I am very deserving of the fine which has been imposed upon me, as a result of gross carelessness of failing to check all National Health forms and keeping accurate records.
>
> " I must explain that, as a young practitioner, I had at the time of these cases, very little experience, in fact under a year's experience of the Health Service. I made the rather serious mistake of leaving all forms and records to the entire care of my receptionist. Although she cannot be held responsible for mistakes made in my surgery, her marked irresponsibility was discovered when these cases were brought to light, and she was in consequence instantly dismissed. These mistakes did not only result in very bad charting, but it also resulted in the claiming of fees for work not done, and also in the not claiming of fees for work done.
>
> " I am sincerely ashamed of myself that my recklessness has occasioned such suspicion. I am very sorry indeed that this is so, and can assure you, that since this happened, everything possible is being done to ensure that it does not happen again."

The only witness before the Disciplinary Committee on the appellant's side was the appellant himself.

In his examination-in-chief (record, p. 27), there is this passage with respect to the receptionist and the case of Miss Mathews:

> " Q.—How old was the assistant you first had? A.—She was sixteen.
>
> Q.—Is she still with you? A.—No.
>
> Q.—When did she cease to be with you? A.—She was instantly dismissed after the Bristol Executive Council found the errors on the charting.
>
> Q.—You appreciate do you not that you are responsible yourself for any errors? A.—Yes; I do appreciate that.
>
> Q.—Let us take these matters one by one. First of all, with regard to Miss Mathews, it is said that in the E.C.17 which you sent in you claimed for fillings in 4 lower right and 7 lower left when there was no cavity. Is that right? A.—Yes; that is quite correct.
>
> Q.—How did that come about? A.—These three teeth in question were charted as suspicious, and during treatment of the patient I decided to keep those teeth under observation as the patient was to have a six monthly appointment for a check-up, and I instructed my nurse and put it down in the record card that these teeth should be obliterated from the E.C.17.
>
> Q.—Did you check the E.C.17 before it was sent in? A.—No, I did not.
>
> Q.—Why not? A.—Because I was extremely busy and I had trained my nurse. I hoped she was doing everything exactly as I had told her. I had a very busy practice and could not do the paper work and see to patients as well."

It will be observed that the appellant here refers to three teeth in answer to a question concerning two (i.e., 4 lower right and 7 lower left), but it would seem from later answers that there was a third tooth (i.e., 7 upper right) which, or a suspected cavity in which, should likewise have been " obliterated from the E.C.17 ".

As regards Mrs. Moger, the appellant (at p. 28 of the record), after explaining how two cavities might be made into one during treatment, continued:

> " That is what happened in Mrs. Moger's case, and my inefficient secretary was warned but failed to alter the card in connexion with the teeth.

> The Chairman: Did that happen or did you think that is what happened? A.—That is the usual thing that happened.
>
> Q.—How did you know you told your secretary to alter the card? A.—That is the usual thing I do.
>
> Q.—Do you remember who wrote on the E.C.17 in this case? A.—The nurse.
>
> Q.—How did you do it? A.—I call it out.
>
> Mr. Noble: Was that the girl of sixteen? A.—Yes; the same girl.
>
> Mr. Brodrick: At any rate, in either of those two cases, Miss Mathews or Mrs. Moger, did you intend to claim for fees to which you were not entitled? A.—Definitely no. I did not deliberately have any fraudulent intent."

As to the overcharging in the case of Mrs. Dennis, the appellant (record, p. 29) explained that she came to him the day before he was due to go on holiday and that he did three fillings in teeth 4, 6, and 7 upper left and told the receptionist which teeth he had done, implying that he left it to her to make the appropriate entries in the patient's record card. On his return from holiday, he received an official letter asking him to forward the E.C.17. He then took the patient's record card and found that it showed that he had done fillings in teeth 4, 5, 6 and 7 upper right, and proceeded to fill in the E.C.17 as the record card showed.

In the cross-examination of the appellant on the cases of overcharging (record, p. 35), this passage occurs:

> " Q.—Am I right in thinking that in the case of Miss Mathews you are admitting that you wrongfully claimed for three fillings which had not been done? A.—Yes.
>
> Q.—And in the case of Mrs. Moger am I right in thinking you admit that you wrongfully claimed fees for one filling which you had not done? A.—Yes.
>
> Q.—In the case of Mrs. Dennis is it right that you wrongfully claimed fees for four fillings when in fact you had only done three? A.—Yes.
>
> Q.—Your explanation is that you left all the charting to a young girl of sixteen? A.—Yes.
>
> Q.—You were too busy doing the work? A.—Yes; I was very busy indeed.
>
> Q.—You left all this to this young person? A.—Whom I had trained, yes.
>
> Q.—Do not you think that was a very unwise thing to do? A.—Yes; I appreciate that now.
>
> The Chairman: I think we shall expunge that last line as to what he thought of his activities."

As to the case of wrongful certification, also concerning Mrs. Dennis, it appears that Mrs. Dennis was not satisfied that all the treatment prescribed for her by the appellant was necessary, and consulted her doctor who referred her to another dentist, Mr. J. G. James; and that, the case having come to the notice of the Dental Estimates Board, they asked the appellant for Mrs. Dennis's E.C.17. The appellant, according to his evidence, entered on the E.C.17 the four fillings erroneously entered on Mrs. Dennis's record card as having been done and sent off the card as requested, making no claim for payment except for the four fillings which should have been only three, the fourth being the subject of the case of overcharging alleged with respect to Mrs. Dennis. Actually, it would seem that the E.C.17 as sent to the board showed sixteen fillings in column 1 of Part 2 of the form (which, as above explained, is designed for showing the treatment which, in the opinion of the dentist, is necessary), of which three had actually been done by the appellant, leaving thirteen remaining to be done of which ten had been filled before Mrs. Dennis came to him and the remaining three had no fillings in them. The appellant maintained throughout his evidence on this part of the case that the old fillings in the ten teeth which had been previously filled were defective and needed attention, while the three which had never been filled were suspect and likely to require attention. Consideration of this part of the case is complicated by the fact that it seems to have been the appellant's practice to enter in column 1 of Part 2 of the E.C.17 not merely work necessary to be done but work likely to be found necessary on further investigation, and, in the latter case, to delete the relevant entries from column 1 in the event of the work being found superfluous. In other words, he treated the entries in column 1 as provisional, and finalised them when the treatment was completed by reference to the work actually done. Thus, if Mrs. Dennis's treatment had gone to completion, the appellant, before certifying for his remuneration, would have struck out of column 1 any work which, in fact, had been found unnecessary. But the treatment was never completed because the Dental Estimates Board called in the E.C.17, and the appellant sent it to them just as it was, including the suspect cases. This practice was not warranted by the regulations, and, in fact, involved a misuse of column 1 which might well lead to confusion. The more important question, however, is whether, given this misapprehension on the appellant's part as to the use of column 1, he honestly believed that these thirteen teeth either needed, or were likely to be in need of, treatment. The appellant's evidence, if accepted, makes it clear that he did honestly so believe. Mr. James (who has already been mentioned) and Mr. Vernon Howarth, the two dentists who gave evidence for the council on the case of wrongful certification, disagreed with the appellant, but admitted that the matter was one of opinion and certainly did not say that no dentist could honestly be of the opinion expressed by the appellant.

As to the scope of the appellate jurisdiction conferred on their Lordships by s. 29 of the Dentists Act, 1957, counsel for the respondents accepted a submission made by counsel for the appellant to the effect that such an appeal is an appeal by way of re-hearing, to which the same principles apply as are applicable to an appeal to the Court of Appeal against the decision of a judge of the High Court sitting as a judge of fact at first instance, and, accordingly, their Lordships find it unnecessary to refer to the authorities cited by counsel for the appellant in support of this proposition. In this connexion, their Lordships were properly reminded of the principle that an appellate court should not lightly differ from the finding of a trial judge on a question of fact and that " it would be difficult for it to do so where the finding turned solely on the credibility of a witness ": see *Benmax* v. *Austin Motor Co., Ltd.* (1), and note the distinction drawn by that case between the finding of a specific fact (which, prima facie, is a matter for the judge of first instance) and the drawing of inferences from the facts specifically found which, subject to the weight properly due to the opinion of the trial judge, is a matter on which the appellate court may properly regard itself as free to form its own view.

Thus, in the present case, a finding by the Disciplinary Committee that the appellant claimed fees for work which had not been done, and as to the circumstances in which he did so would be a finding of specific facts which the appellate tribunal should, prima facie, accept; whereas a finding that, on the specific facts so bound, the appellant was, in relation to the matter in question, guilty of infamous or disgraceful conduct in a professional respect would be in the nature of an inference from the specific facts found, and, as such, more readily open to review. Their Lordships would add that the question whether, in relation to a given matter, a dentist has been guilty of infamous or disgraceful conduct is, in their opinion, a question of mixed fact and law, the question of law being whether, on the facts proved or admitted, the dentist has been guilty of infamous or disgraceful conduct within the meaning of s. 25 of the Act of 1957.

In applying the above principles to the present case, their Lordships are put in some difficulty by the circumstance that, beyond finding the facts alleged in each paragraph of the charge proved, the Disciplinary Committee gave no reasons for its determination. Their Lordships are thus left without any express guidance as to the view of the facts on which the Disciplinary Committee proceeded.

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(1) [1955] 1 All E.R. 326 at p. 327; [1955] A.C. 370 at p. 373.

Their Lordships have also found some difficulty with regard to the precise meaning and effect of the adverb " wrongfully " which appears in each paragraph of the charge and in the questions put to the appellant in the passage from his cross-examination quoted above. Each paragraph of the charge states the act complained of and states that it was " wrongfully " done. It may thus be argued that, in finding the facts alleged in each paragraph of the charge proved, the Disciplinary Committee have found that in each case the act complained of was not only done but was " wrongfully " done, and that this, without more, would suffice to convict the appellant of infamous or disgraceful conduct. The word " wrongfully " is, however, of wide and uncertain import. It can be regarded as adding nothing to the acts complained of, which were plainly wrongful in the sense that the appellant ought not to have done them. On the other hand, it may be regarded as imputing an unspecified degree of culpability of an undefined character ranging from mere carelessness to fraud or dishonesty; it clearly cannot be held that every act which can be characterised as " wrongful " in one sense or another is infamous or disgraceful. The Disciplinary Committee clearly recognised this in the case of Mrs. Moger, where they found the facts alleged to have been proved, including the allegation that the overcharge was made wrongfully, but, nevertheless, acquitted the appellant of infamous or disgraceful conduct in Mrs. Moger's case. Their Lordships think that the solution is to be found in r. 10 (2) of the General Dental Council Disciplinary Committee (Procedure) Rules, 1957 (S.I. 1957 No. 1265). That sub-rule provides:

> " Where in a case relating to conduct the committee have found that the facts or any of them alleged in any charge have been proved to their satisfaction (and have not on those facts recorded a finding of not guilty) [as they did in Mrs. Moger's case] the committee shall forthwith consider and determine whether in relation to the facts found proved as aforesaid the respondent is guilty of infamous or disgraceful conduct in a professional respect . . ."

This shows that the inquiry is to be carried out in two stages, the first directed to finding whether the primary or specific matters of fact alleged, including any facts bearing on the question of culpability or " wrongfulness " have been proved, and the second to determining whether, on the facts so found, the respondent has been guilty of infamous or disgraceful conduct.

Counsel for the respondents argued that the proved or admitted fact that the overcharging took place (no matter how it came about) sufficed to raise a prima facie case with respect to the overcharging in the cases of Miss Mathews and Mrs. Dennis, on which the Disciplinary Committee were warranted in finding the appellant guilty of infamous or disgraceful conduct unless he tendered an explanation which the Disciplinary Committee found acceptable; and counsel invited us to infer that the Disciplinary Committee did not accept the appellant's story to the effect that he relied on the receptionist to make the proper entries or corrections in the documents. Their Lordships cannot accept this submission. It appears to them that the matter fell to be judged by reference to the evidence as a whole, including the appellant's explanation of the way in which the cases of overcharging arose. It further appears to their Lordships that, inasmuch as the findings of the Disciplinary Committee on the cases of overcharging contained nothing to indicate that it did not accept the appellant's evidence as true, and inasmuch as the solicitor, in conducting the council's case, did not challenge the truth of the appellant's explanation in cross-examination or otherwise, but, on the contrary, relied on it as involving gross carelessness on the appellant's part, and inasmuch as the cases of overcharging were never put as cases involving fraud or dishonesty on the part of the appellant as distinct from carelessness or negligence, the Disciplinary Committee must be taken to have accepted the appellant's explanation as true, and to have held that the appellant's conduct in relation to the cases of overcharging with respect to Miss Mathews and Mrs.

A Dennis amounted, on his own explanation of it, to infamous or disgraceful conduct.

The question, then, is whether, on this view of the facts, the Disciplinary Committee was justified in finding the appellant guilty of infamous or disgraceful conduct. Their Lordships find this meaning assigned to the word "infamous" in the OXFORD ENGLISH DICTIONARY:

B
> "2. Deserving of infamy: of shameful badness, vileness, or abominableness; of a character or quality deserving utter reprobation."

(One of the strongest adjectives of detestation.) The meaning assigned to the word "disgraceful" is hardly less extreme:

> "2. Full of or fraught with disgrace; that brings disgrace upon the agent; shameful, dishonourable, disreputable."

C

It must, of course, be remembered that, in the present case, the words "infamous or disgraceful conduct" should be construed in conjunction with the words "in a professional respect"; and we were referred in this connexion to the well-known case of *Allinson* v. *General Council of Medical Education & Registration* (2), where an injunction was sought by a medical practitioner against the D defendant council from allowing his name to remain struck out from the medical register kept by the defendant council under the Medical Act, 21 & 22 Vict. c. 90. By s. 29 of that Act, the name of any medical practitioner judged after due inquiry by the council "to have been guilty of infamous conduct in any professional respect" was liable to be erased from the register. The plaintiff's name having been so erased, he brought his action for an injunction to the effect E above mentioned, claiming that the proceedings leading to the erasure of his name were void on the ground (inter alia) that there was no evidence on which the council could reasonably find that the plaintiff had been guilty of "infamous conduct in any professional respect". This contention was rejected by COLLINS, J., and the Court of Appeal, and LORD ESHER, M.R., said this (3):

> "I adopt the definition which my brother LOPES has drawn up of at any F rate one kind of conduct amounting to 'infamous conduct in a professional respect', viz.: 'If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency', then it is open to the General Medical Council to say that he has been guilty of 'infamous conduct in a professional respect'. G The question is, not merely whether what a medical man has done would be an infamous thing for any one else to do, but whether it is infamous for a medical man to do. An act done by a medical man may be 'infamous', though the same act done by anyone else would not be infamous; but, on the other hand, an act which is not done 'in a professional respect' does not come within this section. There may be some acts which, although they H would not be infamous in any other person, yet if they are done by a medical man in relation to his profession, that is, with regard either to his patients or to his professional brethren, may be fairly considered 'infamous conduct in a professional respect', and such acts would, I think, come within s. 29."

It should be noted that the conduct there in question was very different from the conduct with which the present case is concerned, and was, on the face of it, I quite plainly of an infamous, or for that matter disgraceful, character; and the jurisdiction which the court was asked to exercise was the limited jurisdiction exercisable by way of control of the proceedings of a domestic tribunal, as distinct from the full appellate jurisdiction invoked in this case.

Granted that, in accordance with LORD ESHER's definition of "infamous" conduct in a professional respect, the full derogatory force of the adjectives "infamous" and "disgraceful" in s. 25 of the Act of 1957 must be qualified by the consideration that what is being judged is the conduct of a dentist in a professional respect, which falls to be judged in relation to the accepted ethical standards of his profession, it appears to their Lordships that these two adjectives nevertheless remain as terms denoting conduct deserving of the strongest reprobation, and, indeed, so heinous as to merit, when proved, the extreme professional penalty of striking-off. To make good a charge of " infamous or disgraceful conduct in a professional respect " in relation to such a matter as the keeping of the prescribed dental records it is not, in their Lordships' view, enough to show that some mistake has been made through carelessness or inadvertence in two or even three cases out of (to quote the figures in the present case) 424 patients treated during the period in which the mistakes occurred, whether the carelessness or inadvertence consisted in some act or omission by the dentist himself or in his ill-advised delegation of the making of the relevant entries to a nurse or receptionist and omitting to check the forms to see that she had done as she was told. To make such a charge good there must, in their Lordships' opinion (generally speaking), be some element of moral turpitude or fraud or dishonesty in the conduct complained of, or such persistent and reckless disregard of the dentist's duty in regard to records as can be said to amount to dishonesty for this purpose. The question is to some extent one of degree, but, in their Lordships' view, the cases of overcharging with which this appeal is concerned clearly fall short of the degree of culpability required.

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(2) [1894] 1 Q.B. 750.

(3) [1894] 1 Q.B. at pp. 760, 761.

As to the case of wrongful certification, their Lordships cannot regard the appellant's misuse of column 1 of Part 2 of the form E.C.17 as amounting to infamous or disgraceful conduct. With respect to the treatment alleged to have been unnecessary, the evidence (as their Lordships have already observed) showed that, according to the appellant, he honestly believed it to be necessary (or likely to be found necessary) while the dentists who disagreed with him did not claim that the opinion expressed by the appellant was one which no dentist could honestly hold. In this state of the evidence, their Lordships think it would be wrong to impute to the Disciplinary Committee an implied finding to the effect that the appellant did not honestly hold that opinion. An honestly held opinion, even if wrong, in their Lordships' view plainly cannot amount to infamous or disgraceful conduct.

Counsel for the respondents very fairly admitted that, so far as the cases of overcharging alone were concerned, the Disciplinary Committee would hardly go the length of erasing a dentist's name merely on account of three such cases (involving in the present proceedings a total, including Mrs. Moger, of £5 7s. 7d. out of total payments of some £1,915). The record before their Lordships contains passages suggesting that there may have been other cases of overcharging besides those included in the charge—see, in particular, the appellant's letter of Aug. 1, 1959, referred to above; but it was the duty of the Disciplinary Committee to judge the matter simply by reference to the cases alleged in the charge, or, in other words, " secundum allegata et probata ". This plainly appears from the language of r. 10 (2) of the General Dental Council Disciplinary Committee (Procedure) Rules, 1957, to which reference has already been made. It was, therefore, right for the Disciplinary Committee to confine their consideration of the charge to the matters specifically alleged in the charge; and their Lordships taking the same course find themselves unable to hold that the appellant was rightly found guilty of infamous or disgraceful conduct in relation to the facts alleged.

For these reasons, their Lordships are of opinion that this appeal should be allowed, and that the determination of the Disciplinary Committee should be discharged, and will humbly advise Her Majesty accordingly. The General Dental Council must pay the costs of the appeal.

Appeal allowed.

Solicitors: *Le Brasseur & Oakley* (for the appellant); *Waterhouse & Co.* (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

HAYNES *v.* HAYNES AND SAWKILL.

[Probate, Divorce and Admiralty Division (Wrangham, J.), April 4, 5, 6, 7, 1960.]

Divorce—Evidence—Cross-examination—Petition by husband on ground of adultery—Cross-prayer by wife in answer alleging cruelty—Husband asked question in cross-examination tending to show that he had committed adultery—Whether cross-prayer alleging cruelty a different proceeding from petition alleging adultery—Whether husband obliged to answer—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 32 (3).

The husband petitioned for divorce on the ground of the wife's adultery. The wife by her answer admitted adultery but pleaded condonation and connivance, and misconduct conducing to the adultery. The wife also cross-prayed for divorce on the ground of the husband's cruelty. During the trial the husband was asked a question which tended to show that he had been guilty of adultery. Objection was made to the question on the ground that the husband was entitled to the protection of s. 32 (3) of the Matrimonial Causes Act, 1950, which provides that no witness in any "proceedings instituted in consequence of adultery" shall be liable to be asked or be bound to answer any question tending to show that he has been guilty of adultery unless he has already given evidence in disproof of the alleged adultery. On behalf of the wife it was argued that the question was admissible on the issue of cruelty.

Held: the question would be disallowed since there was only one set of proceedings before the court, and those proceedings were "instituted in consequence of adultery".

Observations of Hodson, L.J., in *Lewis* v. *Lewis* ([1958] 1 All E.R. at p. 861) applied.

Divorce—Connivance—Distinction between conduct conducing and connivance—Motive—Wife forced by husband to leave matrimonial home—Husband knowing that a continuance of adultery by wife was a likely result.

A spouse who does an act foreseeing that the result of the act may well be that the other party to the marriage commits adultery is conducing to adultery by that party; but if the motive with which the act is done is in order to bring about the adultery, then the act may well be held to constitute connivance at the adultery (see p. 405, letter H, post).

The wife left the matrimonial home in 1957 and the husband obtained the services of a housekeeper to look after the children. In October, 1957, the wife began to live in adultery with the co-respondent. On Apr. 6, 1958, the parties were reconciled and the wife returned to the husband who condoned her adultery. However, the husband decided that the reconciliation would not succeed and made it clear to the wife that she must leave and that the housekeeper would come back. His motive was to get the wife out of the house, not to encourage her adultery, though he foresaw that it would probably continue. On Apr. 10, 1958, the wife returned to live with the co-respondent. On a petition by the husband for divorce on the ground of the wife's adultery, the wife pleaded, inter alia, that he had connived at her adultery, and that he had been guilty of misconduct conducing to the adultery.

Held: although the husband had conduced to the continuance of the wife's adultery, he was not guilty of connivance at its continuance, since it was not his motive in forcing the wife to leave the matrimonial home that she should continue her adulterous association with the co-respondent.

Definition of the issue of connivance given by Lord Merriman, P., in *Churchman* v. *Churchman* ([1945] 2 All E.R. at p. 195) considered and applied.

[As to protection of witnesses in proceedings instituted in consequence of adultery, see 12 Halsbury's Laws (3rd Edn.) 372, para. 812; and for cases on the subject, see 27 Digest (Repl.) 519-521, *4618-4640*.

As to connivance at continuation of adultery, see 12 Halsbury's Laws (3rd Edn.) 297, para. 589, note (c); and for cases on the subject, see 27 Digest (Repl.) 378-381, *3118-3135*.

For the Matrimonial Causes Act, 1950, s. 4 (2) (b), s. 32 (3), see 29 Halsbury's Statutes (2nd Edn.) 394, 417.]

Cases referred to:

Churchman v. *Churchman*, [1945] 2 All E.R. 190; [1945] P. 44; 114 L.J.P. 17; 173 L.T. 108; 27 Digest (Repl.) 379, *3131*.

Evans v. *Evans & Blyth*, [1904] P. 378; 73 L.J.P. 114; 91 L.T. 600; 27 Digest (Repl.) 519, *4620*.

Lang v. *Lang*, [1954] 3 All E.R. 571; [1955] A.C. 402; 119 J.P. 368; [1954] 3 W.L.R. 762; 3rd Digest Supp.

Lewis v. *Lewis*, [1958] 1 All E.R. 859; [1958] P. 193; [1958] 2 W.L.R. 747; 3rd Digest Supp.

M. (*otherwise D.*) v. *D.*, (1885), 10 P.D. 75, 175; 54 L.J.P. 68; 27 Digest (Repl.) 441, *3718*.

S. (*otherwise G.*) v. *S.*, [1907] P. 224; 76 L.J.P. 118; 27 Digest (Repl.) 441, *3719*.

Sims v. *Sims*, [1949] W.N. 208; 93 Sol. Jo. 390; 27 Digest (Repl.) 521, *4640*.

Taylor v. *Taylor & King*, *Taylor* (*otherwise Woodhead*) v. *Taylor*, (1923), 128 L.T. 797; 27 Digest (Repl.) 519, *4623*.

Woodbury v. *Woodbury*, [1948] 2 All E.R. 684; [1949] P. 154; [1949] L.J.R. 40; 27 Digest (Repl.) 383, *3154*.

Petition.

This was a petition by the husband for divorce on the ground of the wife's adultery.

The parties were married on Oct. 6, 1945, and there were three children, born in 1946, 1949 and 1951. Except for intervals caused by absences of the wife from the matrimonial home, the parties lived together until Apr. 19, 1957, when the wife left the matrimonial home. On May 11, 1957, the wife met the co-respondent. Later the same month the wife returned to the husband but left again in June, 1957. The husband then obtained the services of a housekeeper to look after the three children. In October, 1957, the wife began to live in adultery with the co-respondent. On Apr. 6, 1958, however, the wife returned to the husband who knew of her association with the co-respondent. On Apr. 10, 1958, however, the wife again, and for the last time, left the matrimonial home and returned to live in adultery with the co-respondent until October, 1959.

The husband presented a petition for divorce on the ground of the wife's adultery with the co-respondent. By her answer the wife admitted adultery with the co-respondent but alleged that the husband had on Apr. 6, 1958, condoned the adultery prior to that date, and had connived at and been accessory to the adultery after Apr. 10, 1958. She also alleged that by his wilful neglect and cruel conduct he had conduced to the adultery after Apr. 10, 1958. The wife further cross-prayed for a divorce on the ground of the husband's cruelty and prayed for the exercise of the court's discretion in her favour notwithstanding her adultery. By his reply the husband denied all the allegations in the answer.

At the trial before Wrangham, J., counsel for the wife when cross-examining the husband asked the husband a question which tended to show that the husband had committed adultery. Counsel for the husband objected on the ground that the husband was entitled to the protection provided by the Matrimonial Causes Act, 1950, s. 32 (3), since the proceedings were " instituted in consequence of adultery ". Counsel for the wife contended that the question was asked not in relation to the adultery issue raised in the petition but in relation to the charge of cruelty raised in the answer. WRANGHAM, J., disallowed the question and gave his reasons in his judgment.

R. J. A. Temple, Q.C., and *H. S. Law* for the husband.
N. N. McKinnon, Q.C., and *N. Taylor* for the wife.
The co-respondent appeared in person.

WRANGHAM, J.: It is perhaps convenient at this moment to deal with the question which arose on the law of evidence during the course of the trial, and on which I ruled at the time but indicated that I would give my reasons in my judgment. Counsel for the wife tendered in cross-examination of the husband a question, of which I need say no more than this, that, by common consent, it tended to show that the husband had been guilty of adultery. It was not contended by counsel for the husband, and could not be contended, in view of that which has been said by the Court of Appeal in *Lewis* v. *Lewis* (1) and by PEARCE, J., in *Sims* v. *Sims* (2) that the question or the answer to it would be irrelevant. On the contrary, it was conceded that the question and answer must be relevant to the issue of cruelty which arose on the cross-prayer of the answer. Counsel for the husband objected to this question on the ground that the husband was entitled to the protection of s. 32 (3) of the Matrimonial Causes Act, 1950, which provides that in any proceedings instituted in consequence of adultery no witness, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery, with a proviso which does not apply in this case. Counsel for the husband relies, in support of that contention, on the fact that the petition in this case is based on adultery.

Counsel for the wife's answer was that the question was not asked in relation to the issue arising out of the prayer for dissolution based on adultery, but that it was asked in relation to the issue arising out of that part of the answer which was a cross-prayer for dissolution on the ground of cruelty. The question, therefore, arises whether it can be said that there was one set of proceedings before me at the trial or more than one set of proceedings. On that question there is not, so far as I have been able to find, any direct authority. *Taylor* v. *Taylor & King* (3), and *S.* (*otherwise G.*) v. *S.* (4), are not, as they might at first sight appear to be, authority on this point because they turn on the wording of s. 3 of the Evidence Further Amendment Act, 1869, (5), which is not the same in a relevant particular as the wording of s. 32 (3) of the Matrimonial Causes Act, 1950. Nor can much reliance be placed on *M.* (*otherwise D.*) v. *D.* (6). In that case a petitioner in a nullity suit was held not to be protected by the statute against being cross-examined about adultery, although there was another suit set down for hearing apparently immediately after the nullity suit in which the husband was alleging adultery against his wife. Not much reliance can be placed on that because it appears that the two suits were separate suits which had not been consolidated but had been set down to be heard the one after the other.

I, therefore, have to form my own impression whether the proceedings before me were one or more than one. Counsel for the wife's argument involves a separation of the proceedings, of that which goes on at the trial, into various issues, each one of which issues constitutes a proceeding; though, indeed, it is to be remarked that the word in the section is not " proceeding " but " proceedings ", which suggests comprehensiveness. If an issue is ordered to be tried separately, there is authority that it constitutes separate proceedings: *Evans*

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(1) [1958] 1 All E.R. 859; [1958] P. 193.
(2) [1949] W.N. 208.
(3) (1923), 128 L.T. 797.
(4) [1907] P. 224.
(5) 9 HALSBURY'S STATUTES (2nd Edn.) 594.
(6) (1885), 10 P.D. 175.

v. *Evans & Blyth* (7). That seems to me to be a long way from holding that a A trial can be dissected into a number of issues arising thereat and that each one of those issues can be called separate proceedings. In many cases, and indeed in this one, only an artificial result would be produced, for if counsel for the wife is right in his arguments that the husband could have been cross-examined as to adultery and that answer taken into account in the cruelty proceedings, as they are on this hypothesis deemed to be, the question would B arise whether the tribunal was entitled to regard his answer to that question on the issue of connivance at adultery, which was also raised by the answer, and to which, in the circumstances of this case, his answer might well be directly relevant. If counsel for the wife is right, either the husband will lose the protection of the statute on the very question whether he should obtain a decree for adultery, if the tribunal takes into account his answer in cross-examination C and is therefore able to find connivance or is assisted in finding connivance; or the tribunal will have to regard his answer for one purpose of the trial and not for the other; and although the tribunal is expected sometimes to perform artificialities it seems to me that counsel for the wife's argument is less likely to be sound, if it will produce another artificiality.

Apart from that, the matter is all one of impression. The word " proceedings " D is apt to describe that which goes on at the trial—although I do not say that it is limited to that. If the legislature had intended that the protection of the statute should be limited to particular issues arising at the trial, I think that the legislature would have said so. I note that in *Lewis* v. *Lewis* (8), where the proceedings began with a petition by a husband based on cruelty met by an answer, also based on cruelty, which was subsequently sought to be amended E by adding a charge of adultery to the charge of cruelty, HODSON, L.J., said this (9):

> " These proceedings having been instituted not in consequence of adultery but . . . in consequence of cruelty, that express statutory provision does not apply and does not become applicable now that the amendment has F taken place. The answer was given in the witness-box when the proceedings were proceedings for cruelty."

The question had been asked in that case before the amendment had been allowed. Although the question did not directly arise in *Lewis* v. *Lewis* (8) there is, at least, in HODSON, L.J.'s words no trace of a suggestion that s. 32 (3) of the Matrimonial Causes Act, 1950, conferred protection in respect G of separate issues and not in respect of questions asked at a trial that had begun in consequence of allegations of adultery. In my judgment there was one set of proceedings only before me. That set of proceedings was instituted in consequence of adultery. The proceedings may have been instituted also in consequence of other things but that they were instituted in consequence of adultery seems to me to be plain. For those reasons I disallowed the question H that was tendered.

[HIS LORDSHIP reviewed the relations between the parties, stated the facts and continued:] It is impossible to make a confident finding as to the precise details of what occurred during those four days between Apr. 6, 1958, and Apr. 10, 1958, when the wife went back to the co-respondent. Judging as best I can from the demeanour of the witnesses and the probabilities of the case, I have come I to the conclusion, first, that there was a reconciliation on the first night; that intercourse did take place between husband and wife, and that by doing that the husband condoned the wife's adultery, which of course was no secret from him. I may add that even if I had not found that intercourse took place, I still would have found that by restoring the wife to the position of mistress of his household and mother of his children the husband was condoning the wife's previous adultery. Second, I have come to the conclusion that the initiative in putting an end to the reconcilation lay with the husband and not with the wife. Precisely what form that initiative took it is impossible to determine, but I think that he made it perfectly clear to the wife that she had got to go, and that he would see to it one way or another that it was too uncomfortable for her to stay. He was determined to get rid of her. It may well be that one of his reasons for coming to that conclusion was that the children were upset. One would not be surprised that the children were upset. They had enjoyed the attention of the housekeeper who, so far as I could judge from seeing her in the witness-box, would be likely to be a much more stable and sensible guardian for them than the mother was. The mother had left several times and had come back again, and that no doubt would be very upsetting for the children. I have little doubt that the children were upset by the mother's arrival and that they did regret the fact that the housekeeper had left and that the mother had come. It is unfortunate that that should be so, but the mother was herself to blame for it. It may be that that was a leading reason why the husband determined that the reconciliation would not do and that he would get rid of his wife and replace her by the housekeeper. As a sensible man, he knew that the result would be that the wife would go back to the co-respondent. Indeed, no secret was made of that; she telephoned to find out whether she could.

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(7) [1904] P. 378.

(8) [1958] 1 All E.R. 859; [1958] P. 193.

(9) [1958] 1 All E.R. at p. 861; [1958] P. at p. 200.

In those circumstances, it is contended on behalf of the wife that the husband not merely conduced to her subsequent adultery but that he connived at it. That his conduct conduced to her subsequent adultery seems to me to be plain beyond argument. He was, as I find, driving her out without just cause, and driving her out in circumstances in which he must, as a sensible man, have foreseen that she would be likely to go back to her lover.

The question is whether in those circumstances it should be held that he connived at her adultery. It is said (see RAYDEN ON DIVORCE (7th Edn.), at p. 209) that the distinction between conduct conducing to adultery and connivance at adultery is one which it is difficult to define; and I was not referred to any authority which assists me to define it. In *Churchman* v. *Churchman* (10), LORD MERRIMAN, P., delivering the judgment of the Court of Appeal, said (11) that the issue on an allegation of connivance is

> "whether on the facts of the particular case the husband was or was not guilty of the corrupt intention of promoting or encouraging either the initiation or the continuance of the wife's adultery . . ."

In the present case there is no question of his conniving at the initiation of the adultery. What is said is that he connived at its continuance. Now, it is to be observed that LORD MERRIMAN qualified the word "intention" by the adjective "corrupt"; and it appears from *Woodbury* v. *Woodbury* (12), that at least in that case "corrupt intention" was to be interpreted as meaning a willing consent. I hope that I have rightly interpreted LORD MERRIMAN if I say that a corrupt intention to encourage the continuance of adultery implies that the act done is done with the motive of encouraging the wife's adultery. In other words, a spouse who acts, foreseeing that the results of his act may well be adultery on the part of his spouse, is conducing to his spouse's adultery; but if the motive for his action is to bring that result about, then he may be held to be conniving at the adultery, not merely conducing to it. There is a difference between motive and intention, as explained in *Lang* v. *Lang* (13).

In the present case I do not think that the husband acted as he did from any motive of encouraging the wife's adultery. I do not think that he A cared in the least whether she continued to commit adultery or not. His motive was to get her out of the house and the housekeeper back again, which he effected in forty-eight hours. He might of course have acted from the motive of encouraging the wife's adultery because he wished to divorce her. In the present case, however, I do not draw the inference that he did act from any such motive. Had he been at this stage particularly anxious to divorce his B wife, he would probably have done so without ever entering into the reconciliation at all. In those circumstances, I am not prepared to find that the husband was moved by a corrupt intention to encourage the continuance of the wife's adultery, although I think that he foresaw that the continuance of her adultery was likely to be the result of what he did.

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(10) [1945] 2 All E.R. 190; [1945] P. 44.
(11) [1945] 2 All E.R. at p. 195; [1945] P. at p. 52.
(12) [1948] 2 All E.R. at p. 687; [1949] P. at p. 158.
(13) [1954] 3 All E.R. 571; [1955] A.C. 402.

I need only add that the wife and the co-respondent continued to live in C adultery from the time when the wife left the husband, Apr. 10, 1958, until a date in October, 1959. The result, therefore, in the present case is this. I am satisfied that adultery between the wife and the co-respondent is proved, both before Apr. 6, 1958 and between Apr. 6, 1958, and October, 1959. I am satisfied that the husband never connived at that adultery. I am satisfied that the husband constructively deserted his wife by turning her out on Apr. 10, 1958, D and that he thereby conduced to her adultery; not that desertion necessarily conduces to adultery, but in this particular case it did. I am not satisfied that the wife has proved any cruelty against the husband, despite the serious incident of the violence which occurred in January, 1956. I do not think that it would be right, in view of the fact that the matrimonial life continued for two years after that without any other incident of violence at all (indeed, without any other E cruelty at all) to find the husband guilty of cruelty. Indeed, the only form of conjugal unkindness I find proved against him relates to the last three or four days. If I had found that the husband's assault in January, 1956, had been revived by his conduct in April, 1958, so as to amount to cruelty I would nevertheless have refused to exercise my discretion in favour of the wife, because I do not regard the cruelty in any sense as that which broke up this marriage. F

I think it would be right, in spite of that which I have found against the husband, to exercise my discretion in favour of the husband in respect of both the desertion and the conduct conducing, which indeed are in effect the same thing, and in the discretion of the court to grant him a decree nisi in respect of the proved adultery of his wife. The prayer of the answer will therefore be rejected and a decree nisi granted.

Decree nisi.

Solicitors: *George L. Barnett & Co.*, Edgware, Middlesex (for the husband); *Cliftons* (for the wife).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

R. *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT, *Ex parte* CHICHESTER RURAL DISTRICT COUNCIL.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Gorman and Ashworth, JJ.), April 28, 1960.]

Town and Country Planning—Purchase notice—Confirmation—Quashing of confirmation—Speaking decision for confirmation stating a sole ground—Invalidity of that ground—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6 *c.* 51), *s.* 19 (1) (*a*).

A piece of coastal land of about two and a half acres at Selsey was subject to considerable erosion, and a large sum of money would be required to prevent further erosion. There were fourteen bungalows on part of the land and the remainder of the land was divided into seventeen plots which were let as caravan sites during the summer, under temporary planning permissions. The owner applied for permission to develop the land for residential purposes, but the application was refused. The owner then served on the local authority a purchase notice under s. 19* of the Town and Country Planning Act, 1947. The Minister of Housing and Local Government confirmed the purchase notice on the ground that " the land in its existing state and with the benefit of the temporary planning permissions . . . is of substantially less use and value to its owner than it would be if planning permission had been granted (without limitation as to time) for the rebuilding of the buildings . . . which formerly stood there and have been demolished since Jan. 7, 1937." On an application by the local authority for certiorari to quash the Minister's decision,

Held: the sole ground stated by the Minister was not a valid ground for confirming the purchase notice, because the question, under s. 19 (1) (a) of the Act of 1947, was whether " the land has become incapable of reasonably beneficial use in its existing state ", and not whether the land was of less use to the owner in its present state than if developed, and, therefore, certiorari to quash the Minister's decision would be granted.

[For the Town and Country Planning Act, 1947, s. 19 (1), see 25 HALSBURY'S STATUTES (2nd Edn.) 517.]

Motion for certiorari.

This was a motion on behalf of Chichester Rural District Council for an order of certiorari to remove into the High Court and quash a decision of the Minister of Housing and Local Government, dated Apr. 20, 1959, confirming a purchase notice under s. 19 of the Town and Country Planning Act, 1947, served on the applicants by George Edward John Bunn, referred to hereinafter as "the owner ", on Oct. 23, 1958, in respect of a parcel of land (containing some 2.65 acres) at West Beach, Selsey, Sussex.

The land in question was a narrow strip of coastal land which was subject to severe erosion. It lay in a gap between the sea defences constructed by the West Sussex Rivers Board and those constructed by the applicants. Originally the site had an area of three and a quarter acres on which there were twenty-three bungalows. Since 1937 a number of the buildings had disappeared. There were now fourteen shack bungalows on the site, and the remainder of the land was divided into seventeen plots to accommodate caravans during the summer, under planning permissions for limited periods (the latest expiring on Jan. 15, 1963). To protect the site the owner obtained planning permission to erect sea defence works and had already spent £1,092 on such works, but a further expenditure of £8,500 was needed to complete the scheme. In May, 1957, he applied to the applicants (as the local planning authority) for permission to redevelop the land by the erection of houses or bungalows, but permission was refused and his appeal against the refusal was dismissed by the Minister on

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* The relevant terms of s. 19 are printed at p. 408, letters E to H, post.

June 27, 1958. On Oct. 23, 1958, the owner served the purchase notice on the A
applicants. The applicants objected to the confirmation of the notice by the Minister and at their request an inspector appointed by the Minister conducted a hearing on Apr. 1, 1959, and made his report to the Minister on Apr. 6, 1959, recommending, subject to legal direction, that the purchase notice be confirmed. The Minister accepted the view set out in the inspector's report* and confirmed the purchase notice. B

The grounds on which the application for certiorari was based were, in particular, that the Minister was wrong in law (a) in deciding that the land was not capable of reasonably beneficial use; and (b) in taking into account allegations (i) that in the future the land might become so incapable; (ii) that the land was capable of other use even more beneficial than the present use but that the other use was forbidden by the decision of June 27, 1958; and (iii) that sea- C
defence works on the land were necessary but would, if done, cost an amount such as to make the use of the land unprofitable.

R. E. Megarry, Q.C., and *J. L. Harman* for the applicants, Chichester Rural District Council.

J. R. Cumming-Bruce for the respondent, the Minister of Housing and Local Government. D

LORD PARKER, C.J.: In this application counsel moves on behalf of Chichester Rural District Council for an order of certiorari to bring up and quash a decision of the Minister of Housing and Local Government dated Apr. 20, 1959, confirming a purchase notice served by a Mr. Bunn on the local authority under s. 19 of the Town and Country Planning Act, 1947. E

Section 19 (1) of that Act provides:

> " Where permission to develop any land is refused, whether by the local planning authority or by the Minister, on an application in that behalf made under this Part of this Act, or is granted by that authority or by the Minister subject to conditions, then if any owner of the land claims—(a) that the land has become incapable of reasonably beneficial use in its F
> existing state . . . he may . . . serve on the council of the county borough or county district in which the land is situated a notice (hereinafter referred to as a ' purchase notice ') requiring that council to purchase his interest in the land in accordance with the provisions of this section."

There are three heads of claim (paras. (a) (b) and (c)) in s. 19 (1), but only para. (a) is relevant in this case. Section 19 (2) provides: G

> " Where a purchase notice is served on any council under this section, that council shall forthwith transmit a copy of the notice to the Minister, and subject to the following provisions of this section the Minister shall, if he is satisfied that the conditions specified in paras. (a) to (c) of the foregoing subsection are fulfilled, confirm the notice, and thereupon the council H
> shall be deemed to be authorised to acquire the interest of the owner compulsorily in accordance with the provisions of Part 4 of this Act, and to have served a notice to treat in respect thereof on such date as the Minister may direct . . ."

It is right to mention that that section has been twice amended, once by s. 70 of the Town and Country Planning Act, 1954 (1), which provided for the insertion I
of a new sub-s. (2A) in s. 19, and also by the Town and Country Planning Act, 1959, (2). To the first amendment, in the view that I take of this case, it is unnecessary to refer. As regards the second amendment, that in any event did not apply to the purchase notice in this case.

The short facts were these. Mr. Bunn is the owner of a strip of coastal land at Selsey; it is 150 feet deep at the north-western end, and, I think, ninety-two feet at the south-eastern end. It is subject to erosion and has had the handicap of coming, as I understand it, between the areas of two local authorities. At one end the land is unprotected by seawalls and is subject to very considerable erosion. In order to prevent further erosion, Mr. Bunn would have to incur, he claims, some very large sum of money, in the nature of £8,500 over and above the sum of about £1,000 which he has already spent. He has felt that the only way in which he can preserve the land and incur that expenditure is if he can obtain permission to develop it for residential purposes. He applied in May, 1957, but permission was refused by the local authority. The refusal was confirmed by the Minister (3), and, accordingly, on Oct. 23, 1958, he served this notice to purchase. On Apr. 1, 1959, there was a hearing before an inspector appointed by the Minister. On Apr. 6, 1959, the inspector reported, and on Apr. 20 the Minister made the decision which it is sought to quash. The position at the moment is that there are fourteen bungalows on this land and there are some seventeen plots which are let to various tenants and on which caravans are placed in the summer months, and that is all subject to temporary permissions. The gross revenue produced at the moment is about £930 a year, but Mr. Bunn is clearly at risk. The temporary permissions may not be renewed, and he is faced with a very large expenditure of money if the land is not to be further eroded.

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* See p. 409, letters E and H, post.

(1) See 34 HALSBURY'S STATUTES (2nd Edn.) 992.

(2) See the Town and Country Planning Act, 1959, s. 35, Sch. 7 and Sch. 9.

It is unnecessary to read the inspector's report, because it is substantially set out in the Minister's decision. The Minister says this in his letter (4):

> "The inspector's report stated that in view of the legal complications involved in the case, he did not consider that he was in a position to make a comprehensive recommendation. He went on, however, 'the existing use of the site is a mixture of holiday, caravan, and residential use, some of which has only temporary planning permission. The planning application in respect of the site was for "redevelopment of building sites for residential purposes". Because of this my feeling is that the land in its existing state and with its existing permissions is substantially less useful to [Mr. Bunn] than it would be with permission for the permanent redevelopment for residential purposes'."

Pausing there, I think that it is quite clear that that of itself is not the test. I suppose that, in every case where land is worth developing and permission to develop is refused, the existing use of the land will be of less beneficial use —it will be less useful to the owner—than if it were developed. The test is whether it "has become incapable of reasonably beneficial use in its existing state." It may be that the word "reasonably" invokes some comparison, but the fact that the land is less useful, to use a comprehensive term, in its present state than if developed is clearly not the test. The Minister, having recited that, goes on to refer to a number of matters with which I need not deal, but towards the end of his letter he says this:

> "The Minister therefore accepts his inspector's view that the land in its existing state and with the benefit of the temporary planning permissions that have been granted is of substantially less use and value to its owner than it would be if planning permission had been granted (without limitation as to time) for the rebuilding of the buildings which stood on the land on the appointed day (5), or which formerly stood there and have been demolished since Jan. 7, 1937. He is accordingly satisfied that the conditions specified in paras. (a) to (c) of s. 19 (1) of the Act are fulfilled."

In my judgment that passage discloses an error of law in this speaking order or speaking decision. It is not a question whether the land is of less use, or of substantially less use, in its present state than if developed, and it is a non sequitur to say that, because it is of substantially less use than if developed, therefore the conditions specified in s. 19 (1) are fulfilled. I prefer to say nothing more about the case, because it may well be that there would have been other grounds for justifying the confirmation of this purchase notice, but I am satisfied that the ground, and the only ground, stated by the Minister, is not a valid ground at all, and, accordingly, in my judgment this decision will have to be quashed.

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(3) On June 27, 1958.

(4) The letter, dated Apr. 20, 1959, informing the local authority of the Minister's decision.

(5) July 1, 1948.

GORMAN, J.: I agree and I desire to add nothing.

ASHWORTH, J.: I also agree.

Order of certiorari granted.

Solicitors: *Lees & Co.* (for the applicants); *Solicitor, Ministry of Housing and Local Government.*

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

R. v. DORSET SESSIONS APPEAL COMMITTEE, *Ex parte* WEYMOUTH CORPORATION.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Byrne and Ashworth, JJ.), May 11, 12, 1960.]

Town and Country Planning—Enforcement notice—Appeal against notice—"Person aggrieved"—Whether local planning authority can be person aggrieved—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6 *c.* 51), *s.* 23 (4), (5).

A local planning authority whose enforcement notice under s. 23 of the Town and Country Planning Act, 1947, has been quashed by a magistrates' court on appeal under s. 23 (4) is not a "person aggrieved" by the decision of the magistrates' court within s. 23 (5) and has no right of appeal under that subsection, even though the magistrates' court has made an order for costs against the planning authority.

R. v. *London Quarter Sessions, Ex p. Westminster Corpn.* ([1951] 1 All E.R. 1032) applied; *R.* v. *Surrey Quarter Sessions, Ex p. Lilley* ([1951] 2 All E.R. 659) distinguished.

[As to the meaning of the words "person aggrieved" in enactments, see 25 HALSBURY'S LAWS (3rd Edn.) 293, para. 569, note (h).

For the Town and Country Planning Act, 1947, s. 23 (4), (5), see 25 HALSBURY'S STATUTES (2nd Edn.) 525.]

Cases referred to:

Ealing Borough Council v. *Jones*, [1959] 1 All E.R. 286; [1959] 1 Q.B. 384; [1959] 2 W.L.R. 194.

R. v. *London Quarter Sessions, Ex p. Westminster Corpn.*, [1951] 1 All E.R. 1032; [1951] 2 K.B. 508; 115 J.P. 350; 2nd Digest Supp.

R. v. *Nottingham Quarter Sessions, Ex p. Harlow*, [1952] 2 All E.R. 78; [1952] 2 Q.B. 601; 116 J.P. 397; 3rd Digest Supp.

R. v. *Surrey Quarter Sessions, Ex p. Lilley*, [1951] 2 All E.R. 659; [1951] 2 K.B. 749; 115 J.P. 507; 2nd Digest Supp.

Stepney Borough Council v. *Joffe*, [1949] 1 All E.R. 256; [1949] 1 K.B. 599; [1949] L.J.R. 561; 113 J.P. 124; 2nd Digest Supp.

Motion for mandamus.

A local planning authority, Weymouth Corporation, moved, pursuant to leave granted on June 13, 1959, for an order of mandamus to Dorset Quarter

Sessions Appeal Committee to hear and determine the corporation's appeal against the order of the Weymouth borough justices, on Dec. 5, 1958, quashing an enforcement notice served by the local planning authority on one John Redvers Westmacott, the respondent to this application, and ordering it to pay his costs. The facts are stated in the judgment of LORD PARKER, C.J.

J. S. Daniel and *J. R. B. Fox-Andrews* for the applicants, the local planning authority.

R. I. Threlfall for the respondent.

LORD PARKER, C.J.: An enforcement notice was served on a Mr. Westmacott, pursuant to s. 23 of the Town and Country Planning Act, 1947, by the applicants, Weymouth Corporation. He thereupon, as he was entitled to do under sub-s. (4) of that section, appealed against the notice to the borough justices. The borough justices on Dec. 5, 1958, allowed the appeal and quashed the enforcement notice. In so doing they made an order against the applicants to pay costs. Thereafter the applicants appealed to Dorset Quarter Sessions who refused jurisdiction on the ground that in their opinion the applicants were not within the words " any person aggrieved " in s. 23 (5). Thereafter there was some delay because the applicants conceived that their proper method of challenging the refusal of jurisdiction by quarter sessions was to appeal by way of Case Stated. It was not, as I understand it, until the Case was almost agreed and ready for signature that they appreciated that quarter sessions would refuse, as they did, to state a Case, taking the point that a matter such as this, a refusal of jurisdiction, fell to be dealt with by mandamus and not by Case Stated. Accordingly, it was not until June 13, 1959, that an application was made ex parte to this court for leave to move for an order of mandamus. Leave was granted and this matter now comes before the court.

Section 23 is a section which has come before this court only too often and I find it unnecessary to read the section in full; it will be enough if I read the relevant parts of sub-ss. (4) and (5). They are in these terms:

> " (4) If any person on whom an enforcement notice is served under this section is aggrieved by the notice, he may, at any time within the period mentioned in the last foregoing subsection, appeal against the notice to a court of summary jurisdiction for the petty sessional division or place within which the land to which the notice relates is situated; and on any such appeal the court—(a) if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof, or, as the case may be, that the conditions subject to which such permission was granted have been complied with, shall quash the notice to which the appeal relates; (b) if not so satisfied, but satisfied that the requirements of the notice exceed what is necessary for restoring land to its condition before the development took place, or for securing compliance with the conditions, as the case may be, shall vary the notice accordingly; (c) in any other case shall dismiss the appeal . . .
>
> " (5) Any person aggrieved by a decision of a court of summary jurisdiction under the last foregoing subsection may appeal against that decision to a court of quarter sessions."

This case is concerned with whether the local planning authority, the applicants in this case, can come within the words " any person aggrieved " in sub-s. (5) of s. 23. By s. 19 of the Interpretation Act, 1889, a " person " includes any body corporate or unincorporate unless the contrary intention is expressed, and the question is whether in its context here there is a contrary intention. Certain things are clear so far as this court is concerned: first, that a local planning authority cannot claim to be aggrieved merely because an enforcement notice has been quashed. It is enough to refer in that connexion to *Ealing Borough*

Council v. *Jones* (1). That case followed previous decisions of this court: *R.* v. *London Quarter Sessions, Ex p. Westminster Corpn.* (2) and *R.* v. *Nottingham Quarter Sessions, Ex p. Harlow* (3), and held that " a person aggrieved " does not cover an authority charged with certain duties under an Act of Parliament which has been frustrated in the performance of what it thought was its public duty; secondly, it is clear that any person against whom an order for costs has been made is " an aggrieved person ". Counsel for the respondent in the present case sought to argue that although that may be so in general, there were certain words in s. 23 (5) which showed that under that section a person who had been ordered to pay costs was not necessarily " an aggrieved person ". I find it unnecessary to deal with that contention. As at present advised I am satisfied that any person against whom an order for costs is made can be said to be " an aggrieved person ". A B C

So much is clear, but the real question here is whether in its context the phrase " any person aggrieved " is apt to cover a local planning authority. In other words, has Parliament evinced an intention to the contrary within s. 19 of the Interpretation Act, 1889. That point was specifically reserved by this court in *Ealing Borough Council* v. *Jones* (1), to which I have referred. Now the first thing to observe is that in s. 23 (4) the justices are authorised to do one of three different things: to quash, to vary or to dismiss. In not one of those three cases, having regard to the decisions, could a local planning authority be aggrieved because they would have merely been frustrated in the performance of what they thought was their duty. It is said, however, and rightly said, that the procedure in what is now s. 55 of the Magistrates' Courts Act, 1952, and r. 30 of the Magistrates' Courts Rules is attracted and incorporated, and there is no doubt that in an appeal under sub-s. (4) there is power in the justices to make such order as to costs as they think fit. Accordingly, so it is argued for the applicants in this case, an order for costs is something which must be taken to be contemplated, and that being so a local planning authority ordered to pay costs is prima facie " an aggrieved person " and there is nothing here to show an intention to the contrary. D E F

I find this by no means an easy question, but I have come to the conclusion that Parliament here has evinced an intention to the contrary. Once one realises that in regard to the three decisions authorised expressly by sub-s. (4) a local planning authority could have no right of appeal at all, it seems to me absurd in the extreme that they should have such a right by the mere incidence of having had an order for costs made against them. As Mr. Threlfall said in his forceful argument for the respondent, one might see a dissatisfied local planning authority saying: please make an order for costs against me and then I can appeal. To my mind the matter then becomes quite absurd. I prefer to look at it in this way, that Parliament never intended a local planning authority to have an appeal on the merits because they would not be aggrieved and it would be the height of absurdity that there should be an appeal on the merits if, and only if, an order for costs was made against them. For my part I think that those considerations show that a contrary intention is expressed in the very words of this section. G H

There is another matter which reinforces me in the view that I take of this case and that is a consideration not only of the section but of the Act itself in regard to the use made of the words " person " and " local planning authority ". I find it unnecessary to go through the various sections, but in no case that I have been able to find is a local planning authority included in the word " person ". Counsel for the applicants has pointed out what is undoubtedly true, that that is very natural because in general powers are being given to local I

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(1) [1959] 1 All E.R. 286; [1959] 1 Q.B. 384.
(2) [1951] 1 All E.R. 1032; [1951] 2 K.B. 508.
(3) [1952] 2 All E.R. 78; [1952] 2 Q.B. 601.

A planning authorities; a local planning authority may do this or may do that, and in such a context a local planning authority would have to be named as such and the word " person " would be quite inapt. Nevertheless there are many cases—I need only mention s. 10 (3), and s. 14 (3) (c)—where it would have been possible to use the word " person " to cover both the local planning authority and the person affected by the act of the local planning authority.

B It was this argument which found favour with this court in *R.* v. *London Quarter Sessions* (4) to which I have referred. LORD GODDARD, C.J., in his judgment in that case, said (5):

> " In the present case, the council having cancelled the registration of certain street traders, those traders appealed, and the magistrate reversed the decision of the council. The question is whether the council have any C right to appeal to quarter sessions under s. 64. I adhere to the opinion which I expressed in *Stepney Borough Council* v. *Joffe* (6), where I said: ' It is, perhaps, not without importance to notice that by s. 64 of the Act from the magistrate's decision a further appeal is given to quarter sessions, which would certainly enable the trader, though not, I think, the borough council, to appeal '. In my opinion, for several reasons, the borough council D was not given an appeal by s. 64. First, wherever ' borough council ' is mentioned in this Act it is always mentioned as the ' borough council ' and persons who may be affected by the orders of a council are mentioned as a ' person '. The right of appeal given by s. 64 is to ' any person deeming himself aggrieved '. In view of the structure of the Act and of the expressions used in the earlier sections, if it had been intended to give a E borough council an appeal, I should have expected that the Act would have said: ' Any person or any borough council deeming themselves aggrieved '."

That was the reason which was put first and foremost in that case by LORD GODDARD. CROOM-JOHNSON, J., based his decision on that point. He said (7):

> " I should want very plain language and very cogent arguments before I F should be disposed to say that the tribunal whose order has been set aside thereupon became persons ' aggrieved ' so that they can appeal against the order of the court of summary jurisdiction."

It is quite true that in that case no order for costs had been made, but it is quite clear from the reasoning in the judgments in that case that the same decision would have been arrived at if an order for costs had been made.

G In *R.* v. *Surrey Quarter Sessions, Ex p. Lilley* (8), the matter went the other way. The section giving the right of appeal was a section not contained in the Act under consideration, which was the Nurseries and Child-Minders Regulation Act, 1948, but a section of the Public Health Act, 1936, which was incorporated in that Act. The section in question, s. 301, provided that:

> " Subject as hereinafter provided, where a person aggrieved by any H order, determination or other decision of a court of summary jurisdiction under this Act is not by any other enactment authorised to appeal to a court of quarter sessions, he may appeal to such a court:
>
> " Provided that nothing in this section shall be construed as conferring a right of appeal from the decision of a court of summary jurisdiction in any case if each of the parties concerned might under this Act have required that I the dispute should be determined by arbitration instead of by such a court."

Those being the words of the section, LORD GODDARD, C.J., in that case said [of the proviso] (9):

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(4) [1951] 1 All E.R. 1032; [1951] 2 K.B. 508.
(5) [1951] 1 All E.R. at p. 1033; [1951] 2 K.B. at p. 510.
(6) [1949] 1 All E.R. 256 at p. 259; [1949] 1 K.B. 599 at p. 603.
(7) [1951] 1 All E.R. at p. 1034; [1951] 2 K.B. at p. 512.
(8) [1951] 2 All E.R. 659; [1951] 2 K.B. 749.
(9) [1951] 2 All E.R. at p. 661; [1951] 2 K.B. at p. 753.

> "That seems to indicate that it was in the mind of the legislature that, unless this provision had been put in, either one of the parties might have appealed." A

It seems to me that this court should follow the reasoning in *R.* v. *London Quarter Sessions* (10). It is true, of course, that each case must depend on the exact wording of the statute, but it seems to me that in the present case the wording is much closer to that in *R.* v. *London Quarter Sessions* (10) than in *R.* v. B *Surrey Quarter Sessions* (11). As I have already said, in *R.* v. *Surrey Quarter Sessions* (11) the section in question showed that "person" was being used as equivalent to "party". It was, moreover, a section taken from the Public Health Act, 1936, which would cover many cases where local authorities were involved, whether as defendants or as plaintiffs. It seems to me here that, applying those considerations, Parliament would, if it had intended otherwise, C have said in sub-s. (5) "any person or any local planning authority aggrieved by a decision of the court", etc.

For my part I would base my judgment on those two grounds. A number of other arguments were addressed to us—contentions based on the additional powers given to a local planning authority under s. 26 of the Act; an argument based on s. 24 (3) of the Act under which the same considerations might be in- D volved as under s. 23 (4) and where it is clear that the local authority could not appeal at all; and there were also arguments based on the fact that if a local planning authority can be a person within the words "any person aggrieved", so also could the Minister (see in this connexion s. 100 of the Act and also s. 41 (4)). For my part, however, I do not base my judgment on a consideration of any of those matters but merely on the two grounds to which I have referred. E

Finally, I should mention that we were invited in this case in any event not to exercise our discretion to grant the order having regard to the delay. Again that is a matter which I find it unnecessary to consider, though I think it right to say, in case this case goes further, that if I had, as at present advised I would have held that delay was no bar.

For these reasons I think that an order of mandamus should be refused. F

BYRNE, J.: I agree. I confess that I have found this a very difficult matter but I have come to the same conclusion as my Lord and in those circumstances I have nothing to add.

ASHWORTH, J.: I also agree.

Application refused.

Solicitors: *Blundell, Baker & Co.*, agents for *Town clerk*, Weymouth (for the applicants); *Sharpe, Pritchard & Co.*, agents for *Percy Smallman*, Weymouth (for the respondent).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

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(10) [1951] 1 All E.R. 1032; [1951] 2 K.B. 508.
(11) [1951] 2 All E.R. 659; [1951] 2 K.B. 749.

R. *v.* KEELEY.

[Court of Criminal Appeal (Lord Parker, C.J., Gorman and Ashworth, JJ.), May 2, 1960.]

Criminal Law—Sentence—Probation—Two probation orders imposed by different courts current at the same time—Subsequent offence—Whether first probation order remained effective to enable punishment to be imposed for the original offence—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 58), *s.* 3 (5).

On Nov. 28, 1958, the appellant was convicted at Oxford City Sessions of housebreaking and larceny and sentenced to eight years' preventive detention. On Mar. 23, 1959, the Court of Criminal Appeal varied this sentence by placing him on probation for three years. On Sept. 30, 1959, he was convicted at Hertfordshire Quarter Sessions of a similar offence and placed on probation for three years. On Jan. 5, 1960, he was convicted, again of a similar offence and also of false pretences, before East Sussex Quarter Sessions and sentenced to eighteen months' imprisonment. This offence was a breach of both the probation order made in the Court of Criminal Appeal which took effect as if made by Oxford City Sessions and also of the probation order made by Hertfordshire sessions. He was sentenced by Hertfordshire Quarter Sessions on Feb. 8, 1960, to twelve months' imprisonment for the offence of which he was convicted on Sept. 30, 1959. On Feb. 12, 1960, he was sentenced by Oxford City Sessions to seven years' preventive detention for the offence of which he was convicted on Nov. 28, 1958. On appeal against this last sentence,

Held: though the probation order made on Mar. 23, 1959, might be ineffective for supervision purposes during the currency of the second probation order, nevertheless the first probation order remained in full effect to enable the court to impose a punishment for the original offence of which the appellant had been convicted on Nov. 28, 1958; therefore the sentence of Feb. 12, 1960, was valid.

R. v. *Havant JJ., Ex p. Jacobs* ([1957] 1 All E.R. 475) considered and distinguished.

Appeal dismissed.

[As to probation orders generally and breaches of probation, see 10 Halsbury's Laws (3rd Edn.) 498, para. 911; p. 504, para. 918; and for cases on the subject, see 14 Digest (Repl.) 573, *5738*.

For the Criminal Justice Act, 1948, s. 3, see 28 Halsbury's Statutes (2nd Edn.) 352.]

Case referred to:

R. v. *Havant JJ., Ex p. Jacobs*, [1957] 1 All E.R. 475; 121 J.P. 197; 41 Cr. App. Rep. 62; [1957] 1 W.L.R. 365; 3rd Digest Supp.

Appeal.

This was an appeal with the leave of the Court of Criminal Appeal by the appellant, Jack Keeley, who had been sentenced on Feb. 12, 1960, at Oxford City Sessions by the recorder (J. G. Foster, Q.C.) to seven years' preventive detention. The sentence was for breach of a probation order made by the Court of Criminal Appeal on Mar. 23, 1959, on appeal from conviction and sentence before the Oxford City Sessions on Nov. 28, 1958, and accordingly, by virtue of s. 80 (5) of the Criminal Justice Act, 1948, the probation order was deemed to have been made by Oxford City Sessions. On conviction on Sept. 30, 1959, of a subsequent offence the appellant had been placed on probation by Hertfordshire Quarter Sessions for three years. He appealed on the ground that the two probation orders could not be effective against him at the same time.

G. Hardy for the appellant.

P. J. Crawford for the Crown.

LORD PARKER, C.J., gave the following judgment of the court: This appellant on Feb. 12, 1960, was sentenced to seven years' preventive detention for breach of a probation order. If ever a man merited that sentence it is this man, and the court feels that it is unnecessary to go into his previous convictions. It is enough to say that he has had many chances to pull himself together and has failed to do so.

The appeal, which is by leave of the court, concerns a purely technical matter. It arises in this way: On Nov. 28, 1958, he was convicted at Oxford City Sessions of housebreaking and larceny, and was sentenced to eight years' preventive detention. On Mar. 23, 1959, this court substituted a probation order for three years in very special circumstances, one of which was that the man's employer came before the court and in effect said: " I can look after this man ", and the court in those circumstances gave the prisoner every opportunity. Despite that, on Sept. 30, 1959, he was again convicted by the Hertfordshire Quarter Sessions of housebreaking and larceny, and that court put him on probation, another probation order, for three years. Notwithstanding that, on Jan. 5, 1960, he appeared before the East Sussex Quarter Sessions, when he was convicted again of housebreaking and larceny and also this time of false pretences, and he was sentenced to eighteen months' imprisonment. Prima facie, that conviction was a breach of both probation orders, that is, the probation order made by this court, which is deemed to be a probation order made by the Oxford City Sessions, and also a breach of the probation order imposed at the Hertfordshire Quarter Sessions. He was duly brought back before the Hertfordshire Quarter Sessions, when he received twelve months' imprisonment for breach of the probation order. Four days later he was brought before the Oxford City Quarter Sessions, when the recorder imposed the sentence now under appeal of seven years' preventive detention for breach of the order of this court which was deemed to be an order made by the Oxford City Quarter Sessions.

The sole point in the appeal is whether the original probation order made by Oxford City Quarter Sessions was still effective and alive once the Hertfordshire Quarter Sessions had imposed a second probation order for three years. Counsel for the appellant, who has said all that is possible for him, points out what I think is quite clear, that under the scheme of this Act (1) a man could not be under supervision in two districts by two different probation officers. Accordingly, so far as supervision at any rate is concerned, and to that presumably would have to be added any particular conditions or requirements of the respective orders, the only effective one would be the second one, that is, that made by Hertfordshire Quarter Sessions. But that is a long way from saying that the original probation order has become ineffective for all purposes. If it were, it is to be observed that a prisoner would go unsentenced, unpunished, for the original offence the subject of the first probation order. It would mean that the statement made to every prisoner pursuant to s. 3 (5) of the Criminal Justice Act, 1948, (2), that if he commits another offence he will be sentenced for the original offence, is of no effect at all. Prima facie, therefore, it seems to this court that, though the original probation order may be ineffective for supervision purposes, it should remain of full effect to enable the court to impose a punishment for the original offence.

Reference has been made to *R.* v. *Havant JJ., Ex p. Jacobs* (3). It is unnecessary to go into the facts of that case save to say that the two probation orders in that case were for one and the same offence; in other words, the court had made a probation order in respect of an offence, there was a breach of that probation

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(1) See Criminal Justice Act, 1948, s. 3, s. 8 and Sch. 5.

(2) Section 3 (5) of the Criminal Justice Act, 1948, so far as material, reads as follows: " Before making a probation order, the court shall explain to the offender in ordinary language the effect of the order . . . and that if he fails to comply therewith or commits another offence he will be liable to be sentenced for the original offence . . ."

(3) [1957] 1 All E.R. 475.

A order and, being brought up to be punished for the original offence, a second probation order was made. In those circumstances, the Divisional Court held that once the second probation order had been made the previous probation order could be no longer of effect. It is to be observed that they did not say that it had become ineffective for all purposes, but whether that was intended or not, the facts there were quite different because there the prisoner was being brought up B and punished by the second probation order for the original offence. If the argument here prevails, the prisoner would go unpunished for the original offence. In the judgment of this court the original probation order remained effective for the purpose of having the prisoner brought back and punished for the original offence. Accordingly, the recorder was fully justified in imposing the sentence he did, and this appeal must be dismissed.

C *Appeal dismissed.*

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

D

ROGERS *v.* ARNOTT.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Donovan and Davies, JJ.), May 16, 17, 1960.]

E

Criminal Law—Fraudulent conversion by bailee—Attempt at dishonest sale—No sale effected—Complete offence—Acquittal of attempt—Larceny Act, 1916 (6 & 7 Geo. 5 c. 50), s. 1 (1), proviso.

A bailee who, being lawfully in possession of the property bailed, determines to sell it for his own benefit contrary to the terms of the bailment and F dishonestly offers the property for sale has fraudulently converted the property to his own use within the meaning of the proviso to s. 1 (1) of the Larceny Act, 1916*, and so is guilty of larceny even though no sale takes place and the true owner of the property suffers no detriment (see p. 420, letters B and C, post).

A bailee who was lawfully in possession of an article, but had no right G to sell it, dishonestly offered it for sale to another person. No sale took place and the true owner of the article suffered no detriment. The bailee was charged with attempted larceny of the article.

Held: the charge was rightly dismissed, because the bailee, having fraudulently converted the article to his own use by his dishonest attempt to sell it, had already stolen the article and so was not guilty of the attempt.

H QUAERE whether, the charge of attempted larceny having been dismissed, the bailee was still liable to be charged with and tried for larceny of the article (see p. 420, letter D, post).

Appeal dismissed.

[As to the merger of an attempt which is a misdemeanour in the felony of the full offence, and as to the jurisdiction of the court to direct that a person, I charged with a misdemeanour, should be indicted for felony, where the court has not proceeded to verdict on the misdemeanour, see 10 HALSBURY'S LAWS (3rd Edn.) 307, para. 567.

As to larceny by a bailee, see 10 HALSBURY'S LAWS (3rd Edn.) 768, para. 1486; and for cases on the subject, see 15 DIGEST (Repl.) 1068, *10,537-10,542*.

For the Larceny Act, 1916, s. 1 (1), proviso, see 5 HALSBURY'S STATUTES (2nd Edn.) 1012.]

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* The relevant terms of the proviso to s. 1 (1) are printed at p. 418, letter I, post.

Cases referred to:

Caxton Publishing Co., Ltd. v. *Sutherland Publishing Co.*, [1938] 4 All E.R. 389; [1939] A.C. 178; 108 L.J.Ch. 5; sub nom. *Sutherland Publishing Co. Ltd.* v. *Caxton Publishing Co., Ltd.* (*No. 2*), 160 L.T. 17; 13 Digest (Repl.) 128, *680*.

R. v. *Jackson*, (1864), 9 Cox, C.C. 505; 15 Digest (Repl.) 1068, *10,537*.

R. v. *Price*, (1913), 9 Cr. App. Rep. 15; 15 Digest (Repl.) 1068, *10,542*.

R. v. *Reeves*, (1859), 5 Jur. N.S. 716; 15 Digest (Repl.) 1067, *10,534*.

R. v. *Wakeman*, (1912), 8 Cr. App. Rep. 18; 15 Digest (Repl.) 1068, *10,539*.

Case Stated.

This was an appeal by Case Stated against the dismissal by Alderman Sir Seymour Howard, Bart., sitting as a magistrates' court for the City of London at the Guildhall, on July 29, 1959, of a charge of attempted larceny brought by the prosecutor against the defendant, who had pleaded not guilty and consented to summary trial. The facts are stated in the judgment of Donovan, J.

Miss A. M. Jennings for the prosecutor.

B. T. Wigoder for the defendant.

Cur. adv. vult.

May 17. **DONOVAN, J.**, at the request of Lord Parker, C.J., read the following judgment: The appellant, a constable in the City of London Police, preferred a charge against the respondent of attempting to steal a tape recorder valued at £54 odd on June 19 last at a car park in the City of London. The recorder in question belonged to a Mr. F. R. Kelly, and was the subject of a hire-purchase agreement between Kelly and one Wayment. At the time of the alleged offence the recorder was in the possession of the respondent, it having been lent to him by one White. How White came to possess it the Case does not explain. It simply says that White at one time shared a flat with Wayment. One must assume for the purpose of this case that White had lawfully obtained possession and had lawfully lent the recorder to the respondent. The latter thus became a bailee of the article. On June 19 the appellant, having received certain information, met the respondent by arrangement, and went with him to a car park in Warwick Lane. There the respondent produced the recorder, demonstrated it, and offered to sell it to the appellant for £25. The appellant then disclosed that he was a police officer and arrested the respondent.

At the hearing of the charge the respondent contended that at the time of the attempted sale there had already been asportation of the recorder, and therefore the full offence of larceny had been committed. Accordingly he could not be convicted of the crime actually charged, namely, an attempt to steal. The appellant, on the other hand, said that the case was one of attempted conversion by a bailee which was incomplete because the sale was not concluded; the respondent was therefore properly charged with attempted larceny. The magistrate found that at the time of the attempted sale the respondent had already stolen the tape recorder, and he was therefore not guilty of a mere attempt. No reasons are given in the Case for the conclusion that the recorder had already been stolen at the time of the attempted sale.

The proviso to s. 1 (1) of the Larceny Act, 1916, reproducing with immaterial modifications s. 4 of the Punishment of Frauds Act, 1857, enacts that

> ". . . a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, if, being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner."

It is contended by the appellant that there was no such fraudulent conversion in the present case, but simply an attempt at it, because in the events which happened the true owner was deprived of nothing, and, as in the case of the civil tort of conversion, some detriment to the owner is essential to the commission of the wrong. I think that the proposition is doubtful and the analogy is in any event misleading. Conversion per se has been defined in a civil action as an act intentionally done inconsistent with the owner's right (see Lord Porter's speech in *Caxton Publishing Co., Ltd.* v. *Sutherland Publishing Co.* (1)). The analogy is misleading because no civil action is possible unless the true owner has suffered damage; but this is not so in the case of a criminal prosecution for fraudulent conversion. One cannot, therefore, determine for the purpose of the criminal law whether there has been a conversion simply by asking whether the true owner has suffered damage. He might indeed recover the article intact, but this would not of itself prevent a prosecution of the dishonest bailee.

The respondent contends that there was a fraudulent conversion here when the respondent, having dishonestly assumed to himself the rights of ownership in the property, endeavoured to exercise it by offering the property for sale. There appears to be no reported judicial decision directly in point. In *R.* v. *Jackson* (2), decided in 1864, the prisoner, who borrowed a coat for one day and was later found with it on board a ship bound for Australia, was held not to have converted the coat to his own use. For this to have happened, said Martin, B., there must have been some act inconsistent with the purpose of the bailment, and he took the view that there was no evidence of such an act in the case. The purpose of the bailment was, presumably, that the bailee might wear the coat, and the learned judge was apparently of opinion that having the coat on board the ship was not sufficient evidence of conversion.

In *R.* v. *Reeves* (3), decided in 1859, the prosecutor, who was lying tipsy on the ground, saw the prisoner, a friend of his, remove his, the prosecutor's, watch from his pocket. He made no protest, thinking the prisoner was doing it from friendly motives. The prisoner then went and offered the watch for sale, but afterwards denied having taken it. It was held that on those facts there was a bailment of the watch and evidence for the jury of a fraudulent conversion within the meaning of s. 4 of the Punishment of Frauds Act, 1857. The jury, however, acquitted the prisoner; but for the denial of ever having taken the watch, the case is very like the present.

In *R.* v. *Wakeman* (4) it was said by this court that a refusal to return to the owner on demand by him the thing bailed might be evidence of fraudulent conversion; and in *R.* v. *Price* (5), where a pony was sold by a man who had simply hired it, Avory, J., said that such a sale prima facie constituted conversion.

So far as the text-books are concerned, Kenny's Outlines of Criminal Law (16th Edn.), para. 245, contains this passage (p. 255):

> "Exactly what constitutes the 'conversion', which involves the bailee in the guilt of stealing, has not been authoritatively stated. The prisoner must have possession of the goods, otherwise he would not be bailee, and then, as it would seem, any conduct on his part which shows that he assumes either the full title of ownership in the goods, or asserts a right to pass the full title of ownership, will amount to such conversion as will render him guilty of stealing them within the statute."

Russell upon Crime (16th Edn.), by the same author (6), has this to say on the subject (p. 1095):

> "It is unfortunate that the term 'conversion' does not appear to have been given a precise definition either judicially or in the text-books. But for the purposes of the law of larceny it is submitted that it is necessary that the offender should have possession of the goods, and that when possession has been obtained any setting up by the offender of a full title to the

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(1) [1938] 4 All E.R. at p. 404; [1939] A.C. at p. 202.
(2) (1864), 9 Cox, C.C. 505.
(3) (1859), 5 Jur. N.S. 716.
(4) (1912), 8 Cr. App. Rep. 18.
(5) (1913), 9 Cr. App. Rep. 15.
(6) J. W. Cecil Turner.

> property in himself, adverse to that of the owner, if done without a bona fide claim of right, will render him guilty of larceny."

It would be rash, I think, to attempt a definition of the term " converts to his own use " which would cover every possible case. A sale of the property by the bailee, contrary to the terms of the bailment, and for his own benefit, is clearly such a conversion. The reason is that the bailee in such a case has usurped the rights of the owner for his, the bailee's benefit. Is the position any different in the case of an attempted sale? I think not. If I am lent property, and then determine in my own mind to sell it for my own benefit contrary to the terms of the bailment, I have determined that in relation to the property I will no longer be a borrower but an owner, and an owner who wishes to sell. When I proceed to carry that intention into effect by offering the property for sale, I am standing in the owner's shoes in relation to that property and exercising an owner's right. In these circumstances I have, in my view, already converted the property to my own use whether the attempted sale takes place or not; and if I have acted dishonestly in the matter, as the respondent here is found to have done, then the offence of larceny is committed. In short, I agree with the learned author of Kenny and Russell in his view on this point.

It is a little strange, perhaps, if the defendant should succeed on the grounds that he has committed the full offence and not merely attempted it, and it is said for him that in these circumstances he cannot be tried for the full offence. I express no opinion on that. The point is not raised in the case, and may yet arise for decision. In the meantime I would dismiss this appeal.

DAVIES, J.: I entirely agree with the judgment which my Lord has just delivered.

LORD PARKER, C.J.: I agree and have nothing to add.

Appeal dismissed.

Solicitors: *Comptroller and City Solicitor* (for the prosecutor); *Arthur W. Kemp* (for the defendant).

[*Reported by* Henry Summerfield, Esq., *Barrister-at-Law.*]

ADAMS AND OTHERS *v.* NATIONAL BANK OF GREECE, S.A.
DARLING AND OTHERS *v.* NATIONAL BANK OF GREECE, S.A.
ADAMS AND OTHERS *v.* NATIONAL BANK OF GREECE, S.A.

[House of Lords (Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Tucker and Lord Denning), April 4, 5, 6, 7, 11, May 19, 1960.]

Conflict of Laws—Foreign law—Recognition—Succession by foreign law, of newly created foreign company to liability of company then dissolved—Subsequent foreign decree altering law of succession so as to exclude retrospectively succession to obligations of dissolved company under English guarantees—Whether decree effective to discharge liabilities under English contracts.

The appellants were the holders of sterling mortgage bonds issued in about 1927 by a Greek corporation, payment of interest on the bonds being guaranteed by the National Bank of Greece. The proper law of the contracts was English. Interest on the bonds ceased after Greece was occupied by the enemy in 1941. In 1953, by a Greek decree made pursuant to a Greek Act (Act No. 2292), the National Bank of Greece and another Greek bank were amalgamated to form the respondent bank, and the amalgamated banks ceased to exist. By Act No. 2292, the respondent bank became the universal successor to the rights and obligations in general of the amalgamated banks. By Greek Decree No. 3504, which came into force on July 16, 1956, Act No. 2292 and the decree of 1953 were amended as from the time when they came into force so as to exclude from the obligations to which the respondent bank had succeeded the obligations of the National Bank of Greece as guarantors of bonds relating to loans in foreign currency. The appellants, having presented for payment coupons for interest due at various dates after July 16, 1956, viz., after the exclusion of liability effected by Decree No. 3504, and having received no payment, sought to recover payment from the respondent bank in London.

Held: the plaintiffs were entitled to recover payment from the respondent bank for the following reasons—

(i) (per Viscount Simonds, Lord Reid and Lord Radcliffe) the respondent bank having become liable by virtue of Act No. 2292 on the guarantee, the proper law of which was English law, could not be discharged, for the purposes of proceedings in English courts, from that liability by subsequent Greek legislation.

(ii) moreover (per Viscount Simonds, Lord Radcliffe and Lord Tucker) it would be neither convenient nor just that an English court should recognise retrospective alterations to the succession of the respondent bank once the validity and consequences of the succession had been established by foreign law.

Dictum of Lord Penzance in *Lynch* v. *Paraguay Provisional Government* ((1871), L.R. 2 P. & D. at p. 272) applied.

(iii) (per Lord Denning) in certain circumstances English law may refuse to accept, or may accept only subject to conditions, a foreign amalgamation of foreign juristic entities (dictum of Lord Atkin in *Russian & English Bank* v. *Baring Bros. & Co., Ltd.*, [1936] 1 All E.R. at p. 519, applied); and since the amalgamation sought to be established retroactively by Decree No. 3504 modifying Act No. 2292 did not provide a successio in universum jus, but contained an unusual exception of liability inconsistent with the essence of the transaction of amalgamation, the English court was entitled to recognise the universal succession provided by Act No. 2292 and to reject the attempt embodied in Decree No. 3504 to detract from it.

National Bank of Greece and Athens, S.A. v. *Metliss* ([1957] 3 All E.R. 608) considered.

Decision of the Court of Appeal ([1959] 2 All E.R. 362) reversed.

[As to the recognition of the dissolution of foreign corporations, see 7 Halsbury's Laws (3rd Edn.) 13, para. 22; as to the discharge of contracts, see ibid., p. 82, para. 151; and for cases on the subject, see 11 Digest (Repl.) 446, 447, *857-863*; and as to when recognition of foreign law is withheld, see 7 Halsbury's Laws (3rd Edn.) 8, para. 10.]

Cases referred to:

Aganoor's Trusts, Re, (1895), 64 L.J.Ch. 521; 11 Digest (Repl.) 395, *514*.

Gibbs & Sons v. *Société Industrielle et Commerciale des Métaux,* (1890), 25 Q.B.D. 399; 59 L.J.Q.B. 510; 63 L.T. 503; 11 Digest (Repl.) 423, *723*.

Lazard Bros. & Co. v. *Midland Bank, Ltd.,* [1932] All E.R. Rep. 571; [1933] A.C. 289; 102 L.J.K.B. 191; 148 L.T. 242; 10 Digest (Repl.) 1299, *9161*.

Lynch v. *Paraguay Provisional Government,* (1871), L.R. 2 P. & D. 268; 40 L.J.P. & M. 81; 25 L.T. 164; 35 J.P. 761; 11 Digest (Repl.) 394, *513*.

Marshall, Re, Barclays Bank, Ltd. v. *Marshall,* [1957] 3 All E.R. 172; [1957] Ch. 507; [1957] 3 W.L.R. 538; 3rd Digest Supp.

National Bank of Greece and Athens, S.A. v. *Metliss,* [1957] 3 All E.R. 608; [1958] A.C. 509; [1957] 3 W.L.R. 1056; 3rd Digest Supp.

Nokes v. *Doncaster Amalgamated Collieries, Ltd.,* [1940] 3 All E.R. 549; [1940] A.C. 1014; 109 L.J.K.B. 865; 163 L.T. 343; 10 Digest (Repl.) 1136, *7911*.

Russian & English Bank & Florance Montefiore Guedalla v. *Baring Bros & Co., Ltd.,* [1936] 1 All E.R. 505; [1936] A.C. 405; 105 L.J.Ch. 174; 154 L.T. 602; 10 Digest (Repl.) 1298, *9154*.

Appeals.

Consolidated appeals from orders of the Court of Appeal (Lord Jenkins, Morris and Ormerod, L.JJ.), dated Apr. 29, 1959, and reported sub nom. *Adams and Others* v. *National Bank of Greece and Athens, S.A., Prudential Assurance Co., Ltd. and Others* v. *National Bank of Greece and Athens, S.A.,* [1959] 2 All E.R. 362, reversing orders of Diplock, J., dated Mar. 13, 1958, and reported [1958] 2 All E.R. 3. Diplock, J., held that the appellants were entitled to recover from the respondent bank arrears of interest due to the appellants on sterling mortgage bonds issued in 1927 by the National Mortgage Bank of Greece. The facts are set out in the opinion of Viscount Simonds.

J. G. Foster, Q.C., Mark Littman and *L. J. Blom-Cooper* for the appellants.

T. G. Roche, Q.C., and *N. H. Lever* for the respondent bank.

Their Lordships took time for consideration.

May 19. The following opinions were read.

VISCOUNT SIMONDS: My Lords, these consolidated appeals are a sequel to *National Bank of Greece and Athens, S.A.* v. *Metliss* (1) which was recently heard in the House. The bank, which was the appellant in that case, has changed its name to National Bank of Greece, S.A., and is respondent to these appeals. The appellants are the holders of sterling bearer bonds, part of an issue made in or about the year 1927 by a Greek corporation, the National Mortgage Bank of Greece, which I will call "the mortgage bank". These bonds were guaranteed by a Greek corporation also known as the National Bank of Greece, which was dissolved in 1953. I will call it "the old bank". They provided for payment of principal on presentation on or after Dec. 1, 1957, and, in the meantime, for payment of interest at seven per cent. per annum on presentation of the appropriate coupons. The rate of interest was in December, 1935, changed from seven per cent. to 4¾ per cent.

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(1) [1957] 3 All E.R. 608; [1958] A.C. 509.

In April, 1941, Greece was occupied by the enemy, and payment of the sums falling due under the bonds ceased and, so far as is relevant to this case, has not been resumed. In November, 1949, and at subsequent dates, the suspension of payments under Greek bonds payable in foreign currency was regularised so far as Greek law is concerned by emergency laws imposing a moratorium which has obtained to this day. They do not, however, affect the present case. In February, 1953, the Greek government passed a law known as Act No. 2292 which related to the amalgamation of banking corporations with limited liability by shares, of which the material provisions were as follows:

> "4. . . . The company which absorbs another company by merger, or the new company, formed by the amalgamation, becomes the universal successor to the rights and obligations in general of the amalgamated companies, without any other formality or act whatsoever.
>
> "8. . . . all provisions in force of laws, decrees or ministerial decisions in favour of one of the amalgamated companies are considered as being in favour of the new company as from the formation of the latter.
>
> "10. The amalgamation of [such companies] . . . may also be effected . . . by decree promulgated on the proposals of the Council of Ministers."

On Feb. 27, 1953, a decree was promulgated under the powers conferred by s. 10 amalgamating the old bank and another company known as the Bank of Athens to form a new company which was called the National Bank of Greece and Athens and is the respondent bank. Paragraph 5 of this decree provided that the old bank and the Bank of Athens should cease to exist and that their property should be considered as automatically contributed to the respondent bank who should be substituted ipso jure, and without any other formality, in all assets and liabilities of the amalgamated banks, as their universal successor.

I need not refer to certain proposals thereafter made by the mortgage bank and the new bank (the respondent bank) as guarantors of the bonds. They were not accepted by the appellants, nor by another bondholder, one Cyril Metliss, who, in December, 1955, commenced an action against the respondent bank claiming the interest that was in arrear on his bonds. Judgment was given in his favour by SELLERS, J., on July 12, 1956, and this judgment was affirmed by the Court of Appeal and by this House. Four days after the judgment of SELLERS, J., was given, the Greek law was altered by Legislative Decree No. 3504. This decree, which I will call "Act 3504" substituted for para. 2 of art. 4 of Act 2292 as from the time it came into force the following clause:

> "The company which has absorbed another company by amalgamation or the new company created by amalgamation becomes the universal successor to the rights and obligations of the companies amalgamated without the necessity of any other formality or action, with the exception of the obligations of these companies as principal debtors, guarantors or for any other cause deriving from bonds, securities in general or contracts or any other cause and relating to loans in gold or foreign currency by bonds or otherwise payable to the bearer issued by the limited liability companies, juridical persons of public law, municipalities and communes etc. The company which has absorbed another company or is newly created by amalgamation does not acquire nor is it considered as having acquired by virtue of this present or other statute or decree or articles of association published in pursuance of this present law or in any other manner the above obligations deriving from loans in gold or foreign currency until a law is passed providing the extent and the manner in which they will become subject to these obligations",

and further provided as follows:

> " Paragraph 5 of Article Sole of the Royal Decree dated Feb. 26/27, 1953, ' on the amalgamation of the National Bank of Greece and the Bank of Athens by the creation of a new limited liability banking company ' is abolished as from the time of its publication. The rights and obligations of the new limited liability banking company created by the said decree under the name of ' National Bank of Greece and Athens, S.A.' are governed as from the time the company was created by the relative provisions of Statute 2292/1953 as amended by the present law."

On Sept. 17, 1956, the first appellants commenced their action against the respondent bank in respect of interest payments on coupons duly presented which became due at various dates between July 28, 1956, and Aug. 22, 1956. On June 4, 1957, the second appellants commenced their action for like interest payments which became due at various dates between Aug. 8, 1956, and May 21, 1957, and on Jan. 17, 1958, the third appellants commenced their action for like interest payments which fell due at various dates between Dec. 1, 1950, and Jan. 9, 1958, and for repayment of principal which fell due on Dec. 1, 1957. In no case was the relevant coupon presented for payment before the passing of Act 3504. The respondent bank resisted the claims on the single ground that, whatever might be the case if Act 2292 stood alone, Act 3504 relieved them from liability under the bonds. They did not seek to challenge the findings of fact as to Greek law in the *Metliss* case (2). DIPLOCK, J., decided in favour of the appellants; the Court of Appeal unanimously reversed his decision, holding that, by virtue of Act 3504, the respondent bank were absolved from the liability to which they were previously subject. Hence the appeal to this House.

My Lords, the argument before your Lordships ranged far and wide. That was not surprising for neither side could claim to find precise authority for their contentions. Recourse was, therefore, had to analogies which were not always helpful. But I think that at least the contentions can be simply stated. The respondent bank say that, at the dates when writs were issued against them (or at the dates when causes of action against them accrued), their juristic personality was created by the two Acts 2292 and 3504, not, they insist, by Act 2292 alone, therefore, in the words of MORRIS, L.J., who delivered the judgment of the Court of Appeal (3),

> " those who need recourse to Greek law must take it as they find it. If they assert that Greek law can endow, they must recognise that Greek law can disendow. If they aver that Greek law can create, they must accept that Greek law can change. If they need to have the foundation of Greek law on which to build a claim, they can hardly say that Greek law as it used to be suits them far better than Greek law as it is."

The respondent bank could not wish to have their case stated more cogently. But, say the appellants, this is to approach the question in the wrong way. At all material times the old bank and, after Act 2292 came into force, the new bank were under an obligation to the bondholders to pay the interest and principal of the bonds as they became due. The obligation of the old bank became the obligation of the new bank as its universal successor, and was recognised as such by the English court. The proper law of the obligation, whether of the old bank or the new, was English law and, according to the well established principle of private international law as administered in our courts, the obligation could not be altered or discharged to the detriment of the English creditor by a decree of the Greek government. It was, they said, immaterial that the Greek court might pay regard to the new law. This, then, is the problem and I hope that I have stated fairly the rival contentions. It is, I think, obvious that that of the respondent bank rests on the assertion, which was reiterated with no lack of vigour, that the new bank did not come into any contractual relation with the bondholders, and that, therefore, the principle of international law to which I have referred could have no application. It was said that, in the *Metliss* case (4), the English courts affirmed the liability of the respondent bank under Act 2292 because it recognised the status of the new bank as the " universal successor " of the old bank; this was a question of status and, if the status was changed by Greek law, then the obligations originally imposed by Act 2292 would change also. The status (so the argument proceeded) was, in fact, changed by Act 3504 which purported to absolve the new bank from its former obligations; therefore, the new bank was no longer liable.

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(2) [1957] 3 All E.R. 608; [1958] A.C. 509.
(3) [1959] 2 All E.R. at p. 365; [1960] 1 Q.B. at p. 81.

My Lords, this argument is, in my opinion, unsound. It is no doubt true that, in the *Metliss* case (4), the decisive reason for holding the respondent bank liable to the bondholders was that, its status being recognised as universal successor to the old bank, it would be illogical to ignore such an essential incident of its creation as its liability for the old bank's obligations. But what does that mean but that the contractual relation which had existed between the bondholders and the old company now existed between them and the new company. The new company stood, it was said, in the shoes of the old, a metaphorical expression, no doubt, and to be distrusted accordingly, but vividly expressive of the consequences of universal succession. In the *Metliss* case (4), their Lordships were not concerned with the question whether the legal relation between the parties ensuing from Act 2292 was contractual or something else for which I find no apt word. But, if I say that, from that moment the new bank was bound by the old bank's obligations to the bondholders and was at the same time entitled to all the defences which the old bank would have had by English law to their claims, I describe a relation which is indistinguishable from that which arises out of contract. There is nothing in the speeches of their Lordships in the *Metliss* case (4) which suggests a contrary view.

This being the position from Feb. 27, 1953, to July 16, 1956, I am at a loss to understand how any Act or law of the Greek government after that date could affect the position. Greek law was the law of the respondent bank's being; it might, therefore, have been dissolved by Greek decree; but it would, none the less, have been subject to be wound-up in the courts of this country and would have met the same claims dead as alive. However, it was not dissolved, but, by Act 3504, was declared not to be subject to certain liabilities of the old bank, and, moreover, retrospectively declared never to have been so liable. I think that it was admitted, at any rate I am clear that it could not be denied, that, if the obligation of the new bank under Act 2292 was contractual, no alteration of it by Greek law would be effective in our court. It is on the reiteration of the blessed word " status " that the respondent bank relies. The obligation rested on status; the status was altered; the obligation disappeared—in fact was never there. My Lords, I doubt whether anything is to be gained by debating whether Act 3504 should be described as an Act affecting status or an Act discharging contracts. Give it what label you will, its effect is that it purports to relieve the respondent bank of a liability theretofore enforceable against it, and, for my part, I should not hesitate to say that the principle of private international law in regard to discharge or alteration of a contract is applicable whatever device of nomenclature is used, if the effect of the challenged decree is the discharge or alteration of contractual rights.

My Lords, I must notice at this point what appears to be a conspicuous fallacy of the respondent bank's argument. It assumes that the relation between the parties commenced when the cause of action accrued and that, at that moment, the appellants, having recourse to Greek law, must take it as it is in the whole, that is Act 2292 as amended by Act 3504. But this is a wrong assumption. From the moment that Act 2292 became operative, the respondent bank was under an obligation to the bondholders, inchoate perhaps, but inescapable, when, according to its terms, it became enforceable. It was to that Act alone that the bondholders were entitled and bound to look. It is true enough that their right and duty arose because the English court recognised the new bank as having the status of universal successor of the old bank—a thing, I parenthetically observe, it surely would not have done if the Act had purported to vest assets but not liabilities—but it is not crucial or, strictly speaking, relevant to ask how or why such recognition was given or how or why the obligation arose. The fact, and the only material fact, was that it did arise, and, having arisen, it was not to be displaced by Greek law.

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(4) [1957] 3 All E.R. 608; [1958] A.C. 509.

I do not think, my Lords, that much assistance is to be got from authorities. But such cases as *Lynch* v. *Paraguay Provisional Government* (5) and *Re Aganoor's Trusts* (6) offer a useful analogy. It is sufficient to refer to the former case. The facts are sufficiently stated in the headnote. A domiciled Paraguayan died in Paraguay, leaving personal property in England. After his death, but before a grant was made in England, the Government of Paraguay declared that all the property of the deceased, wherever situate, was the property of the nation of Paraguay. The English court nevertheless held that the right to the grant of probate and the succession to the property must be governed by the law of Paraguay as it existed at the time of the death, and, therefore, the Government of Paraguay had no locus standi to contest the validity of the will. LORD PENZANCE, after citing (7) from s. 481 of STORY'S CONFLICT OF LAWS:

> " The universal doctrine now recognised by the common law, although formerly much contested, is, that the succession to personal property is governed exclusively by the law of the actual domicil of the intestate at the time of his death ",

referred to the argument that the relevant Paraguayan decree had a retrospective operation and had by the law of Paraguay become part of that law at the time of the death, and that a Paraguayan court would be bound by the decree, and proceeded (7):

> " This may be so; but the question is, whether the English courts are bound in like manner; or, more properly speaking, the question is, in what sense does the English law adopt the law of the domicil? Does it adopt the law of the domicil as it stands at the time of the death, or does it undertake to adopt and give effect to all retrospective changes that the legislative authority of the foreign country may make in that law? No authority has been cited for this latter proposition, and in principle it appears both inconvenient and unjust."

The same principle was asserted and applied in *Re Aganoor's Trusts* (6), and more recently in *Re Marshall, Barclays Bank, Ltd.* v. *Marshall* (8). It can be applied here. The bearer bonds have been held, perhaps changed hands, I know not, since 1953, on the footing that the recognition by the English court of the new bank as the universal successor of the old laid the new bank by English law under the old bank's obligations in regard to them. It would be neither convenient nor just that subsequent legislation in Greece should, retrospectively or otherwise, alter or discharge that obligation.

In my opinion, this appeal should be allowed and the judgment of DIPLOCK, J., restored. The respondent bank must pay the costs here and below.

LORD REID: My Lords, this case is a sequel to a case recently decided in this House, *National Bank of Greece and Athens, S.A.* v. *Metliss* (9). Both are concerned with the rights of holders of parts of an issue in 1927 of £2,000,000 seven per cent. sterling mortgage bonds. The debtor was the National Mortgage

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(5) (1871), L.R. 2 P. & D. 268. (6) (1895), 64 L.J.Ch. 521.
(7) (1871), L.R. 2 P. & D. at p. 271. (8) [1957] 3 All E.R. 172; [1957] Ch. 507.
(9) [1957] 3 All E.R. 608; [1958] A.C. 509.

A Bank of Greece and the bonds were guaranteed by the National Bank of Greece, (which I shall call " the old bank "). It is not disputed that the proper law of the bonds is English law. Payment of interest ceased when Greece was occupied by the enemy in 1941, and since the war a Greek moratorium had been in force which, admittedly, would have been a good defence if *Metliss's* action (10) or an action like that now before your Lordships had been raised in Greece.

B In 1953, by virtue of the Greek Act No. 2292, the old bank was compulsorily amalgamated with the Bank of Athens to form the present respondent (which I shall call " the new bank "). The new bank was also the defendant in *Metliss's* case (10). Act 2292 provided, by s. 4,

> C "... The company which absorbs another company by merger, or the new company, formed by the amalgamation, becomes the universal successor to the rights and obligations in general of the amalgamated companies, without any other formality or act whatsoever ",

and a royal decree made in pursuance of that Act provided:

> D " As from the publication of the present decree, the National Bank of Greece, Ltd. Cy., and the National Bank of Athens, Ltd. Cy., shall cease to exist and the entire property of each of them in its whole (assets and liabilities) on the day of publication is considered as being automatically contributed to the new limited liability banking company [the National Bank of Greece and Athens Company] constituted by virtue of these presents, which is substituted, ipso jure, and without any other formality, in all rights and obligations of the said amalgamated banks, as their universal successor."

E Metliss successfully sued the new bank for money due under his bonds. Some days after SELLERS, J., had decided in his favour, a new Greek law No. 3504 of 1956 was enacted. It could not affect the decision of *Metliss's* case (10), but the new bank maintains that it enables the new bank to succeed in the present case. It provides (again I take the agreed translation):—

> F " Article 1. Paragraph 2 of art. 4 of Statute 2292/53 ' on the amalgamation of limited liability banking companies ' is replaced as from the time it came into force with the following:—
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> " The company which has absorbed another company by amalgamation or the new company created by amalgamation becomes the universal successor to the rights and obligations of the companies amalgamated G without the necessity of any other formality or action, with the exception of the obligations of these companies as principal debtors, guarantors or for any other cause deriving from bonds, securities in general or contracts or any other cause and relating to loans in gold or foreign currency by bonds or otherwise payable to the bearer issued by the limited liability companies, juridical persons of public law, municipalities and communes etc. The com- H pany which has absorbed another company or is newly created by amalgamation does not acquire nor is it considered as having acquired by virtue of this present or other statute or decree or articles of association published in pursuance of this present law or in any other manner the above obligations deriving from loans in gold or foreign currency until a law is passed providing the extent and the manner in which they will become subject to these I obligations.
>
> " Article 2. Paragraph 5 of Article Sole of the Royal Decree dated Feb. 26/27, 1953, . . . is abolished as from the time of its publication. The rights and obligations of the new limited liability banking company created by the said decree under the name of ' National Bank of Greece and Athens, S.A.' are governed as from the time the company was created by the relative provisions of Statute 2292/1953 as amended by the present law."

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(10) [1957] 3 All E.R. 608; [1958] A.C. 509.

The purpose and intention of this new law No. 3504 are clear. The new bank is to retain the whole assets of the old bank which it took as universal successor under law No. 2292 and it is to remain liable for all the obligations of the old bank except those specified in the new law which include the obligations to these bondholders; no one is to be liable in respect of these obligations until a new law is passed. There may or may not have been good reason for making this exception; we are not concerned with that and it is not for us to judge the policy of the Greek legislature. What we are concerned with is whether, by English law, the provisions of law No. 3504 prevent the appellants from succeeding as Metliss succeeded. There is no doubt that the new law is valid in Greece, but how far can it receive effect here according to the principles of private international law as recognised by the English courts? The answer to that question appears to me to depend on a correct appreciation of what was decided by this House in the *Metliss* case (11).

The argument for the new bank was that Metliss succeeded because, at the time when he claimed his money, Greek law made the new bank liable to meet the guarantee obligations of the old bank; but that the appellants cannot succeed because, at the time when they claimed their money and the principal debtor failed to pay, Greek law provided that the new bank was not liable to meet the old bank's guarantee obligation. One must look at Greek law at the relevant time, and the relevant time was the date when the principal debtor failed to pay its debt; the new bank had then ceased to be a guarantor. But for Greek law No. 2292, no one would have had any right to sue the new bank in respect of the old bank's obligations. What Greek law gave Greek law can take away, and law No. 3504 has taken away from the appellants what law No. 2292 gave. When Metliss's cause of action arose, the new bank stood in the shoes of the old bank because it had been directed by Greek law to do so; when the appellants' cause of action arose, the new bank did not because it was then directed by Greek law not to do so.

If the appellants' right against the new bank was a Greek right, if it arose under Greek law and not under English law, I would regard that argument as unanswerable. But, in my judgment, the decision in *Metliss's* case (11) establishes that the appellants' right is an English right. There were two questions in *Metliss's* case (11). First, do we recognise the status of universal successor created by Greek law so as to make it possible to sue the universal successor in England in respect of obligations to which he has succeeded by Greek law. The answer was " yes ". But that does not touch the question in the present case. The answer might be " yes ", because we simply allow a creditor to enforce in this country a Greek right; if that were the case, then any defence good in Greece would be good here. Or the answer might be " yes ", because the effect in English law of recognising the status of the universal successor is to put him in the shoes of the person whom he has succeeded as a party, or as if he were a party, to that person's English contracts; if that is the true view, then the universal successor, by reason of his capacity as such, acquires English rights and becomes bound by English obligations which are independent of Greek law. In my judgment, the decision of the second point in the *Metliss* case (11) shows that the latter is the true view. It is true that the noble and learned Lords who took part in the *Metliss* case (11) do not say so in so many words; there was no need for them to do so. But that seems to me to be necessarily implicit in the decision and it is the decision that matters.

The second point decided in *Metliss's* case (11) was that, although Greek law would have prevented him from succeeding by reason of the Greek moratorium, the nature of his right in England was such that Greek law did not affect it and the moratorium was no defence. We do not refuse in all cases to recognise a moratorium in force in a foreign country; when an action is brought here for money payable in England, we recognise it as affecting rights of which the proper

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(11) [1957] 3 All E.R. 608; [1958] A.C. 509.

A law is the law of that country, but we do not recognise it as affecting rights of which the proper law is English law. So I think that the decision that the moratorium did not apply necessarily implied that Metliss had acquired an English right. And he could only acquire an English right by operation of English law. Greek law cannot create an English right or obligation any more than it can annul an English right or discharge an English obligation. Metliss succeeded B because the new bank had somehow been made liable to be sued on an English contract as a party, or as if it were a party, to that contract. English law can do that, but I do not see how Greek law can. Let me suppose that a Greek statute simply required X, a stranger, as a condition of the granting of some concession, to pay A's debt to B under an English contract, and that that gave B a right to sue X in Greece. We might recognise that Greek right by allowing B to sue X C here. But the ground of liability would not be that Greek law had made X a party to A's contract with B, or had made him liable to be sued in England as if he were a party. It would simply be that B had a Greek statutory right to be paid a certain sum by X, the amount being measured in a certain way. That would be a Greek right, and I can see no reason why a Greek moratorium should not affect it. And, if a later Greek statute repealed the earlier one, I do not see on D what possible ground B could thereafter maintain an action against X. No doubt the Greek statute could say expressly or by implication that X was to pay, notwithstanding the moratorium, but it is clear that law No. 2292 did not say that because, admittedly, the rights and obligations of universal successors were by Greek law subject to the moratorium. So, in order to avoid the moratorium, Metliss must have acquired some right not given to him by law No. 2292. How E did he acquire that right? That question brings one back to the first point decided in *Metliss's* case (12). It was decided in that case that English law can and should, as a matter of rational justice, recognise the Greek status of universal successor, with the result that the new bank having that status was, by English law, made liable to be sued here on the contracts of the defunct old bank as standing in place of the old bank. One can say that the new bank, as representing F the old bank, has become a party to its contracts, or that it is to be treated as if it were a party. If a party is defined as a person who made an agreement with the other party, then it is self-evident that the law cannot add a party to a contract. But the law can, and does, permit persons to sue and be sued on contracts to which they were not parties in that sense. An executor can sue or, with limited liability, be sued on the deceased's contracts, and the holder of a G bearer bond can sue although he made no kind of agreement with the debtor. What matters is not the name which one attaches to a person representing the original party, but the fact that he can sue or be sued, so that all the incidents of the contract attach to him. Here, all the incidents of the old bank's contracts did attach to the new bank. The old bank could not have pleaded the Greek moratorium, so neither could the new bank; its obligation was measured by H English law because that was the proper law of the old bank's contracts. Whether or not the new bank became a party to those contracts it was, by English law, made liable to the contractual obligations in its capacity as universal successor of the old bank.

It follows that, before the enactment of law No. 3504, the new bank had become subject to the old bank's obligations to the appellants, and the question I is, therefore, what effect that law had on that position. If that law had simply purported to discharge the new bank from its obligations to the appellants, it could not have received effect in England because it is well established that the English courts cannot give effect to a foreign law as discharging an English obligation to pay money in England. But the case for the new bank can be put in a more favourable light than that. We hold that the new bank can be required to pay the old bank's debts only because of its status or capacity as universal successor. That status is a Greek status created by Greek law, and the law which confers or imposes a status can abolish it. What Greek law can do Greek law can undo. So, to be consistent, if we say that certain consequences attach to a person by reason of his Greek status, we should say that those consequences cease to operate on the destruction of that Greek status by Greek law. Greek law has destroyed the new bank's status as regards these appellants, so we ought to recognise that fact by holding that it can no longer be sued in its capacity of universal successor and is, therefore, no longer liable on the contracts of the old bank. To that the appellants make two answers. In the first place, they say, on the analogy of *Lynch* v. *Paraguay Provisional Government* (13), that the position of the new bank, as universal successor, became fixed at the time of the dissolution of the old bank, and that English law will not recognise any subsequent change of status by foreign law. *Lynch's* case (13) arose out of the death of President Lopez of Paraguay and the assumption of power by the Provisional Government which then confiscated his property. It was held that, nevertheless, the universal legatee under his will was entitled to probate here. LORD PENZANCE based his decision not on our refusal to recognise foreign confiscatory legislation, but on the ground that we only recognise the law of the deceased's domicil at his death as governing his succession and do not give effect to any subsequent changes. I do not at all question the authority of that decision, but I am not satisfied that it should be applied to a case like the present. I doubt whether that case would entitle an English creditor to sue a foreign heir residing in this country, who had taken no steps to deal with property of the deceased in England, and who had been disinherited by a later foreign law and deprived of the property to which he had succeeded, merely because he had been heir and universal successor at the time of the death of the deceased. If law No. 2292 had been repealed and the whole assets and liabilities of the old bank had been vested in and transferred to another corporation so that the new bank ceased in any way to represent the old bank, I am not satisfied that English law must thereafter continue to regard the new bank as the universal successor of the old bank. But what was actually done by law No. 3504 was something very different from that. So I prefer to base my decision on the next ground.

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(12) [1957] 3 All E.R. 608; [1958] A.C. 509.

The effect of law No. 3504 was to leave things exactly as they were with one exception. The new bank continued to hold all the assets of the old bank, it was still referred to as the universal successor of the old bank, and it was still subject to all the liabilities of the old bank with the sole exception of a class of liabilities which included the liabilities of the old bank to these bondholders and may have included some others. No one was to be liable for these obligations. The effect of law No. 3504, leaving aside for the moment its retrospective character, was the same as if it had merely discharged these liabilities. As I have already said, it is well settled that English law cannot give effect to a foreign law which discharges an English liability to pay money in England, and the appellants' contracts were English contracts under which they were to be paid in England. So, unless the form of a foreign law is more important than its substance and effect, law No. 3504 must be treated as a law which seeks to discharge English liabilities and it cannot, therefore, be effective in England. In my judgment, we must look at the substance and effect of a foreign law, and that is a question of fact. I have found nothing in the evidence to show that its effect was anything other than I have stated. But law No. 3504 purports to be retrospective, and it was said that its effect was, therefore, not to discharge these obligations, but to deem that they never existed. There is no general rule that English law will never give effect to foreign retrospective legislation, but that does not mean that a foreign legislature can compel an English court to shut its eyes to proved facts. The British Parliament, being legally omnipotent in this country, can require us to do that; it can require our courts not only to deem that black is white but to

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(13) (1871), L.R. 2 P. & D. 268.

A deem that black always has been white. But I know of no principle, reason or authority which would entitle a foreign legislature to do that. We must recognise the fact that, for three years between the enactment of law No. 2292 and that of law No. 3504, the new bank was bound to fulfil English contractual obligations; and, if a Greek law could not discharge those obligations by direct enactment, it cannot do so by being framed in retrospective form.

B Finally it was said that, if law No. 2292 had originally contained the provision which has now been inserted in it by law No. 3504, we could not have held the new bank liable to the appellants, and why should it make a difference that the present law was enacted in two stages. It is quite true that, in that case, the new bank could not have been held liable. A different and, perhaps, difficult question would have arisen. What effect, if any, could we give to a selective law which, C though purporting to make the new bank the universal successor, imposed on it some, but not all, of the obligations of the old bank? I will not attempt to answer that question. In this case, the fact is that, before law No. 3504 was passed, the new bank had become bound to fulfil the obligations in the old bank's English contracts, and for the reasons which I have given those obligations have not been affected or discharged by the enactment of the new law. I am, therefore, of D opinion that this appeal should be allowed.

LORD RADCLIFFE: My Lords, I agree that this appeal must be allowed. Having regard to what has been said already, I confine my reasons to four sentences. I think that the Court of Appeal were in error in treating the appellants' rights against the respondent bank as being derived from the law of Greece. E I think that, on the contrary, their rights were based on the law of England and that, as part of that law, the universal succession created by Act 2292 of the Greek legislative authority and the decree of Feb. 27, 1953, made thereunder rendered the respondent bank liable on the guarantee of their predecessors. I do not think that, once they had become so liable, they could be discharged from liability by any subsequent legislative act of the Greek government, such as F Decree 3504. I think also that LORD PENZANCE was correct when he said that it would be neither just nor convenient (see *Lynch* v. *Paraguay Provisional Government* (14)) that an English court, once the validity and consequences of a succession created by foreign law have become established by its rules, should recognise retrospective alterations of that succession which may be propounded by the foreign law.

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LORD TUCKER: My Lords, the arguments in this appeal ranged over a very wide field, but the question for decision can be shortly stated, i.e., whether the courts of this country will recognise and give effect to the Greek decree No. 3504 as operating retrospectively to relieve the respondent bank from its obligations as guarantor of the bonds on which the appellants are now suing. Your Lordships have already held, in *National Bank of Greece and Athens, S.A.* v. H *Metliss* (15), that the respondent bank was, prior to July 16, 1956, liable to holders of these bonds as guarantor by virtue of the Greek law No. 2292 of Feb. 18, 1953, and the decree of Feb. 27 of that year by which the National Bank of Greece (the original guarantor) was amalgamated with the National Bank of Athens, S.A. to form a new company, the present respondent, which became the universal successor " in all rights and obligations of the said amalgamated banks ".

I On July 16, 1956, legislative decree No. 3504 was passed. Its terms have already been stated and need not be repeated. Its effect in Greek law was admittedly to absolve the respondent bank from any liability as guarantor of the bonds now sued on, but the question is whether the English courts will so regard it. Much discussion has taken place whether this decree should be regarded as a law of status or discharge. My Lords, I cannot think that the decision of this case should turn on a matter of words of this kind. In one sense, the law clearly operated to discharge the respondent bank from part of the obligations to which it had originally succeeded by enacting retrospectively, in effect, that such obligations should be deemed never to have been incurred. On the other hand, the law did vary one of the attributes of the universal successor. I think, however, that the principle which your Lordships should apply in the present case is that which is to be found in *Lynch* v. *Paraguay Provisional Government* (16), namely, that the English courts will only recognise the laws of succession in force in the country of the deceased's domicil at the date of his death. It is, of course, true that that case was dealing with a claim to a grant of probate of a will made by a domiciled Paraguayan in respect of personal property in England, but the decision was not based on the necessity of ascertaining the intentions of the testator, as contended by counsel for the respondent bank, and the principle applied is equally applicable to an intestacy. The present case is not covered by the actual decision in *Lynch's* case (16), but, in the absence of express authority, it would seem to me that the principle there enunciated is the one which your Lordships should apply to a case such as the present, where foreign law has destroyed one legal entity and created another as the universal successor to all the assets and obligations of the former and subsequently seeks by retrospective legislation to exclude obligations incurred under contracts governed by English law. To quote the words of LORD PENZANCE in *Lynch's* case (17):

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(14) (1871), L.R. 2 P. & D. 268 at p. 272.
(15) [1957] 3 All E.R. 608; [1958] A.C. 509.

> " In illustration of this view it was suggested, that if the question were to arise in a court of Paraguay such court would be bound by the decree, and therefore bound to declare the provisions of the decree to be effective at and from the time of the death. This may be so; but the question is, whether the English courts are bound in like manner; or, more properly speaking, the question is, in what sense does the English law adopt the law of the domicil? Does it adopt the law of the domicil as it stands at the time of the death, or does it undertake to adopt and give effect to all retrospective changes that the legislative authority of the foreign country may make in that law? No authority has been cited for this latter proposition, and in principle it appears both inconvenient and unjust."

My Lords, whatever may be the appropriate label to attach to law 3504, I would apply these words to it in so far as it seeks retrospectively to effect the liability of an existing legal entity in respect of negotiable instruments governed by English law to which liability it had succeeded as universal successor at the date of the legal " death " of the juristic person to which it was the successor. If, however, it were necessary to decide this case by selecting the appropriate label for law No. 3504, I would prefer the label " discharge ".

I would, accordingly, allow the appeal.

LORD DENNING: My Lords, on July 12, 1956, SELLERS, J., held that the proper law of these Greek bonds is English law, and his ruling on this point has never since been challenged. It follows that the bonds must be paid according to their terms by English law. No Act of the Greek legislature can suspend the obligation to pay; nor can it discharge the debtor or the guarantor from their duty to honour the bond. Nevertheless, Greek law may assume an importance in the enforcement of the bonds, because the parties bound by the bonds were Greek corporations. The National Mortgage Bank of Greece was the principal debtor; and the National Bank of Greece was the guarantor. These banks were the creatures of Greek law. Each was incorporated by Greek law. Each could be dissolved by Greek law. Either could be amalgamated by Greek law with another

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(16) (1871), L.R. 2 P. & D. 268.

(17) (1871), L.R. 2 P. & D. at p. 271.

A Greek corporation. That is, indeed, what has happened. The guarantor, the
National Bank of Greece, has by Greek law, been amalgamated with the Bank of
Athens. If the Greek legislature chooses to dissolve or amalgamate its own
creatures, the English courts cannot prevent it. They must recognise it as a fact.
Just as English law must recognise a dissolution (see *Lazard Bros. & Co.* v.
Midland Bank, Ltd. (18)), so, also, it must recognise an amalgamation. The
B former companies cease to exist and are merged in a new amalgamated company.
Such is the fact; or rather the state of affairs which we must recognise as a fact.
But the legal consequences of that fact, in relation to an English contract, are a
matter for English law. Thus, English law has already laid down some of the
consequences which follow from the amalgamation of the National Bank of
C Greece with the Bank of Athens. That amalgamation, when it was originally
effected in February, 1953, carried with it, as every true amalgamation should,
successio in universum jus, that is to say, succession to all the assets and liabilities
of the former companies. Once the new amalgamated company took unchallenged
possession of the assets, the bondholders were entitled to treat the new amalgamated
company as the successor to the former companies, succeeding to all their
D obligations, and thus responsible as guarantor of the bonds: see *National Bank
of Greece and Athens, S.A.* v. *Metliss* (19).

But your Lordships are faced with a new problem because the Greek legislature
has now amended the original law (2292 of 1953) as to amalgamation. On July 16,
1956, four days after the decision of SELLERS, J., in the *Metliss* case (19), the
Greek legislature (by law 3504 of 1956) declared that, on an amalgamation of
E banking companies, there was not to be a complete successio in universum jus.
The new amalgamated company was to take over all of the assets. But not all
of the liabilities. It was not to be responsible for liabilities on bonds such as
these. This law was made retrospective to the original law of 1953.

What is the effect of this amendment? How does it affect the liability of the
F new amalgamated company to the bondholders? There are three ways of looking
at Greek law 3504 of 1956. It can be regarded as (i) a law relating to
discharge, or (ii) a law relating to succession, or (iii) a law relating to status.
(i) *As a law relating to discharge.* This way of looking at it arises from the fact
that the new amalgamated company was formed in 1953, and that nothing
happened to it in 1956 which affected its status. It did not die. It continued in
G existence just as before. All that happened in 1956 was that the Greek legislature,
by law 3504, attempted to discharge it from some of the liabilities that it had
assumed. But this could have no effect on these bonds. They were governed by
English law; and the liabilities under them cannot be discharged by foreign
legislation: see *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux*
(20). (ii) *As a law relating to succession.* This way of looking at it arises from the
H fact that, in 1953, the new amalgamated company succeeded to all the assets and
liabilities of the former companies. It was as if they had died and it had succeeded
them. Afterwards, on July 16, 1956, the Greek legislature, by law 3504, attempted
retrospectively to alter the succession by providing that the new amalgamated
company should be exempt from some of the liabilities. But this could have no
effect on the bonds. English law does not recognise foreign legislation which
I retrospectively alters rights of succession: see *Lynch* v. *Paraguay Provisional
Government* (21). (iii) *As a law relating to status.* This way of looking at it arises
from the fact that the original law 2292 of 1953 was a law of status. It dissolved
the two former companies and merged them into a new amalgamated company.
It defined the attributes of this amalgamation by providing for successio in

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(18) [1932] All E.R. Rep. 571 at p. 576; [1933] A.C. 289 at p. 297.
(19) [1957] 3 All E.R. 608; [1958] A.C. 509. (20) (1890), 25 Q.B.D. 399.
(21) (1871), L.R. 2 P. & D. 268.

universum jus. This was an essential part of a law of status. The amending law 3504 of 1956 amended this law by redefining the attributes of the amalgamation. By amending a law of status, it must itself be regarded as a law of status. On this view, it can be said that law 3504 does affect the liability on the bonds, because the status of a Greek company is governed by Greek law. It exempts, therefore, the new amalgamated company from liability.

My Lords, I doubt whether this case is properly to be solved by seeking to put law 3504 into any particular category. Like the Court of Appeal, I do not derive assistance from the attempt to apply to it some label of precise description. I prefer to consider it as it is, as a law which defines the attributes of amalgamation, and see what effect should be given to it. I put on one side the liabilities which arose between February, 1953, and July 16, 1956. During this period the principal debtor failed to pay interest due on the bonds and the new amalgamated company became liable as guarantor to pay that interest. Once this liability arose, I do not think that Greek law could take it away. The principles in *Gibbs'* case (22) would apply. We are here concerned with the liabilities which arose after July 16, 1956. The bondholders claim the principal and interest which accrued due on the bonds after July 16, 1956. They do not sue the principal debtor. They sue the guarantor. And it is quite clear that the liability of the guarantor only arose after July 16, 1956; for he did not become liable until the principal debtor made default. Who was the guarantor at that time? The bondholders say it was the new amalgamated company. But how can they make this good? They must rely on the Greek law of amalgamation for the purpose; but they cannot rely on law 2292 as it was passed initially in 1953, because it was amended on July 16, 1956. They have to rely on Greek law 2292 in the amended form which it has assumed since July 16, 1956.

Now here comes the point. The Court of Appeal say that (23) " . . . those who need recourse to Greek law must take it as they find it ". The bondholders must take the Greek law as it is, not as it used to be. They must take the new amalgamated company with the attributes now given to it by Greek law. And by Greek law it is expressly exempt from liability on bonds such as these. This is a formidable argument, as, indeed, one would expect, seeing the quarter from which it comes. It raises at once the question: What effect does English law give to an amalgamation which does not carry with it the attribute of successio in universum jus? To take an extreme case. Suppose that a foreign law of amalgamation provides that the new amalgamated company is to take over all the assets of the former companies but is to bear none of the liabilities. That would very much resemble a fraudulent conveyance, as Lord Atkin once had occasion to observe: see *Nokes* v. *Doncaster Amalgamated Collieries, Ltd.* (24). It would be contrary to all notions of what a true amalgamation should be; for it is of the very essence of the transaction that the liabilities and assets of the former companies should attach to the new company. That was pointed out by my noble and learned friend, Lord Tucker, in *National Bank of Greece and Athens, S.A.* v. *Metliss* (25). Faced with such a situation, I would recall that Lord Atkin once said that the municipal law of this country, as of other countries,

> " . . . may in defined conditions refuse to accept or may accept only under conditions either the creation or destruction of a foreign juristic person ":

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(22) (1890), 25 Q.B.D. 399.
(23) [1959] 2 All E.R. at p. 365; [1960] 1 Q.B. at p. 81.
(24) [1940] 3 All E.R. 549 at p. 559; [1940] A.C. 1014 at p. 1029.
(25) [1957] 3 All E.R. at p. 615; [1958] A.C. at p. 529.

A see *Russian & English Bank & Florance Montefiore Guedalla* v. *Baring Bros. & Co., Ltd.* (26). Now an amalgamation involves the destruction of two foreign juristic persons and the creation of a new one. Applying, as I think one may, LORD ATKIN's words to this situation, it means that English law may, in certain circumstances, refuse to accept the foreign amalgamation, or may accept it only under conditions. One such circumstance is when it does not provide for successio B in universum jus. English law may refuse to accept the amalgamation and wind-up the former companies as though they had not been destroyed; or it may accept the amalgamation subject to the condition that, if the new amalgamated company takes possession of the assets, it must be responsible for the liabilities; for that is of the very essence of the process of amalgamation.

C Applying these principles, it seems to me that the English courts are not called on to recognise Greek law 2292 in the form that it has now retrospectively assumed. By the amendment made on July 16, 1956, the Greek legislature has presumed to vest all the assets in the new amalgamated company but some only of the liabilities. It has excluded the liabilities on bonds payable in gold or foreign currency. This exclusion is such an unusual provision in an amalgamation, and D is so inconsistent with the essence of the transaction, that there is no comity of nations which requires the English courts to recognise it. Seeing that the assets have become irretrievably vested in the new amalgamated company, the English courts are entitled, I think, to accept the amalgamation as effective to create a successio in universum jus, and to reject the attempt to detract from it. The bondholders are, therefore, entitled to treat the new amalgamated company as E the guarantor of the bonds, even in respect of liabilities arising after July 16, 1956, as well as those before.

I would allow the appeal accordingly.

Appeal allowed.

Solicitors: *Herbert Smith & Co.* (for the appellants); *Stibbard, Gibson & Co.* (for the respondent bank).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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(26) [1936] 1 All E.R. 505 at p. 519; [1936] A.C. 405 at p. 428.

ROUTH TRUSTEES *v.* CENTRAL LAND BOARD.
ROUTH *v.* CENTRAL LAND BOARD.

[COURT OF APPEAL (Lord Evershed, M.R., Ormerod and Devlin, L.JJ.), May 2, 3, 1960.]

Court of Appeal—Evidence—Further evidence—Case Stated from Lands Tribunal—No right to adduce fresh evidence—Lands Tribunal Act, 1949 (12, 13 *&* 14 *Geo.* 6 *c.* 42), *s.* 3 (4).

Town and Country Planning—Development value—Determination—Land requisitioned at relevant date—Whether requisition an incident relevant to calculation of value—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6 *c.* 51), *s.* 61 (5), *s.* 89 (1).

Proceedings should not be entitled as between " the Trustees of the Estate of . . .", without naming the individual trustees, and the opposing party (see p. 437, letter I, post).

Fresh evidence on values cannot be adduced on appeal by Case Stated from the Lands Tribunal, since the appeal is only on law (see p. 442, letter A, post).

Land, the freehold of which belonged to the appellants, was subject to requisition by the Crown on July 1, 1948, and had been so for some eight years. On appeal from a determination of development value by the Central Land Board the Lands Tribunal, applying s. 61 (5)* and s. 89 (1)† of the Town and Country Planning Act, 1947, decided that regard must be had to the fact that the land was in requisition and likely to remain requisitioned until 1952. The tribunal intimated, however, that if, in the circumstances, the requisition did adversely affect the amount of development value, its effect was small‡. On further appeal,

Held: though the values must be calculated according to prices current immediately before Jan. 7, 1947, treating the land as having been immediately before that date in the same physical state as it was immediately before the requisition began, yet it would be wrong in making the valuations to ignore altogether the fact that the land was in requisition and likely to remain so for some time with the consequence that its development would be postponed (see p. 440, letter F, post); it was not, however, necessary finally to decide this point because if the requisition did have adverse effect on the development value, the effect was, on the true interpretation of the tribunal's decision, negligible (see p. 441, letter E, post).

Appeals dismissed.

[**Editorial Note.** Section 58 of the Town and Country Planning Act, 1947, and s. 65, s. 66 and s. 68, so far as they relate to payments under schemes under s. 58, were repealed, with provision for satisfaction of claims duly made, by s. 2 (1) of the Town and Country Planning Act, 1953. Provision for making payments for depreciation of land values by reference to claims established under Part 6 of the Act of 1947 is now made by the Town and Country Planning Act, 1954, Part 1, in the special cases there indicated. The Central Land Board was dissolved and its functions transferred to the Minister of Housing and Local Government and Secretary of State for Scotland on Apr. 1, 1959, by the Central Land Board

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* The relevant terms of s. 61 (5) are printed at p. 439, letter E, post.

† The relevant terms of s. 89 (1) are printed at p. 439, letter G, post.

‡ An extract of the relevant part of the decision of the tribunal is at p. 440, post, footnote (4), letter I.

(Dissolution and Transfer of Functions) Order, 1959 (S.I. 1959 No. 530). The transfer was without prejudice to the operation of anything done by the board before Apr. 1, 1959.

As to an appeal from the decision of the Lands Tribunal, see 10 HALSBURY'S LAWS (3rd Edn.) 179, para. 321.

For the Lands Tribunal Act, 1949, s. 3 (4), see 28 HALSBURY'S STATUTES (2nd Edn.) 322.

For the Town and Country Planning Act, 1947, s. 58 (1), s. 61 (5), and s. 89 (1), see 25 HALSBURY'S STATUTES (2nd Edn.) 560, 565, 605.]

Cases Stated.

These were two appeals by way of Cases Stated by the Lands Tribunal (JOHN WATSON, Esq., and J. R. LAIRD, Esq.), on July 27, 1959, for the decision of the Court of Appeal pursuant to the Lands Tribunal Act, 1949, s. 3 (4). In one case the appellants were stated to be the trustees of the estate of J. W. Routh, deceased, and in the other case the appellant was Reginald Alan Routh, the respondent in each case being the Central Land Board. The appeals were from the decisions of the Lands Tribunal dated Nov. 28, 1958, on appeals from determinations by the Central Land Board, made on Nov. 6, 1953, of the development values in the freehold interest in certain areas of land situated at Tilehurst, in the county borough of Reading.

The original claims in the present cases were dated Apr. 29, 1949, and revised valuations were submitted by the appellants in 1954. Between 1952 and 1954 the greater part of the land was acquired by Reading Corporation and had since been developed as a housing estate. The decision of Nov. 28, 1958, was on a re-hearing by the Lands Tribunal arising out of an order of the Court of Appeal, dated June 5, 1957, setting aside a decision of the Lands Tribunal made on July 29, 1954. The land in question had been requisitioned by the War Department or by Berkshire War Agricultural Executive Committee at dates in 1939 or 1940 and was still under requisition on July 1, 1948.

The appellants also applied, by original motions, for leave to adduce further evidence.

The appellants appeared in person.

G. D. Squibb, Q.C., and *W. J. Glover* for the respondent, the Central Land Board.

LORD EVERSHED, M.R.: These are appeals in the form of Case Stated to the court pursuant to s. 3 of the Lands Tribunal Act, 1949. In the one case the appellant is Mr. Reginald Alan Routh, the respondents being the Central Land Board, and in the other case the appellants are stated as being the trustees of the estate of J. W. Routh, deceased. I mentioned this matter earlier on and I wish to repeat it in the hope that some notice will be taken of it. It is not a point on which I am placing any blame whatever on the appellants in this court because this form of entitling the proceedings has probably been in use for some time, but I wish to say that it is quite wrong. The trustees of the estate of J. W. Routh are not a body corporate or incorporated by royal charter or otherwise. The phrase " the trustees of the estate of J. W. Routh " can only mean the individuals who for the time being may be the trustees of that estate and it is quite wrong that proceedings should bear that title. It can be seen how such a thing might be abused, for, shortly before the appeal, it would be possible by appropriate machinery to substitute for the previously existing trustees some one person who was a man of no substance whatever, and if he was entitled to continue the appeal the other party might be put at considerable disadvantage. In the present case it appears that the present trustees are three in number, Mr. Reginald Alan

Routh himself, Wing-Commander Routh and also Mrs. Routh, the wife of the first trustee whom I have named. Mrs. Routh, I gather, was made a trustee in December, 1959, after the hearing before the Lands Tribunal. I am in some doubt whether, strictly speaking, she would be entitled to be heard as an appellant in this court without an amendment of the proceedings, but, as such an amendment, if asked for, would have been granted, nothing turns on it. I refer to it again only to emphasise that this form of entitling proceedings (and we came across it recently in a Revenue case (1)) is quite wrong and I hope that it will not be repeated.

The matter comes before us by virtue of s. 3 (4) of the Lands Tribunal Act, 1949. In view of the conclusion which I have reached on a great many of the points in this case, I think it necessary that I should read the whole of that subsection. It is as follows:

> " A decision of the Lands Tribunal shall be final: Provided that any person aggrieved by the decision as being erroneous in point of law may, within such time as may be limited by rules of court, require the tribunal to state and sign a case for the decision of the court [which means this court (2)] and, where the decision of the Lands Tribunal is given on a review by way of appeal of the previous decision of another person, that person if dissatisfied with the decision of the Lands Tribunal shall be treated for this purpose as a person aggrieved thereby."

Ever since the foundation of the Court of Appeal by statute less than a century ago, it has been laid down as a principle that in the ordinary case a hearing in the Court of Appeal shall be a re-hearing of the case. That does not mean that the witnesses are called again, but it does mean that, save where Parliament by statute otherwise directs, it is open to an appellant to challenge matters or findings of fact in this court, and it is the duty of this court to come to its own conclusion on the facts; though, as is well known, this court is always slow to reverse the court below on a finding of fact, particularly one which depends on that court's estimation of the demeanour and so forth of the witnesses. I am going into this matter, elementary though it is, at a little length in the hope that it may be some consolation to the appellants and that they may appreciate the limitations which are placed on us by Parliament in the present case. For this is a case of a kind in which Parliament, in its wisdom, and by the terms of the Lands Tribunal Act, 1949, has said in plain terms that there shall be no review of matters of fact in the Court of Appeal on a case coming from the Lands Tribunal. On matters of fact the decision of the Lands Tribunal, right or wrong, is final; but a person aggrieved, as the appellants in this case say that they are aggrieved, may require a Case Stated, which will raise questions of law, and law only. In this case, the vital question was one of valuation, arriving at an estimation in pounds, shillings and pence, of the development value of certain interests in land belonging to the appellants, and a matter of value and such a matter of estimation is one of fact.

[HIS LORDSHIP then dealt with the appellants' complaint that the Lands Tribunal arrived at a wrong conclusion on the evidence, and said that the question what evidence was to be accepted was one for the tribunal and that there was no misdirection of themselves by the tribunal as regards any of the matters complained of as would justify the court in saying that the tribunal's figures could not stand. HIS LORDSHIP continued:] I come, therefore, to the point which is a question of law or involves a question of law, and it is this. We are concerned with two cases: one in which the appellants are the trustees of the estate of J. W. Routh, the land in which they are interested amounts to sixty acres and more, and the other of which is the case of Mr. R. A. Routh, who is interested in adjoining land of about eighteen acres—I am using round figures. In both cases, however, at the relevant date (and I will state what I mean by that presently) the greater part of the property was subject to requisition either by the War Department or by another Ministry of the Crown. In arriving at the figures which the expert witnesses for the respondent, the Central Land Board, put before the tribunal, it was indicated that the value attached to the property had been affected, and affected for the worse from the point of view of the appellants, by the fact of these requisitions still being operative.

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(1) See *Tollemache Settled Estates* (*Trustees*) v. *Coughtrie*, at p. 127, letter H, ante.

(2) See s. 3 (11) (a) of the Lands Tribunal Act, 1949; 28 HALSBURY'S STATUTES (2nd Edn.) 323.

I must now state what I mean by " the relevant date ". The Town and Country Planning Act, 1947, came into effect on July 1, 1948, and, on its coming into effect, permission was required, by virtue of s. 12, for any development of land to be carried out thereafter. By way of compensation for what the owner lost, it was provided by Part 6 of the Act (3) that the landowner should get a payment for the depreciation of his land value in consequence of the operation of the Act. Section 58 (1) provides:

> " Subject to the provisions of this Part of this Act, payments shall be made in accordance with a scheme to be made by the Treasury under this section, in respect of interests in land which are depreciated in value by virtue of the provisions of this Act."

Section 61 (5) provides:

> " For the purposes of this section, the restricted and the unrestricted values of interests in land shall be calculated by reference to prices current immediately before Jan. 7, 1947, and for that purpose any such interest shall be treated as if it had been subsisting immediately before that date with all incidents to which it is subject on the appointed day [July 1, 1948] (being incidents which are relevant to the calculation of the restricted or unrestricted value of that interest, as the case may be), and the land shall be treated as having been immediately before that date in the same state as it is on the appointed day . . ."

The last line which I have read has to be qualified by virtue of a later section of the Act, s. 89. In the case of land subject to requisition s. 89 (1) provides:

> " For the purposes of Part 6 of this Act, the development value of any interest in land which is requisitioned land on the appointed day shall be calculated as if the land had been on that day in the state in which it was immediately before the beginning of the period of requisition . . ."

The subsection then goes on to provide that the reference to the appointed day at the end of s. 61 (5), which I have read, must be treated as being a reference to the beginning of the period of requisition. Therefore, in the case of requisitioned land, s. 61 (5) says that the values must be calculated according to prices current immediately before Jan. 7, 1947, and one has to treat the land as having been immediately before that date in the same state as it was, not on July 1, 1948, but on the date when the requisition commenced.

The first problem of interpretation is not difficult. I do not think that we have been told the actual dates of the requisition, but I do not think that that matters. There is no doubt whatever that the land or the bulk of it was subject to requisition on July 1, 1948, and had been for some time before. One is, therefore, required by s. 61 (5), as interpreted by s. 89 (1), to arrive at the calculation of value as though the land had been immediately before the relevant date, Jan. 7, 1947, in the same state as it was immediately before the requisition. Now the argument was put: What is meant by the phrase " in the same state as it is "? The tribunal concluded that it meant in the same physical state (4), the same condition, and I think that it must mean that; it cannot, indeed, mean anything else. One has to disregard physical changes in the case of requisitioned land which may have occurred since the requisition. For example, in this case I gather that part of the land was used for the installation of certain hutments. One has to ignore the fact that those hutments were on the land at the valuation date and treat the land as it stood just before the requisition began. But then there has been a second question. It has been suggested for the appellants here that, for the purpose of valuing development value, one ought to ignore the requisition altogether. It may be that this is the first time that this particular point has arisen. Leading counsel for the Central Land Board who has great experience in these matters said that he did not recall any other case. I confess to having felt some sympathy with the appellants because, since this Act was designed to enable landowners to get fixed, and when the Act was passed fixed for all purposes, the development value of their land as distinct from its existing use value, it seems a little hard that their development value should be affected for worse by the accident of the fact that at the relevant date the land was subject to requisition. It was, therefore, suggested that, if the land is to be treated as though it was in the same state as it was before the appointed day, no notice should be taken of the requisition. I am by no means clear from the terms of the decision that in this case it could make any difference, and it may, therefore, strictly not be necessary to express a final view about it. But, as at present advised, I think that, although one values the land, treating it on the valuation date as in the same condition physically as it was immediately before the requisition began, one cannot ignore, for the purposes of considering development value, the fact, the circumstance, the incident (to use the word in s. 61 (5) of the Act of 1947), that, as the land is requisitioned and is likely to remain under requisition for some time, development would have had to be postponed (5) for a while. After all, what is being valued is the particular interest in land. If it was a case of a freeholder, his interest would be limited, if there was a subsisting lease, to his reversionary interest as freeholder, and presumably the lessee's interest would be a separate interest to be valued. Here the interest of the appellants relevant at the date was that they had the freehold although it was subject to requisition. It is true that, so far as the physical condition of the land is concerned, one has to ignore the requisition: none the less, what is being considered by Part 6 of the Act of 1947 (6) is an assessment of the depreciation in the value of the land " by virtue of the provisions of this Act ". It is clear that the requisition had nothing whatever to do with the Act of 1947. Therefore, if it were necessary to state a conclusion, I would be disposed to agree with the view of the tribunal that the valuation had to have regard to the circumstance that the land was at the relevant date under requisition. As I indicated earlier, I am by no means satisfied (and from this I take some comfort) that it could have made any difference. We know that in the period with which we are here concerned, shortly after the last war, a landowner could not develop as he wished because of building licences and so on, and so it is stated in the decision:

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(3) **Part 6 consists of s. 58 to s. 68, inclusive.**

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(4) In their decision the Lands Tribunal, after referring to s. 89 and s. 61 (5) of the Town and Country Planning Act, 1947, said: " In our view the ' state ' of the land [i.e., the ' state ' referred to in s. 61 (5) and s. 89] means physical state, and the combined effect of these provisions, together with those of Sch. 3, is merely to provide that any alteration in the physical state of the land, whether it increases or decreases its value must not be taken into account. In valuing requisitioned land for the purpose of Part 6 both the restricted and the unrestricted values are diminished, or increased, by that part of the value which on the appointed day derives from the anticipated period of continued requisition. There may be cases where an owner of land which is dead ripe for development incurs a serious loss because a period of requisition, at a disproportionately low rent, impedes a development which would greatly enhance its value. If so, this is not one of them. But that is not to say that the development value of this part of the appeal land is not less than it would have been had this requisition been ignored. Counsel for the appellants asked us to state what in our opinion the determinations should be if on this point we are wrong in law. But he did so only in his closing speech and had put no questions to [the district valuer] on that point. In these circumstances we think it sufficient to say that, having regard to all the other adverse factors, the difference in the unrestricted values—and therefore in the development values—would be small. Because of the circumstances which we have mentioned —general conditions, local conditions, and special considerations applying to the land with which we are concerned—we have come to the conclusion that Mr. Cole [a valuer who gave evidence on behalf of the appellants] is again unrealistic. We do not believe that in July, 1948, any purchasers could have been found for these pieces of land at prices based on the expectation of completing their development within the periods which he has assumed."

> " Apart . . . from any other consideration, a developer would have seen little prospect of being able to begin operations until some five years after the appointed day."

That period would overlap the estimated length of time of the requisition. Therefore, when, later in their decision, the tribunal stated in their conclusion (7) that, if this matter of requisition did have an adverse effect on the value, the result would, in their own language, " be small ", I interpret that as meaning, in effect, negligible.

That disposes of the one point which raises a question of law. When these cases came on there were also applications by way of original motion before the court in both cases for leave to adduce further evidence. It was quite plain that what the appellants sought to do was to bring before us fresh evidence of the values, at the relevant date, of these properties. We were told in some instances that this fresh evidence was evidence which had not been available to the appellants when the matter was before the Lands Tribunal. So far as the evidence had been available before the Lands Tribunal though not in fact called, it is of course plain on general principles which apply to other cases that we should not in this court, unless there was some very special reason which has not been indicated here, have allowed the additional evidence to be called. As regards evidence which came into the possession of the appellants later and which, therefore, they could not call, there might have been, in an ordinary appeal, a case in which such additional evidence might have been allowed; but having regard to the terms of s. 3 (4) of the Lands Tribunal Act, 1949, it is plain, I think, that no question of calling additional evidence in a case of this sort could be permitted. I repeat again the essential terms of the subsection, which are that the only matters which by statute this court can entertain are questions of law of a limited kind which are made the subject of a Case Stated by the tribunal, raising the submission that their decision as it stood, and on the facts before them, was erroneous in some way in point of law. It is quite plain, therefore, that the attempt by the appellants to bring fresh evidence before this court could not possibly be substantiated and we earlier indicated that we refused those applications accordingly.

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(5) The difference between the case for the appellants and the case for the respondents as regards the effect of a requisition on values is apparent from the last preceding footnote. Mr. Francis, a chartered surveyor and district valuer for Berkshire, had given evidence for the Central Land Board, before the Lands Tribunal. The tribunal's summary of his view on this matter was as follows: " He said that he had been influenced, when making his valuations, by the fact that the northern part of the land was requisitioned with no likelihood of de-requisition until December, 1952, and also by the fact that there was no prospect of being able to drain the southern part until 1953. He had based his valuations on settlements of Part 6 claims in relation to similar land, and he submitted a schedule containing particulars of claims that he had settled in relation to twenty-five neighbouring sites, all of more than five acres, within a radius of one mile of the appeal land ". The tribunal then set out Mr. Francis's valuation of the three appeal areas and continued: " All his settlements of unrestricted value, so Mr. Francis said, were based on values which in general range from £4 to £5 a foot for land with frontage to existing roads. He had then deferred these values per foot for various periods depending on the ripeness of the sites for development. None of the back land was ripe at the appointed day; therefore he considered its development value to be small. In each case, having deducted from the total area that of the notional building plots with road frontage, he had valued the remaining back land at an overall price per acre. The carriage-ways over the appeal land would in his opinion have had no value to a developer; even if they had been in the right places, they would have had to be re-made to bye-law width. Therefore all the appeal sites fell into the category of back land. It is clear from this that the frontage values, at £4 to £5 a foot, are inherent values before ripeness for development is taken into account. But the values per acre of the back land—where Mr. Francis takes only one bite at the unripe cherry—contain a latent element of deferment."

(6) See s. 58 (1).

(7) See footnote p. 440, letter I, ante.

I do not think it necessary to pursue the matter. I have attended to the arguments which Mr. Routh and his wife have put with force before us. I have no doubt that they feel very strongly that the figures which the tribunal reached were unfairly low, but I have come quite clearly to the conclusion that, if that is so, it is because, and only because, the tribunal came to a conclusion of fact which on a review might not have commended itself to this court or to another tribunal. I am not saying that they did so, but that is the highest it can be put, and, that being so, the matter is clearly not open to the appellants for review in this court. I therefore have to conclude that both appeals must be dismissed.

ORMEROD, L.J.: I agree.

DEVLIN, L.J.: I also agree. *Appeals dismissed.*

Solicitor: *Solicitor, Ministry of Housing and Local Government.*

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

BOHNEL v. BOHNEL.

[COURT OF APPEAL (Sellers, Willmer and Harman, L.JJ.), April 29, May 2, 1960.]

Divorce—Cruelty—Intention—Concealment of conduct that might cause injury—Inference of absence of intention to injure—Husband's practice of dressing in women's clothing—Refusal of medical treatment—Treatment calculated to increase frigidity.

The husband made a practice of dressing in women's clothing and of using unguents and powder like a woman, but made every effort to conceal the aberration from the wife and it was only discovered by her on returning home unexpectedly on two occasions. The discovery on the first occasion in 1955 was a great shock to her and caused a nervous breakdown, but it was not shown to have done so on the second occasion in 1958, and the wife continued to cohabit with the husband for eight months afterwards. The husband saw a psychiatrist about his condition but did not undergo treatment and there was evidence that such treatment would have repressed his sexual desires and so have increased his frigidity towards the wife, which was one of the factors affecting her. On appeal by the wife from dismissal of a petition by her for divorce on the ground of cruelty,

Held: cruelty had not been established because—

(i) the husband's concealment of the continuance of his conduct, the unlikelihood of the wife's discovering it and the absence of injury to her health when in 1958 she did discover it, negatived any inference that the husband was pursuing a course of conduct which he ought to have foreseen would cause injury to her health,

(ii) nor (*semble*) was such an inference justified by the fact that the husband declined to undergo medical treatment, in view of the prospect that it would increase frigidity towards the wife and so, in the circumstances, would not have been effectual to improve marital relations.

Appeal dismissed.

[As to the intention to be cruel as an element in cruelty in divorce proceedings, see 12 HALSBURY'S LAWS (3rd Edn.) 272, para. 520; and for cases on the subject, see 27 DIGEST (Repl.) 296, *2415*, *2416*.]

Cases referred to:

Jamieson v. *Jamieson*, [1952] 1 All E.R. 875; [1952] A.C. 525; 116 J.P. 226; 3rd Digest Supp.

Williams v. *Williams*, (Mar. 16, 1958), " The Times."

Appeal.

The wife appealed against an order of His Honour JUDGE ARMSTRONG, sitting as a Special Commissioner, made on Aug. 18, 1959, dismissing her petition for divorce on the ground that the husband had not been guilty of cruelty.

R. F. G. Ormrod, Q.C., and *T. G. Field-Fisher* for the wife.

The husband was not represented.

WILLMER, L.J., delivering the first judgment at the request of SELLERS, L.J., said: This is an appeal against a decision of His Honour JUDGE ARMSTRONG given on Aug. 18, 1959, whereby, sitting as a Special Commissioner, he dismissed a wife's petition for divorce on the ground of cruelty. Though undefended, the case is not without difficulty, for the allegations made by the wife against the husband are of an unusual nature. The learned commissioner himself clearly found the case one of some difficulty, for, after hearing evidence at considerable length on two separate dates, he took time to consider his decision, and in due course delivered a considered judgment in which he dealt very fully with the issues raised.

The parties were married on Apr. 10, 1943, the husband being then thirty-three years of age, and the wife twenty-nine. At the time of the marriage the husband, who was of Czechoslovak origin, was serving in the Forces, and continued to do so until the end of the war, after which the parties settled down and lived in this country. There were two children of the marriage, only one of whom survives, a boy born on Apr. 13, 1948. It appears that, after a visit to Czechoslovakia at the end of the war, the parties came to this country and lived together first with the wife's parents, and later in a caravan. There was then a period, from about 1949 to 1953, during which the parties were separated, the wife living with her parents, and the husband remaining in the caravan, though he continued to visit the wife at intervals. They came together again in 1953, and lived at 96, Osborne Road, Windsor, and so remained until the end of 1958, when the wife left the husband. Her petition was presented on Jan. 20, 1959.

The wife's case, as set out in the particulars under para. 5 of the petition, was as follows:

> " The nature of the petitioner's case is that since the year 1945 the respondent has constantly desired and shown his desire to dress and behave like a woman. In 1945 the respondent possessed a suitcase filled with women's clothes. In 1948 he acquired a pair of women's shoes. In 1955 at the matrimonial home the petitioner discovered the respondent attempting to conceal women's clothes in and under a wardrobe. On this occasion the respondent possessed unguents and powder more usually possessed by women than men. In 1958 at the matrimonial home the petitioner found the respondent dressed like a woman and the respondent told the petitioner he wished to live with another man. The respondent is repelled by sexual intercourse."

The wife's story as given in evidence so far as material is as follows: From the beginning the relationship between the parties was cool, and sexual intercourse took place only at rare intervals, usually at the instigation of the wife. As early as

1945, when the parties were about to go away on their visit to Czechoslovakia, the wife, on opening the suitcase which the husband had possessed, discovered that it contained women's clothes. When challenged about this, the husband said that in his youth he had been in the habit of dressing up as a woman. For the time being the wife accepted this explanation, though she appears to have been left with a suspicion that another woman might be involved. Nothing further was proved until 1955, when an incident of considerable consequence occurred. The parties had been away for a visit to the wife's parents, from which the husband returned to the matrimonial home before the wife. When the wife reached home, she was unable to get in, the latch on the door having been dropped, and she had to wait until the husband opened the door and let her in. The husband was wearing a dressing gown over his jacket and trousers, but on following him upstairs the wife discovered that he had women's clothing in the bedroom and that there were cosmetics and face-cream, of a type used by women, on the dressing table. The wife admitted that she had never seen the husband with his face actually made up, nor up to that time had she ever seen him actually wearing women's clothing. She challenged the husband about her discovery, and a discussion ensued, in the course of which he started crying and asked for her help. She suggested that he should see a doctor, and he agreed to do so. There is no doubt that the discovery which the wife made caused her a very great shock, and shortly afterwards she had a complete nervous breakdown. She was received into Holloway Sanatorium, Virginia Water, as a voluntary patient and was under treatment there from June 13 to Nov. 26, 1955. In accordance with his promise, the husband did see a psychiatrist, but he never in fact underwent any treatment.

After her discharge from the sanatorium, the wife returned to live with her husband, and the next thing that happened according to her—though this is not pleaded in the petition—was that she discovered that he was again collecting women's clothing. She appears to have taken no action about this, and nothing further happened till a date early in 1958. The exact date has not been fixed, but from the evidence of Dr. Irwin it is clear that it was some time not later than April. On this occasion the wife, who was working at the time, was given some time off on a Saturday afternoon, and returned home unexpectedly and found the husband actually dressed in women's clothing. When challenged about this, the husband said that she could have a separation or a divorce or anything she wanted. During a later discussion that same weekend he said he wanted to be a woman, and in reply to a further question he admitted that he would like to live in a house with another man.

The wife said that she was very upset by this further discovery, but there is no evidence to show that on this occasion her health was adversely affected. She did again attend the sanatorium, where she interviewed Dr. Irwin, but she did not require or receive any treatment herself. I think that the inference is that she went there primarily to discuss the possibility of her husband receiving treatment. It appears from the evidence of Dr. Irwin that the husband in fact went to see him, and admitted his taste for dressing up in women's clothing; but, although Dr. Irwin expressed the view that he could have been given certain treatment which might have controlled his impulses, the husband never in fact underwent any such treatment.

After that date the parties continued to live together, though clearly they were more or less at arm's length. The wife said that the husband ignored her and the child. No further sexual intercourse took place, the last occasion having been, according to the wife, at Christmas, 1957. There were no further incidents, and eventually in December, 1958, the wife left.

Evidence was given by Dr. Smedhurst, who attended the wife during her stay in the sanatorium in 1955, that at the time of her admission she was suffering from what was described as " agitated depression ", requiring intensive treatment. She had to be accommodated at first in a protected room, and thereafter she

A received intensive electrical treatment. This was so far successful that by October of that year she was able to give a lucid history of her married life. She was discharged during the following month, apparently cured, and there is no evidence of any further breakdown in her mental health after that date. Dr. Smedhurst's view of the cause of the wife's breakdown in 1955, I think, may be collected from two answers which she gave in the course of her evidence. She was asked:

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> " Are you prepared to say whether or not within your knowledge what Mrs. Bohnel was suffering from when she came into Holloway on that first occasion was consistent with a woman who had had a shock perhaps of finding out about that sort of side of her husband's life? A.—Yes. At that time in fact it seemed dramatically so from the patient's point of view. She felt at that time that he was the obsessive factor, and we were inclined to C agree that she had been trying to conceal from herself the full significance of her husband's perversion, which shortly before her admission she had discovered the full extent of it and its consequences and she had reacted to this by being unable to face up to it and in time she had become more and more shattered until she could see no way out of her predicament."

D Later on, on p. 23, Dr. Smedhurst said in answer to a question from the learned commissioner:

> " I think that our patient was disgusted with this sort of thing at the time, and I think it took a violent form, because she felt that this was a perversion that would affect the whole family."

Dr. Irwin, who saw the wife in 1958, said that in his view there was a possibility E of a recurrence of what had happened to the wife in 1955—the circumstances being similar. In fact, as already stated, no such recurrence did take place, and it has not been necessary for the wife to receive any further treatment. As I understand it, it is not suggested that the mere fact of the husband having a tendency which impelled him to collect women's clothes, cosmetics, and so forth, was of itself sufficient to amount to cruelty. What has been contended, both here and before F the learned commissioner, is that the cruelty lay in continuing the practice after the events of 1955, when its damaging effect on the wife's health was brought so forcibly to his attention. The husband, it is said, is in a dilemma from which there is no escape. Either he was able to control his tendency, in which case there would be no excuse for continuing a practice which he knew was extremely distressing to his wife; or else the tendency was one which he could not control without G undergoing treatment, in which case his refusal to undergo the treatment that was offered to him in 1955 was inexcusable. In either event the result must be the same, i.e., that the husband continued to pursue a course of conduct which he could have avoided. Reliance was placed on *Williams* v. *Williams* (1), in which COLLINGWOOD, J., found cruelty proved against a husband who persisted in the practice of dressing up as a woman, despite the distress which to his H knowledge it caused to his wife.

The learned commissioner came to the conclusion that the wife's nervous breakdown in 1955 was largely contributed to by the shock she received when she discovered how her husband was behaving. This conclusion was well warranted by the evidence, and must in my judgment be accepted. He took the view, however, that the decisive feature of this case was the secretive nature of the husband's I behaviour. So far from flaunting his feminine tendencies, he did his best throughout to conceal from his wife the way in which he was behaving. This alone, in the view of the learned commissioner, was enough to distinguish the present case from *Williams* v. *Williams* (1), in which the gravamen of the charge against the husband was that he was constantly parading his tendencies, both in his conversation and in his behaviour, to the manifest distress of his wife. On this point again I find myself in agreement with the learned commissioner. Moreover, the fact of the husband making every effort to conceal what he was doing from his wife makes it impossible to impute to him any actual intention to injure her. In these circumstances, the learned commissioner rightly applied his mind to the position whether an intent to injure ought to be inferred, on the basis that the husband deliberately pursued a course of conduct which, as a reasonable man, he must have realised would be likely to cause injury. He came to the conclusion that no such intent ought to be inferred, his reasoning, as I understand the judgment, being substantially as follows. If and so far as the husband was able to control his actions, he was indulging his tendencies in circumstances in which he could reasonably suppose they could never come to the knowledge of the wife. In so far as he was incapable of controlling his actions without treatment, his refusal to undergo the treatment that was offered was not in all the circumstances unreasonable; nor, in the view of the commissioner, would the treatment available to the husband have been effective to cure what he regarded as the real cause of the wife's distress.

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(1) (Mar. 16, 1958), "The Times ".

With regard to this last point, the view of the learned commissioner appears to have been that the real cause of the wife's distress was, not so much the discovery of the husband's abnormal tendencies and behaviour, but the fact that she had little sexual attraction for him, of which his abnormal tendencies were merely a symptom. The treatment which would have been available for the husband would not have had any effect by way of encouraging sexual desire on his part; on the contrary, it would have been actually repressive of the sexual drive. The learned commissioner accordingly concluded that it would not have been in any way effectual to remove what he regarded as the basic cause of the wife's distress. It is undoubtedly true that, on the evidence, sexual relations between the parties always were cool, and became cooler as time went on; but it is complained that the commissioner's view that this was the basic cause of the trouble finds scant support in the evidence. I am not satisfied that this criticism is justified, for it is not to be forgotten that the learned commissioner was not confined, as we are, to the written record of the evidence as it appears in the transcript, but had the advantage of seeing the wife herself, and the opportunity of forming his own conclusions as to her personality. I do not think, however, that the matter is of any great relevance, and I am prepared to deal with the case on the basis that, as contended on her behalf, it was simply the discovery of the husband's habit of collecting and using female clothes, cosmetics, and so forth, that was the cause of the wife's distress.

As I have already indicated, I am satisfied that the evidence fell short of proving that the husband deliberately intended to hurt or cause injury to the wife. This is the only possible inference to draw from the fact that he was at such pains to conceal his abnormal activities from her. In these circumstances, I think that the learned commissioner directed himself correctly in asking himself the question whether, in pursuing his abnormal course of conduct, the husband was doing something which, as a reasonable man, he ought to have foreseen was likely to cause injury to the wife. If so, there is good authority for saying that such conduct might amount to cruelty, so as to warrant the court in granting relief to the wife. The question is one that it is rarely easy to answer, and, in the case of conduct such as is in question in this case, it is always a matter of difficulty to decide on which side of the line it falls. I do not think that the law, as it applies to a case of this class, can be better or more succinctly stated than it was by LORD TUCKER in *Jamieson* v. *Jamieson* (2), when he said (3):

> " Every such act must be judged in relation to its surrounding circumstances, and the physical or mental condition or susceptibilities of the innocent spouse, the intention of the offending spouse, and the offender's knowledge of the actual or probable effect of his conduct on the other's

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(2) [1952] 1 All E.R. 875; [1952] A.C. 525.

(3) [1952] 1 All E.R. at p. 887; [1952] A.C. at p. 550.

> health (to borrow from the language of LORD KEITH) are all matters which may be decisive in determining on which side of the line a particular act or course of conduct lies."

Applying this test, it seems to me that, in order to found a charge of cruelty on the conduct of the husband in continuing to practise his abnormal tendency after 1955, it would have to be shown (a) that there was some real probability of the wife finding out about it, (b) that if she did find out it would probably cause her another serious shock, and (c) that such shock would be likely to cause further injury to her health, as it did in 1955. So long as the husband succeeded in concealing his continued practice of the abnormal tendency from the wife, it is clear that it could do her no hurt. As to this, the learned commissioner said:

> "He practised it in circumstances which he, I think, could reasonably suppose could not come to the knowledge of his wife. There is no case where he flaunted it or talked about it, that he was emotional, or in any way sought to bring it into the married life in any single form."

I can find nothing to criticise in this statement. It was by the merest accident, and an accident not readily foreseeable, that the wife made her discovery in 1958, through returning home unexpectedly in the middle of the afternoon. It is important to observe, however, that on this occasion the discovery does not appear to have caused any great shock, nor did it have any adverse effect on her health. Events proved, therefore, that there was in fact no such danger of injury to the wife.

However, I think that it is highly relevant to remember that after the discovery the wife continued to reside with the husband for another eight months, with no apparent untoward results, before she finally left in December, 1958. Were it proved that the previous conduct did in truth amount to cruelty, this circumstance would have been of no little materiality in considering the question of condonation. But it is also material, in my judgment, in considering the prior position, viz., whether the husband's conduct ever amounted to cruelty at all. It seems to me that the only fair inference to be drawn from the fact that the wife was prepared to continue living with the husband for another eight months is that she was not in fact unduly disturbed by her discovery that the husband was still continuing to practise his abnormal tendencies. If this be right, it makes it all the more difficult to draw the inference that, by continuing his practices in secret, the husband was pursuing a course of conduct which he might reasonably have foreseen was likely to cause injury to the wife.

The case is, no doubt, near the borderline; but, giving the matter the best consideration that I can, I find myself unable to say that the learned commissioner came to a wrong conclusion in deciding that in all the circumstances cruelty had not been proved. I think that it is impossible to interfere with his decision, and, accordingly, in my judgment, the appeal must be dismissed.

HARMAN, L.J.: I agree with all that WILLMER, L.J., has said, and with the reasons which he has adduced in the course of his judgment. This case is near the borderline and it has not been made easier for us by the fact that it was undefended and that the examination of the complainant wife was conducted by counsel almost entirely through the medium of leading questions. Further than that, he occasionally volunteered a certain amount of evidence on his own behalf, no doubt on instructions. When one adds that the shorthand note is obviously not the work of a practised hand, and that the transcript of the learned judge's judgment was obviously inaccurate in a number of respects and has not been revised by the judge, the difficulties of this court become apparent.

The result depended in the end on two incidents in 1955 and 1958. There was also an incident which my Lord has described in 1945, when the wife found a suitcase full of women's clothes, but that the husband passed off so successfully that the wife thought that there was another woman behind it and, therefore, was far from guessing the truth at that stage. In 1955 she made a discovery which was a very great shock to her, but it is to be remembered that on this occasion the husband had no reason to suppose his wife would turn up at the flat. The couple had been living with her parents and he alone had returned to the matrimonial home. She followed him and found the door locked, and, after waiting a certain amount of time, he came down the stairs in his dressing gown and let her in. When she got upstairs on this occasion she found a lot of women's clothing which he had attempted to hide under the wardrobe. In fact, it is quite clear that he was practising this aberration at the time when he supposed, and I think not unreasonably supposed, that she would not find out anything about it. Be that as it may, she made the discovery, and one must accept that it was a very great shock to her, and one cause, no doubt, of her subsequent breakdown.

The whole case therefore depends on whether the incident of 1958 shows that he was continuing a course of conduct which he knew would be likely to be detrimental to her health and did so in reckless disregard of her welfare. It is contended that he must have contemplated the ordinary consequences of his acts, and therefore have been in fact willing to hurt her, although the evidence shows that he did not intend to do so. The 1958 incident occurred because the employers for whom she was then working on a certain Saturday afternoon at her request allowed her to go home early. She was anxious to see what it was that he was doing, and she found him wearing one of her dresses. Again this is at a time when she was supposed to be out at work and he gave way to the temptation which this aberration put on him when he had reasonable cause to suppose that she would not be at home, and therefore would know nothing about it. On the whole, I cannot question the learned commissioner's decision that he was not acting in a way so reckless of her welfare as to be guilty of cruelty.

The second ground alleged was that it was a cruel thing on his part to decline to undergo a certain course of treatment. I cannot accept that view. The evidence was that, if he had undergone such a course of treatment, it would have done no good to the marital relations between these parties. Her real complaint was that he was cold to her and the shock to her was finding out the reason why he was so. If by suppressing his sexual desires the psychiatrist had been able to cure him, or to suppress all the evidence of this aberration, so far from making him less cold to her, that would presumably have made him more so—at any rate, it would not make him other than he was already in that respect. Therefore, things being as they were, it does not seem to me to be unreasonable on the whole for him to say that he did not propose to have this treatment but to battle with this aberration himself as best he might. If we were to hold this conduct to be cruelty, in my judgment we would be going beyond any case which has been drawn to our attention or is now known to the court. The cruel acts were not brought, so to speak, into the matrimonial home, except by the action of the wife, unexpected by the husband, which he had no reason to anticipate. It seems to me that there is all the difference in the world between a tendency of this sort being flaunted before others or emphasised to the wife and a case like this where the husband struggled, unhappily in vain, to conceal it and was discovered because the wife had curiosity about it and so found out. I cannot help feeling that cruelty here is not established and I would dismiss the appeal.

SELLERS, L.J.: I have felt considerable sympathy with the wife. There was much in the husband's conduct to humiliate and distress her. The evidence adduced at the trial seems to me to have been not wholly satisfactory. I do not feel at all convinced that the case which the wife wished to put forward was fully advanced, but, for the reasons given by my Lords, as the case stands, I do not feel that I can say that the learned commissioner decided the case wrongly, and I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Pennington & Sons* (for the wife).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

R. *v.* NICHOLLS.

[Court of Criminal Appeal (Byrne, Sachs and Winn, JJ.), May 16, 1960.]

Criminal Law—Indictment—Duplicity—Warehouse-breaking contrary to Larceny Act, 1916 (6 *&* 7 *Geo.* 5 *c.* 50), *s.* 26 (1), *s.* 27 (2).

The appellant was indicted on one count of "warehouse-breaking contrary to s. 26 (1)* and s. 27 (2)† of the Larceny Act, 1916". He was found guilty of warehouse-breaking. On appeal,

Held: the indictment was bad for duplicity, as two separate offences were charged in the one count, and, therefore, the conviction must be quashed.

Appeal allowed.

[As to duplicity in an indictment, see 10 Halsbury's Laws (3rd Edn.) 386, para. 698, and 390, para. 707.

For the Larceny Act, 1916, s. 26, s. 27, see 5 Halsbury's Statutes (2nd Edn.) 1027.

For the relevant rule relating to the form of the indictment, r. 4 of the Indictments Act, 1915, Sch. 1, see 5 Halsbury's Statutes (2nd Edn.) 998.]

Appeal.

The appellant, William Nicholls, was charged at the Central Criminal Court on Feb. 11, 1960, together with one other William Nicholls (who pleaded guilty) on an indictment in the following form:

> "Statement of offence: Warehouse-breaking contrary to s. 26 (1) and s. 27 (2) of the Larceny Act, 1916. Particulars of offence: William Nicholls and William Nicholls on Jan. 11, 1960, broke and entered a warehouse at Bridport Road, Edmonton, N.18, with intent to steal and stole therein twenty-two overcoats, the property of Dunlop Clothing & Waterproof Co., Ltd."

The appellant was convicted on Feb. 12, 1960. He appealed against his conviction on the ground that the indictment was bad for duplicity.

J. E. Pullinger for the appellant.

H. J. Leonard for the Crown.

BYRNE, J. delivered the following judgment of the court: The appellant was charged at the Central Criminal Court on an indictment which was framed in this way:

> "Statement of offence: Warehouse-breaking contrary to s. 26 (1) and s. 27 (2) of the Larceny Act, 1916."

The particulars of offence alleged that on Jan. 11, 1960, he broke and entered a warehouse at Bridport Road, Edmonton, to steal therein and stole therein twenty-two overcoats, the property of Dunlop Clothing & Waterproof Co., Ltd. The verdict of the jury was taken in this form:

> "Members of the jury, are you agreed upon your verdict? (The foreman of the jury): We are.
>
> "(The clerk of the court): Do you find the prisoner, William Nicholls, Guilty or Not Guilty of warehouse-breaking on this indictment? (The foreman of the jury): Guilty."

The first thing that is to be said about the matter is this. The maximum penalty for breaking and entering and stealing is fourteen years' imprisonment; the maximum penalty for breaking and entering with intent to steal is seven years' imprisonment, and thus it would be obviously of great importance to know what the verdict of the jury really meant. It is quite plain on looking at this record

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* Section 26 reads: "Every person who—(1) breaks and enters any . . . warehouse . . . and commits any felony therein . . . shall be guilty of felony and on conviction thereof liable to penal servitude for any term not exceeding fourteen years."

† Section 27 reads: "Every person who, with intent to commit any felony therein . . . (2) breaks and enters any . . . warehouse . . . shall be guilty of felony and on conviction thereof liable to penal servitude for any term not exceeding seven years."

that no one could ascertain whether the jury had, in fact, convicted the appellant A
of an offence which would carry a maximum punishment of fourteen years or of an offence which would carry a maximum punishment of seven years. These sections, s. 26 and s. 27, are separate and distinct sections of the Larceny Act, 1916, and it seems to this court that it is obviously a case of duplicity. If this matter had in fact been dealt with in this indictment in two separate counts, the matter would have been plain and the verdict returned would have indicated B
quite plainly what the finding of the jury was, but, as it is, these two sections of the statute have been linked together and the appellant was in fact in one count of this indictment charged with two separate offences. In the opinion of this court that indictment was bad for duplicity, and that means that this appeal must be allowed and the conviction quashed.

Appeal allowed. Conviction quashed. C

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* Kevin Winstain, Esq., *Barrister-at-Law.*]

R. *v.* SMITH. D

[Court of Criminal Appeal (Byrne, Sachs and Winn, JJ.), May 9, 10, 18, 1960.]

Criminal Law—Capital murder—Intent—Police officer acting in execution of his duty—Defence that prisoner had no intention to kill or do grievous bodily harm—Direction to jury—Failure to explain that the presumption of intending natural consequences of acts is rebuttable—Ultimate question the subjective one of intent of accused, not what intent might well be imputed to a E
reasonable man.

The presumption that a man intends the natural consequences of his acts is rebuttable and the final question must always be whether on the facts as a whole an actual intent to do grievous bodily harm is established, remembering that intent and desire are different things and that, once it is proved that an accused knows that a result is certain, the fact that he does F
not desire it is irrelevant (see p. 455, letter A, and p. 453, letter F, post).

The appellant was driving a car in which was stolen property. He was stopped by a policeman on point duty in the normal course of traffic control. Whilst stationary another policeman, who knew the appellant, came up and spoke to him and at the same time noticed what was in the back of the car. The appellant was asked to pull over to the nearby kerb. The G
appellant accelerated and made off down an adjoining road with the policeman who had spoken to him hanging on to the car endeavouring to stop it. The car pursued an erratic course and eventually the policeman was thrown off in the path of a vehicle, which ran over him, causing fatal injuries. At his trial on an indictment for capital murder the appellant maintained that he had no intention of either causing the policeman severe injury or of killing H
him. The trial judge's directions to the jury included at the end of his summing-up the words ". . . if you are satisfied that . . . he must, as a reasonable man, have contemplated that grievous bodily harm was likely to result to that officer still clinging on . . . then the accused is guilty of capital murder ". The jury returned a verdict of capital murder under s. 5 (1) (d) of the Homicide Act, 1957*. On appeal, I

Held: that the verdict of capital murder could not stand because, the present case not being one in which grievous bodily harm must obviously have been caused by the appellant's acts, the summing-up might have led the jury to consider that they were entitled to infer guilty intent, if a reasonable man would have considered the results likely to follow from the acts done, without sufficiently warning the jury that if on the facts as a whole they were left in reasonable doubt whether the appellant did intend to do grievous bodily harm they should acquit him of capital murder; accordingly a verdict of manslaughter would be substituted (see p. 456, letter A, post).

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* Section 5 (1) of the Homicide Act, 1957, so far as material, reads as follows: ". . . the following murders shall be capital murders, that is to say . . . (d) any murder of a police officer acting in the execution of his duty or of a person assisting a police officer so acting."

R. v. *Steane* ([1947] 1 All E.R. 813) applied.

R. v. *Ward* ([1956] 1 All E.R. 565) explained.

Appeal allowed: verdict of manslaughter substituted.

[As to the proof of intention generally, see 10 Halsbury's Laws (3rd Edn.) 282, para. 522, p. 457, para. 842; and for cases on the subject, see 14 Digest (Repl.) 500-502, *4819*, *4830-4835*, *4839*, *4840* and 3rd Digest Supp.

For the Homicide Act, 1957, s. 5 (1), see 37 Halsbury's Statutes (2nd Edn.) 177.]

Cases referred to:

R. v. *Lenchitsky,* (Jan. 11, 1954), unreported; see p. 454, footnote (7), post.

R. v. *Steane,* [1947] 1 All E.R. 813; [1947] K.B. 997; [1947] L.J.R. 969; 177 L.T. 122; 111 J.P. 337; 32 Cr. App. Rep. 61; 14 Digest (Repl.) 33, *47*.

R. v. *Vickers,* [1957] 2 All E.R. 741; [1957] 2 Q.B. 664; 121 J.P. 510; 41 Cr. App. Rep. 189; [1957] 3 W.L.R. 326; 3rd Digest Supp.

R. v. *Ward,* [1956] 1 All E.R. 565; [1956] 1 Q.B. 351; 40 Cr. App. Rep. 1; [1956] 2 W.L.R. 423; 3rd Digest Supp.

Appeal.

On Apr. 4, 1960, the appellant, Jim Smith, was arraigned at the Central Criminal Court, before Donovan, J., and a jury, on a charge that on Mar. 2, 1960, he murdered Leslie Edward Vincent Meehan, a police officer acting in the execution of his duty. He pleaded not guilty, was tried and was convicted on Apr. 7, 1960, under s. 5 (1) (d) of the Homicide Act, 1957*, of the offence of capital murder, so charged. He appealed against conviction on the ground, among others, that the judge misdirected the jury in law in stating that if they thought that a reasonable man would realise that the appellant's act might well cause serious bodily harm to P.C. Meehan, they would be entitled to impute such an intent to the appellant and to convict him of capital murder. It was submitted that the objective test of what a reasonable man would have thought was wrong, and that the true test was the subjective one—what was in the mind of the appellant? The cases and authorities enumerated below were cited in argument in addition to those in the judgment†. On May 10, 1960, the court stated that they would allow the appeal against the verdict of capital murder and substitute, under s. 5 (2) of the Criminal Appeal Act, 1907‡, a verdict of manslaughter and would sentence the appellant to ten years' imprisonment. The facts are stated in the judgment.

Edward Clarke, Q.C., and *Miss A. M. Jennings* for the appellant.

J. M. G. Griffith-Jones and *S. A. Morton* for the Crown.

Cur. adv. vult.

May 18. **BYRNE, J.,** read the following judgment of the court: The appellant was convicted at the Central Criminal Court of the capital murder of P.C. Meehan. The facts were as follows: At about 7.30 p.m. on Mar. 2, 1960, the appellant, aged twenty-six, was driving his car, in the back of which were some sacks of scaffolding clips that he and another man, a passenger in that car, had just stolen. When they reached Beresford Square, S.E.18, P.C. Baker, on point duty, stopped in the normal course of traffic control the flow of vehicles in the Square, and the appellant happened to be at the head of a line which came to a halt. Whilst he was thus stationary another policeman, P.C. Meehan, with whom the appellant had for some time been on quite friendly terms, came round to the driver's window and spoke to the appellant. On noticing what was in the back of the car he told the appellant to pull over slowly to the nearby kerb and also told P.C. Baker to get on to the police station. The appellant, however, instead of drawing into the kerb, made off at an increasing pace down Plumstead Road, S.E.18. P.C. Meehan got part of his arm inside the open window on the driver's side, and after first walking and then running continued bravely to hang on as the car gathered speed. Whether he was throughout clinging to the off-side of the car or whether at one stage he was actually on the bonnet, is one of the things of which witnesses gave varying accounts; but the bulk of the evidence was to the effect that he remained at all times on the off-side. As the appellant's car went up Plumstead Road, which is twenty-seven feet six inches wide, it undoubtedly pursued an erratic course; of four drivers of successive cars coming in the opposite direction three referred to the appellant's car as coming " at them " and spoke of having received what they referred to as bangs or bumps. Then P.C. Meehan was shaken off and fell in front of the fourth car, receiving fatal injuries to his head.

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* See footnote p. 450, ante.

† *R.* v. *Horsey,* (1862), 3 F. & F. 287; *R.* v. *Vamplew,* (1862), 3 F. & F. 520; *R.* v. *Doherty,* (1887), 16 Cox C.C. 360; *R.* v. *Lumley,* (1911), 76 J.P. 208; *R.* v. *Hedley,* (1945), 31 Cr. App. Rep. 35; *R.* v. *Charlson,* [1955] 1 All E.R. 859; *Lang* v. *Lang,* [1954] 3 All E.R. 571 at p. 575; [1955] A.C. 402 at p. 427; *R.* v. *Cunningham,* [1957] 2 All E.R. 412; Kenny's Outlines of Criminal Law (17th Edn.), para. 106; Russell on Crime (11th Edn.), pp. 518, 572; Criminal Law Review, 1954, pp. 661 et seq.

‡ 5 Halsbury's Statutes (2nd Edn.) 930.

There was also the evidence of a pedestrian who at the material time was behind the appellant's car. He spoke of an attempt by the appellant to push the police officer off, but did not indicate whether that was at a stage when the car was moving slowly or when it was going fast. Moreover; he appeared in any event not to be sure as to what he saw. It is thus not necessary to refer again to his testimony.

The distance from the point in Beresford Square, S.E.18, where the appellant's car first started moving at a pace which could have swept P.C. Meehan off his feet to the spot where he was killed was about a hundred yards. The time taken to cover that distance was probably of the order of ten seconds. There was no evidence that P.C. Meehan suffered any specific injury from any bump before he was run over by the fourth car. The appellant did not stop when P.C. Meehan fell from the car, but went on for some yards to a place where he dumped the stolen sacks of clips. Then he at once returned in the car to Beresford Square. Upon P.C. Baker informing him that P.C. Meehan was dead, he said: " I am the driver of the car he was hanging on to "; and then to another police officer he said: " I know the man. I would not do that for the world. I only wanted to shake him off ". A little later he made further statements which included reference to the fact that he got frightened at P.C. Meehan's actions. At the trial the appellant attempted by his evidence to put forward a case that he had put his foot on the accelerator in mistake for the brake, and that he did not realise that P.C. Meehan was hanging on to his car. In addition he said several times that he was " scared " and " frightened ", and in effect did not realise what he was doing. As regards the course of his car he laid emphasis on the weight of the sacks of clips as possibly affecting the steering, and throughout he maintained emphatically that he had no intention of either causing P.C. Meehan any severe injury or of killing him. He referred to the fact that P.C. Meehan knew him quite well and was aware of his address.

One of the defences raised by this evidence was that the death of the police officer in the above circumstances was a mere accident, and a considerable portion of the summing-up was devoted to this point. However, as was to be expected, the jury rejected the appellant's evidence in relation to his foot having got on to the wrong pedal and as to his not knowing that the police officer was hanging on to the car. Once more accident was excluded, there was only room for a verdict either of capital murder or of manslaughter, and the jury returned a verdict of capital murder. On this appeal no submission has been made that there could have been in the circumstances an acquittal on the basis of there having been a mere accident. Accordingly, the sole question raised by the appeal is whether a verdict of manslaughter should be substituted for that of capital murder.

At no stage did the prosecution submit that there had been established against the appellant an actual intent to kill P.C. Meehan; and the learned judge, immediately after dealing with the defence of mere accident, stated that as regards the rest of his summing-up he proposed to assume that the jury would not find that the appellant deliberately intended to kill the police officer. Thus the issue for the jury on the charge of murder was whether the prosecution had established that the appellant intended to cause the police officer grievous bodily harm (see *R.* v. *Vickers* (1)). On that issue the prosecution's case was that this intention ought to be inferred from the appellant's conduct, whilst the case for the defence was that the appellant in fact had no such intent and that in any event the intent was not established as an inference from the facts.

In these circumstances it fell to the learned judge to direct the jury on the meaning and application to the particular facts of the maxim on which the prosecution had relied and which is often stated in the following terms: " A man must be taken (or presumed) to intend the natural consequences of his acts ". This is a presumption to which the learned judge at the outset referred in the following terms:

> " The intention with which a man did something can usually be determined by a jury only by inference from the surrounding circumstances including the presumption of law that a man intends the natural and probable consequences of his acts."

Neither at that stage nor later was the jury given any explanation in general terms of the meaning or effect of the word " presumption " or that any such presumption may be rebutted (2).

Whatever may have been the position last century when prisoners could not go into the witness-box and the distinction between presumptions of law and presumptions of fact was not so well defined, it is now clear, as was naturally conceded by counsel for the Crown, that the presumption embodied in the maxim previously stated is not an irrebutable presumption of law. The law on this point as it stands today is that this presumption of intention means that, as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee them and intend them. Although, however, that is an inference which may be drawn, and on the facts in certain circumstances must inevitably be drawn, yet if on all the facts of the particular case it is not the correct inference, then it should not be drawn.

The law on this topic was particularly illuminated by the following passage in the considered judgment of this court delivered by LORD GODDARD, C.J., sitting in the Court of Criminal Appeal with ATKINSON and CASSELS, JJ., in *R.* v. *Steane* (3):

> " No doubt, if the prosecution prove an act the natural consequences of which would be a certain result and no evidence or explanation is given, then a jury may, on a proper direction, find that the prisoner is guilty of doing the act with the intent alleged, but if, on the totality of the evidence, there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if, on a review of the whole evidence, they either think that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted."

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(1) [1957] 2 All E.R. 741; [1957] 2 Q.B. 664.

(2) The presumption stated above is a rebuttable presumption of law, see *R.* v. *Farrington*, (1811), Russ & Ry. 207; *R.* v. *Harvey*, (1823), 2 B. & C. 257 at p. 264; *R.* v. *Martin*, (1881), 14 Cox C.C. 663 at p. 667; *R.* v. *Meade*, [1909] 1 K.B. 895 at p. 899.

(3) [1947] 1 All E.R. 813 at p. 816; [1947] K.B. 997 at p. 1004.

As regards the various other authorities cited by counsel for the appellant on this point, care must, of course, be taken to consider the phrases therein used in relation to the particular facts. The strength of any presumption obviously varies according to particular facts and this may entail considerable adjustments in the practical terms of the charge to the jury. Thus there is a class of cases where the act of the accused must obviously cause grievous bodily harm, as where a blow with a sharp and heavy hatchet is deliberately aimed at and strikes the victim. In another class are cases where a reasonable man would realise that his act might cause grievous bodily harm but the degree of the probability or possibility of that type of harm resulting varies according to the facts of the case. In the first class of case where the harm must obviously result from the act and there is no evidence which could be regarded as rebutting the presumption, a direction to the jury that " a man must be presumed to intend the natural consequences of his act " could be apposite, in the other cases it would not. In the other cases the charge to the jury will, of course, vary according to the facts (including the degree of likelihood of grievous bodily harm being caused) but the essence of the matter remains that whilst the accused may be presumed to have intended the natural consequences of his act, the question is: " Did he actually intend them? ".

Having regard to these considerations *R.* v. *Ward* (4) appears to represent the high-water mark of the application of the presumption; and indeed, in this court counsel for the appellant submitted that the decision was inconsistent with the general stream of authority. That was a case in which the court by a judgment delivered by LORD GODDARD, C.J., upheld the verdict of the jury on the footing that where any sane man " must have known that what he was doing would cause at least grievous bodily harm, and if the child died of that grievous bodily harm ", then " what was done does amount to murder in law " (5). In other words, the harm was certain, there was in the view of the court no evidence which could rebut knowledge of that certainty, and the inference of intention was inevitable. We think that the sentence which we have quoted contains the true ratio of the decision in that case; in so far as the summing-up which was thereby approved appears at any point to depart from that ratio, it is in our opinion to be regarded as justified by the particular facts of that case.

That the judgment in *R.* v. *Ward* (4) ought not to be regarded as deciding that an irrebuttable presumption of law arose in cases where there was no such certainty is shown by *R.* v. *Steane* (6) in 1947 (see also *R.* v. *Lenchitsky* (7) in which the jury had been instructed to take into account the actual intention of a feeble-minded accused).

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(4) [1956] 1 All E.R. 565; [1956] 1 Q.B. 351.

(5) [1956] 1 All E.R. at p. 567; [1956] 1 Q.B. at p. 356.

(6) [1947] 1 All E.R. 813; [1947] K.B. 997.

(7) In *R.* v. *Lenchitsky* the appellant appealed against conviction of murder of a girl of five years of age, whom he had taken into his house and started to undress; she had cried and he had stopped her crying by putting his hand over her mouth and by tying part of her clothing around her mouth and nose, and he had put her into a box. The appellant was feeble-minded and there was evidence that his intelligence was that of a child of eight or nine years of age. The judgment of the Court of Criminal Appeal (LORD GODDARD, C.J., BYRNE and PARKER, JJ.) was delivered by BYRNE, J., on Jan. 11, 1954, who concluded the judgment as follows: " Finally the learned judge said this to the jury at the end of his summing-up—' Are you satisfied that at the time when the accused man put the bandage over her nose and the underclothes over her mouth he was capable then of forming an intent, and that he must have realised when he was doing those acts that they might cause death or grievous bodily harm ? '. The learned judge's concluding words were these—' If on a review of the whole of the evidence in this case the prosecution have failed to satisfy you that at the time when the accused man did those acts—putting the bandage over her nose and compressing it and putting the underclothes over the face of this little girl of five years of age—if you are not satisfied that at the time he had an intention to kill or to do grievous bodily harm you should find him not guilty of murder but guilty of manslaughter '. In the opinion of this court that direction, which the learned judge gave to the jury, was absolutely accurate and, so far as this court is concerned, they are not aware of any other way in which the case could be properly put. There is, in our opinion, nothing in this appeal and it is accordingly dismissed ".

The final question for the jury must always be whether on the facts as a whole an actual intent to do grievous bodily harm was established, remembering of course that intent and desire are different things and that, once it is proved that an accused man knows that a result is certain, the fact that he does not desire that result is irrelevant.

Once mere accident was excluded, the present case became one in which the degree of likelihood of serious injury to the police officer depended on which of the not always consistent versions of the facts given by witnesses for the prosecution was accepted. It was one in which it could not be said that there was a certainty that such injury would result; and it was one in which there always remained the question whether the appellant really did during the relevant ten seconds realise what was the degree of likelihood of serious injury. If the jury took the view that the appellant deliberately tried to drive the body of the police officer against oncoming cars, the obvious inference was open to them that the appellant intended serious injury to result; if, however, they concluded that he merely swerved or zigzagged to shake off the officer, or if they concluded that for any reason he may not have realised the degree of danger to which he was exposing the officer, a different situation would arise with regard to the inferences to be drawn. In the former case the jury might well have felt they were dealing with consequences that were certain; in the latter only with degrees of likelihood.

In such circumstances it was essential, once the language of presumption had been used, to make it clear that a presumption can be rebutted; to explain in broad language what view of the facts might constitute a rebuttal; to point out the distinction between consequences that must and consequences that might result; and in the end to make it plain that the overall burden of proving actual intent continued to rest on the prosecution.

When one looks at the summing-up which followed the direction as to the defence of mere accident, it would appear that the learned judge framed his charge to the jury on the basis of various passages in *R.* v. *Ward* (8), one at least of which appears to treat results which are likely as being on the same footing as results which are certain. In so doing he may well have been influenced by the request of counsel for the appellant at the trial to base his directions on that particular judgment. The result, however, was that when he came (9) to the concluding passages of the summing-up he spoke of the jury being entitled to impute guilty intent if a reasonable man would have considered results " likely " or such as " might well " flow from the acts done, and spoke thus, in our opinion, without sufficient reference to the fact that those matters provided no more than a pointer towards the solution of the ultimate question: what was the actual state of mind of the appellant. Thus phrases were used (10) in this vital portion of the summing-up which, taken as a whole, we feel might have led the jury to consider that they were entitled to infer guilty intent from what a reasonable man would think to be likely, without sufficient warning that if on the facts as a whole they were left in reasonable doubt whether the appellant did intend to do grievous bodily harm, then it was for the jury to acquit on the charge of capital murder. The final passages included the phrases " If you are satisfied that . . . he must as a reasonable man have contemplated that grievous bodily harm was likely to result . . . then the accused is guilty of capital murder."

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(8) [1956] 1 All E.R. at pp. 566, 567; [1956] 1 Q.B. at pp. 355, 356.

(9) The trial judge had directed the jury, at the beginning of the summing-up " . . . Murder is committed when one person deliberately and unlawfully kills another intending to do it. It is also murder if a person intentionally and unlawfully inflicts grievous bodily harm on another person, not wishing to kill him at all, but the victim unfortunately dies from those injuries. It is for the prosecution to prove the intention in both cases. The intention with which a man did something can usually be determined by a jury only by inference from the surrounding circumstances including the presumption of law that a man intends the natural and probable consequences of his acts ". Subsequently, after directing the jury that in the circumstances there was no room for acquittal on the ground of pure accident, the trial judge said: " Now I know that you would not wish to come readily to the conclusion that the accused actually intended to kill the police officer. It is a matter for you to decide on the evidence, but the evidence does not oblige you to do that, and I propose to assume, having said it is entirely for you, in all that I say from now onwards that you will not find that he deliberately intended to kill this police officer; but I have told you already that that is not the end of the matter on the question of murder. If the accused intended to do the officer some harm which would seriously interfere at least for a time with his health and comfort, and thus perhaps enable the accused to make good his escape for the time being at least, but that unfortunately the officer died instead, that would be murder too."

Accordingly, it does not seem to us safe to assume that the jury fully understood the position as regards the relevant presumption. We have for these reasons come to the conclusion that the verdict of capital murder should not stand and that a verdict of manslaughter should be substituted.

Appeal allowed in part (11). *Sentence varied.*

Solicitors: *Registrar of Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(10) Thus, after discussing the evidence and the question whether the appellant's purpose was to dislodge the police officer from the car, the trial judge said—" If you feel yourselves bound to conclude from the evidence that the accused's purpose was to dislodge the officer, then you ask yourselves this question: Could any reasonable person fail to appreciate that the likely result would be at least serious harm to the officer? If you answer that question by saying that the reasonable person would certainly appreciate that, then you may infer that that was the accused's intention, and that would lead to a verdict on the charge of capital murder. He asks you to remember, and you will, that he went back after dumping the stolen goods in the side street to inquire how the officer was and to admit his responsibility. He says that it would be stupid for him to try and harm the officer who was well known to him. But members of the jury, you have to judge (I repeat) of his intention at the time . . ." Subsequently the trial judge concluded his summing-up as follows: " The final piece of evidence bearing on this man's intent at the time is given by P.C. Weatherill who took him from the scene to the station in a police car. He says that the accused said to him: 'Is he dead?' and the officer replied that he thought so. Then, according to the officer, he said: 'I knew the man, I wouldn't do that for the world. I only wanted to shake him off.' Now the only part of that evidence of P.C. Weatherill which the accused challenges is the part that incriminates him, namely, 'I only wanted to shake him off'. He says that he did not say that. You may think that it is a curious thing to imagine, and further it may well be the truth—he did only want to shake him off. If, however, the reasonable man would realise that the effect of doing that might well be to cause serious harm to this officer, then you would be entitled to impute such an intent to the accused. Therefore, summing-up the matter as between murder and manslaughter, if you are satisfied that when the accused drove his car erratically up the street, close to traffic on the other side, he must, as a reasonable man, have contemplated that grievous bodily harm was likely to result to that officer still clinging on, and that such harm did happen and the officer died in consequence, then the accused is guilty of capital murder, and you should not shrink from such a verdict because of its possible consequences. On the other hand, if you are not satisfied that he intended to inflict grievous bodily harm on the officer—in other words, if you think that he could not, as a reasonable man, have contemplated that grievous bodily harm would result to the officer in consequence of his actions—then, the verdict would be guilty of manslaughter. When you return from your deliberations, you will be asked if you find the accused guilty of capital murder. If you do your answer will simply be 'Guilty', otherwise it will be 'Not guilty of murder, but guilty of manslaughter'. Members of the jury, that concludes my summing-up."

(11) On May 31, 1960, the Attorney-General granted his certificate under s. 1 (6) of the Criminal Appeal Act, 1907, to the Director of Public Prosecutions for appeal to the House of Lords.

A

GARDNER *v.* BLAXILL AND ANOTHER.

[Queen's Bench Division (Paull, J.), May 2, 3, 9, 1960.]

Option—Renewal of lease—Option of "continuing for an extension of seven or fourteen years"—Option exercisable providing tenant had "reasonably" fulfilled his covenants—Whether option exercised by tenant's conduct in B *remaining in occupation after expiry of original term and paying rent reserved by lease—Whether, if tenant in breach of covenant to repair, option exercisable.*

By a lease dated June 26, 1947, premises were demised for a term of seven years from June 24, 1947, at a yearly rent of £80 payable quarterly in advance, and the tenant covenanted to keep the premises in good and C substantial repair during the term. The lease contained the following words: "Provided that the tenant has reasonably fulfilled the covenants [of the lease] he has the option of continuing for an extension of seven or fourteen years." After the term demised by the lease had expired on June 24, 1954, the tenant, who had forgotten about the option, stayed on in the premises and duly paid the next quarter's rent to the landlords; the land- D lords, who also probably had forgotten about the option, accepted the rent. Thereafter, the landlords accepted from the tenant from quarter to quarter the rent reserved by the lease dated 1947, and the tenant continued to occupy the premises. In 1957 a dispute arose between the parties when the landlords asked for more rent, and in February, 1958, the tenant without prejudice to his contention that the option had been exercised by conduct E gave notice in writing exercising the option.

Held: the option had been validly exercised by conduct because—

(i) on the true construction of the option it was an option to extend the lease for a term of fourteen years with a break at seven years so that the term was sufficiently certain, and

(ii) no notice was necessary for the exercise of the option, and, on accept- F ance of rent paid by the tenant for the quarter next following the expiry of the original term demised, the option was exercised unless there were facts showing the contrary (which there were not), and

(iii) by accepting that quarter's rent the landlords waived their right under the proviso in the option to object on the ground that the tenant had not reasonably fulfilled the covenants for repair.

G *Hersey* v. *Giblett* ((1854), 18 Beav. 174) followed on (i) above.

Per Curiam: the word "reasonably" [in the proviso] . . . meant that the tenant could exercise his option provided that he behaved during the tenancy in a way which a reasonably minded tenant might well behave (see p. 462, letter C, post); and, while at the time of the notice exercising the option [in 1958] the tenant was in breach of his covenant to repair, yet he H had reasonably fulfilled the condition on which he could exercise the option (see p. 462, letter G, post).

[As to options to renew a lease, see 23 Halsbury's Laws (3rd Edn.) 473, 474, paras. 1094, 1095.]

Cases referred to:

I *Finch* v. *Underwood*, (1876), 2 Ch.D. 310; 45 L.J.Ch. 522; 34 L.T. 779; 31 Digest (Repl.) 78, *2320*.

Hersey v. *Giblett*, (1854), 18 Beav. 174; 23 L.J.Ch. 818; 52 E.R. 69; 30 Digest (Repl.) 403, *464*.

Robinson v. *Thames Mead Park Estate, Ltd.*, [1947] 1 All E.R. 366; [1947] Ch. 334; [1947] L.J.R. 545; 176 L.T. 295; 31 Digest (Repl.) 74, *2290*.

Action.

This was an action by the plaintiff, Cecil Reginald Gardner, by writ dated Mar. 25, 1958, for a declaration that he had validly exercised the option to extend the term contained in a lease dated June 26, 1947, and made between A the defendants, Wilfrid Charles Blaxill and Edith Margaret Blaxill, as lessors, and the plaintiff and one Straker as tenants, in respect of a shop and premises at 251, Dartmouth Road, Sydenham, in the County of London. Shortly after signing the lease Straker disappeared, and by the date of this action he had died; it was not disputed that the action was properly brought by the plaintiff alone. So far as the plaintiff was concerned the lease was home-drawn, but its provisions B, other than the option, were clearly either taken from a form or drawn up with a lawyer's assistance. By the lease the defendants demised to the plaintiff and Straker the shop and premises at 251, Dartmouth Road, for a term of seven years from June 24, 1947, at a yearly rent of £80 payable by four equal quarterly instalments, the rent to be paid one quarter in advance. The plaintiff and Straker covenanted, inter alia, to keep the premises in good and substantial C repair during the term. The last paragraph of the lease, so far as is material, read as follows:

> "... Provided that the tenant has reasonably fulfilled the covenants hereinbefore mentioned he has the option of continuing for an extension of seven or fourteen years providing the premises have not been taken by the housing authorities." D

The premises were not required by the housing authorities. On June 24, 1954, the term of seven years granted by the lease expired. The plaintiff who was carrying on the business of carpenter and cabinet maker at the demised premises, having forgotten about the option to extend the lease, stayed on in the premises after that date and duly paid the rent for the quarter following that ended E on June 24, 1954. This rent was accepted by the defendants, and thereafter from quarter to quarter the plaintiff paid and the defendants accepted the rent reserved by the lease dated June 26, 1947, and the plaintiff continued to occupy the demised premises. In 1957 the defendants intimated that the rent must be increased to more than the rent reserved by the lease. On Feb. 20, 1958, the plaintiff gave notice in writing exercising the option conferred by the lease. F The plaintiff contended that by his conduct in remaining in occupation of the premises after June 23, 1954, paying the rent reserved under the lease and observing the covenants in the lease he had validly exercised the option to extend the lease. Alternatively, the plaintiff contended that he had validly exercised the option by a notice in writing dated Feb. 20, 1958. The defendants denied that the option was validly exercised by the plaintiff's conduct and G contended that the notice of Feb. 20, 1958, was of no effect because it was not given within a reasonable time before the expiry of the term of seven years granted by the lease, alternatively that it was not given within a reasonable time after the expiry of that term and the plaintiff had not reasonably fulfilled the covenants contained in the lease.

David Hirst for the plaintiff. H

J. T. Plume for the defendants.

Cur. adv. vult.

May 9. **PAULL, J.**, having referred to the lease, read the following judgment: If there were no exercise of the option, the lease came to an end on June 24, 1954. By the time that date had arrived, certainly the plaintiff, and I probably the defendants (who have not given evidence) had forgotten all about the proviso as to the option. When June 24, 1954, arrived, the plaintiff stayed on in the premises and duly paid his rent with regard to the following quarter. That rent was accepted. Thereafter from quarter to quarter the rent was paid and the plaintiff continued to occupy the premises. In the summer of 1957 Mr. Blaxill, one of the defendants, approached the plaintiff and informed him that the time had come when the plaintiff must pay more rent for the premises. The plaintiff told Mr. Blaxill that he did not think Mr. Blaxill could do that, as his lease was still in existence. Each of the parties consulted solicitors, with the result that a letter was written by the solicitors instructed by Mr. Blaxill stating that there had been no exercise of the option contained in the lease but a holding over from year to year, and a letter was written by solicitors instructed by the plaintiff to say that the plaintiff had exercised his option by continuing his occupation of the premises and paying the rent (1). Since each of the parties stoutly maintained that his view of the position was the correct view, the writ in the present action was issued. It is for me to determine whether or not the option to which I have referred has in fact been exercised by the plaintiff.

Looking once more at the vital clause (2), it will be seen that it can be divided into a main clause and a proviso. The main clause gives the tenant, the plaintiff, the option of continuing for an extension of seven or fourteen years; the proviso is that before such an option is exercised the tenant must have reasonably fulfilled the covenants of the lease. I propose to consider the main clause first.

Both counsel for the plaintiff and counsel for the defendants, who have argued this case extremely well, agree that they have been unable to find any authority which can help me to construe the words "the option of continuing for an extension of seven or fourteen years", except that counsel for the plaintiff has been able to refer me to *Hersey* v. *Giblett* (3). In that case there was an agreement that the tenant should take a house as a yearly tenant at the rent of £36 with a proviso that should the tenant wish for a lease of the premises the landlord would grant the same for seven, fourteen or twenty-one years at the same rent on the condition that the tenant should pay the same and perform all the covenants by which the tenant held the premises. Later the landlord's assignee gave the tenant notice to quit, whereupon the tenant applied to take up the lease and, that being refused, a bill was filed for specific performance. The case was tried before Sir John Romilly, M.R. One of the arguments of counsel for the landlord was that there was no certainty as to the duration of the lease: whether it should be one for twenty-one years determinable at seven and fourteen years, or should be one for seven years, or one for fourteen years, or one for twenty-one years. Counsel also contended that if it was to be determinable there was no reason why both sides should not have the right of determining it. The Master of the Rolls at the very beginning of his judgment, says as follows (4):

> "... I concur with the plaintiff in thinking that it is sufficiently clear what was intended between the parties, which was a tenancy from year to year, with an option given to the lessee to ask for a lease from the beginning, for twenty-one years, determinable at his option, at seven or fourteen. It appears to me to be sufficiently plainly expressed by the terms of the contract, and sufficiently clear to enforce against the parties, if there are no other ingredients in the case to prevent it."

That statement by Sir John Romilly has, so far as I am aware, always been considered to be an accurate statement of the law. In the latest (8th) edition of Foa's General Law of Landlord and Tenant at p. 97, para. 160, it is stated:

> "The continuance of the term may depend on the acts of the parties after the tenancy has commenced, as where a demise is made for a term of years (twenty-one, for instance) and power is given 'to break' (usually at seven, or fourteen, or both) upon a notice of specified length being given by one of the parties to the other. The legal effect of a demise 'for seven, fourteen, or twenty-one years' is exactly the same."

One of the points taken by counsel for the defendants in this case, is that in any event before the option under the lease can be exercised the plaintiff must state whether he desires the lease to be continued for seven years or for fourteen years, as otherwise the length of the extension of the lease is uncertain. At first I was impressed by this argument. There is a very practical difference between a lease for seven years and a lease for fourteen years with a break at seven years. In the former case, if, as so often happens, and indeed has happened in this case, the tenant forgets the passage of time and pays an extra quarter's rent after the seven years has expired, he thereby becomes a tenant from year to year and can get out of his obligation to continue as tenant by giving the requisite six months' notice. In the latter case, so soon as he has paid rent for the quarter following the expiration of the seven years and stays on over the seven years, he has contracted to remain a tenant of the premises for a further seven years. Apart, therefore, from authority, I should have felt inclined to hold that there could be no exercise of the option by merely continuing on in the premises and paying rent, since even if the plaintiff had sent a letter stating, " Take notice that I exercise my option under the lease ", that would have been an equivocal act, since he would not have made it plain whether he meant that he was opting to be a tenant for a further seven years or for a further fourteen years or for a further fourteen years with a break at seven years. In the light of *Hersey* v. *Giblett* (5), however, I think I am bound to hold that this particular point must fail, and that if, for instance, the plaintiff had sent a letter in the terms I have just stated, that would have meant that he opted to remain on as tenant for the full fourteen years with the right to break at seven years. In other words, the words " the option of continuing for an extension of seven or fourteen years " must be interpreted as though they read, " the option of continuing for an extension of fourteen years with a break at seven years ".

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(1) If an option does not state the terms of renewal, the new lease is on the same terms, e.g., as to rent, as the original lease; see 23 Halsbury's Laws (3rd Edn.) 474, para. 1095.

(2) See p. 458, letter C, ante, for the terms of the option.

(3) (1854), 18 Beav. 174.

(4) (1854), 18 Beav. at p. 177.

Reading the main clause in this way, I have to decide whether that option is exercised merely by the tenant staying on and paying rent after the first seven years have elapsed, or whether the effect of his so doing is to constitute him a tenant holding over from year to year. Counsel for the plaintiff contends for the former; counsel for the defendants contends for the latter, he adding that in any event the act of staying on and paying rent is at least an equivocal act as between these two results and, therefore, the effect must be construed against the tenant.

One starts, of course, from the fact that the effect of staying on and paying rent normally is undoubtedly to constitute the tenant a tenant holding over from year to year. As against that, one has to look carefully at the precise words of the option, and primarily it is difficult to see how an option to continue can be exercised except by continuing. The usual term in a lease with regard to an option for an extension of time contains some such word as " renew ", which imports " making afresh ". There is no such word in this lease. Further, an option to extend the time usually has some provision with regard to the giving of a notice by the tenant stating that he desires to take advantage of the option. There is no such provision in this lease. The plain meaning of the word " option " is " choice ". Reading " choice " for " option ", the clause means that the tenant has the choice of continuing his tenancy. The plain meaning of " continuing " is " carrying on " or " not ceasing to be ", and reading " carrying on " for " continuing ", the clause reads, " the tenant has the choice of carrying on for an extension of fourteen years with a break at seven years "; or, reading " not ceasing to be ", the clause reads, " the tenant has the choice of not ceasing to be the tenant for an extension of fourteen years with a break at seven years ". The precise wording of the clause is, I think, important and it is to be noticed that the word after " continuing " is " for " and not " by ". It may well be that if the parties had used the word " by " the use of that word would have imported that something had to be done by the tenant in order to extend the tenancy. The lease must be construed according to the exact words which the parties chose to use, and at least one of the parties had the idea that the landlord could not terminate the lease in 1958. In my judgment, no notice was necessary before the option can be said to have been exercised.

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(5) (1854), 18 Beav. 174.

The next question is when precisely is the option exercised. Is it exercised if the tenant stays on for a day over the seven years, or is it exercised only when the tenant pays to the landlord the rent due in respect of the quarter following the seven years and the landlord accepts that rent? In my judgment, it is the latter. It does not follow if a tenant stays on for a day over his period that he has any intention of doing other than making a final clearing up before he actually leaves. It is true that the phrase " tenant on sufferance " is used in such circumstances, but I do not think that his action is sufficient to show an intention of exercising a choice or option. So soon, however, as he sends the rent for the following quarter, whether it be in advance or in arrears, he is definitely indicating to the landlord that he desires to remain a tenant after the seven years is over, and, reading the words of the lease in the way in which I have read them, I think he definitely indicates that he is exercising his option unless he expressly avers to the contrary. If the landlord accepts that payment, then, in my judgment, he must be deemed to have accepted it on the terms that the tenant has exercised his option, unless indeed there are facts proving the contrary.

I now turn to the other part of the clause, the proviso. If I am right in my interpretation of the main part of the clause that I am considering, I do not think that any question under the proviso arises. If a tenant indicates to his landlord that he is exercising an option to continue his tenancy and the landlord takes no objection with regard to the condition of the premises, and the tenant thereafter remains on as a tenant, it seems to me plain that the landlord cannot thereafter raise the question whether the tenant was entitled to exercise his option by reason of the condition of the premises. He has waived that right. The statement of claim in this action did not raise waiver, although counsel for the plaintiff contended that it was raised by implication. Counsel ex abundanti cautela applied to me to deliver a reply in order to plead waiver, and counsel for the defendants did not object to this course being taken. A reply was therefore delivered. The result is that, in my judgment, if I am right in my interpretation of the main clause, the defendants are precluded from raising any question of lack of repair in 1954.

In view of the fact that I may be held to be wrong in my interpretation of the main clause, and in view of the fact that if I am wrong the plaintiff would have to rely on a notice to exercise the option given by him on Feb. 20, 1958, in which event the question as to repair would become very material, it is my duty to express my view both with regard to the interpretation of the proviso to the clause and also with regard to the facts arising thereunder.

Once again in the proviso a word is used which is not usually found in leases, and counsel have been unable to find any authority to assist in its interpretation. The proviso is not that the tenant must have fulfilled the covenants to the lease, but that the tenant must have reasonably fulfilled the covenants to the lease. Two interpretations of the word " reasonably " have been put before me. Counsel for the defendants says that the word governs " fulfilled " and, therefore, one starts with the fact that the tenant must fulfil his obligations under the lease. The result is, says counsel, that before the tenant can extend his lease he must show that he has done that work which would be necessary to fulfil the covenant. If he has done that work, then the word " reasonably " comes into play and the landlord may not be able to complain if the work is not quite up to the standard necessary strictly to fulfil the covenant. Counsel for the defendants has referred me to *Finch* v. *Underwood* (6) and *Robinson* v. *Thames Mead Park Estate, Ltd.* (7), both of which cases point out that the onus of showing that the proviso has been strictly fulfilled before the option is exercised is on the tenant, who exercises the option which has the proviso attached. Counsel for the plaintiff, on the other hand, says that that is not the right way of looking at the matter. The insertion of the word " reasonably " means that the parties have agreed that the tenant may exercise his option provided he has behaved as a reasonable tenant might have behaved in relation to his covenants. The difference between the two points of view may best be illustrated in this way. It may well be necessary, in order to keep the premises in good and substantial repair, to repaint the premises each three years, or indeed at even shorter intervals, but a reasonably minded tenant might well come to the conclusion that the premises will come to no harm if the repainting is left over for a further year. In those circumstances, could a tenant exercise his option half way through the fourth year? Counsel for the plaintiff would say " Yes "; counsel for the defendants would say " No ". I have come to the conclusion that counsel for the plaintiff is right, and that by inserting the word " reasonably " the parties not only intended to mean, but must be deemed to have meant, that the tenant can exercise his option provided he behaves during his tenancy in a way in which a reasonably minded tenant might well behave.

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(6) (1876), 2 Ch.D. 310.

(7) [1947] 1 All E.R. 366; [1947] Ch. 334.

[His Lordship said that when the plaintiff, without prejudice to his contention that the option had already been exercised, served his notice dated Feb. 20, 1958, the defendants had had the premises surveyed and as a result of that survey, a schedule of dilapidations was served on the plaintiff on Mar. 17, 1958. The defendants contended first, that the condition of the premises when they were so surveyed was such that the plaintiff had no right to exercise his option in February, 1958; and secondly, that the condition found in 1958 showed that in June, 1954, there must also have been a breach of the covenant to repair. There was no dispute that the work indicated in the schedule was work necessary to be carried out in March, 1958, in order that the plaintiff should fulfil the full repairing clause in his lease. His Lordship, after reviewing the evidence given by the plaintiff's surveyor and by the defendants' surveyor, said that the plaintiff had acted reasonably with regard to fulfilling his obligations to keep the premises in repair and that so far as structural work was concerned, the plaintiff had done everything a reasonable tenant would do. His Lordship continued:] There is clearly no evidence to show that the tenant was in breach of his covenant to repair in 1954, and, in so far as the onus is on the tenant to show that he had fulfilled his covenant at that date, he has done so by his evidence. If it is necessary for me to make a finding with regard to the condition of the premises in 1958, I hold that, while at the time of the notice exercising his option the tenant was in breach of his covenant that he should keep the premises in good and substantial repair, to the extent that the work called for by the schedule was reasonably necessary in order strictly to fulfil that covenant, he had reasonably fulfilled the condition on which he could exercise the option and was, therefore, entitled to exercise the option. As I have indicated, this finding only becomes material if it is found that I am wrong with regard to my interpretation of the main clause. If I am wrong in that interpretation, and if I am wrong in my interpretation of the word " reasonably ", then I think that the plaintiff would fail in this action. For the reasons that I have given, he succeeds, and I shall make the declaration asked for.

Judgment for the plaintiff.

Solicitors: *Coulson & Coulson*, Sydenham (for the plaintiff); *E. F. Iwi*, agent for *Armstrong & Co.*, Forest Hill (for the defendants).

[*Reported by* Wendy Shockett, *Barrister-at-Law.*]

WILLAN *v.* WILLAN.

[COURT OF APPEAL (Sellers, Willmer and Harman, L.JJ.), May 10, 1960.]

Divorce—Condonation—Sexual intercourse—Intercourse induced by wife's violence.

A wife was guilty of persistent assaults on and violence to her husband and in particular frequently demanded sexual intercourse when he did not wish to have it and pulled his hair, caught hold of him by the ears and shook his head violently until he was induced to comply as the only means of getting any rest. Following on a night in which this happened and in which the husband had intercourse with the wife in the early hours of the morning, the husband left the wife and subsequently brought proceedings for divorce.

Held: the wife's cruelty had been condoned by the husband by the last act of intercourse, which was a distinct act from the wife's preceding acts of cruelty and which in a man must be deemed to be his voluntary act unless induced by fraud.

Dictum of VISCOUNT SIMON, L.C., in *Henderson* v. *Henderson & Crellin* ([1944] 1 All E.R. at p. 45) and *Cramp* v. *Cramp & Freeman* ([1920] P. 158) followed.

Appeal dismissed.

[As to condonation, see 12 HALSBURY'S LAWS (3rd Edn.) 304, para. 603; and for cases on the subject, see 27 DIGEST (Repl.) 396-402, *3263-3310*.]

Cases referred to:

Cramp v. *Cramp & Freeman*, [1920] P. 158; 89 L.J.P. 119; 123 L.T. 141; 27 Digest (Repl.) 397, *3274*.

Henderson v. *Henderson & Crellin*, [1944] 1 All E.R. 44; [1944] A.C. 49; 113 L.J.P. 1; 170 L.T. 84; 27 Digest (Repl.) 397, *3271*.

Snow v. *Snow*, (1842), 2 Notes of Cases, Supp. i; 6 Jur. 285; 27 Digest (Repl.) 404, *3339*.

Appeal.

The husband appealed against an order of Mr. Commissioner GALLOP, Q.C., made on Oct. 13, 1959, dismissing the husband's petition for divorce on the ground that, although cruelty by the wife had been established, it had been condoned by sexual intercourse between the parties.

Lord Dunboyne for the husband.
W. Kee for the wife.

WILLMER, L.J., delivering the first judgment at the request of SELLERS, L.J., said: This is an appeal by a husband against a decision of Mr. Commissioner GALLOP of Oct. 13, 1959, whereby, on a petition for dissolution of his marriage on the ground of cruelty brought by the husband against his wife, the learned commissioner, although finding cruelty proved, dismissed the petition on the ground that the cruelty had been condoned. The husband appeals to this court, inviting us to find that in the circumstances there was no condonation and that the husband is entitled to the relief claimed. There has been no cross-notice filed on behalf of the respondent wife, and it must be taken, therefore, that there is now no dispute as to the fact of the wife having been cruel to the husband.

The relevant facts lie within a comparatively small compass. The parties were married on June 2, 1925, and there are two children of the marriage, one born shortly after the marriage and the other born soon after the war in 1946. The husband was away on military service during the war, but cohabitation was resumed on his demobilisation, and he continued to live with his wife until the morning of Sept. 29, 1958.

The husband's case against the wife is that throughout the marriage, and more particularly in the latter part of it, she frequently and persistently assaulted him and showed violence to him and that she was immensely jealous of his relations with other women; and it was also said that she habitually used offensive and obscene language, calling him by horrible names and so forth. It is also alleged—and this is the real gravamen of the charge—that she frequently demanded sexual intercourse with him at times when he did not wish to have it, obliging him to conform to her wishes by indulging in various types of violence in order to bend his will to hers. In particular, it was said that she would pull his hair, catch hold of him by the ears, and shake his head violently to and fro; and, at any rate on one occasion, it was said that she kicked him on his injured leg, causing him great pain. She would also pester him far into the night to have sexual intercourse, so that eventually he was compelled to comply as the only means of getting his rest. That is the nature of the husband's case of cruelty which, as I have said, was found in his favour. I have referred to the details of it only because the alleged act of condonation is very largely bound up with the kind of conduct which is complained of by the husband as cruelty on the part of his wife.

It appears that for some time before the final separation the parties were on bad terms, although sexual intercourse was continuing in the circumstances which I have described. The husband at least was for some time in the hands of solicitors, and we know that on or about Aug. 13, 1958, the solicitors wrote on his behalf to his wife, complaining of her cruel conduct and informing her that the husband would be obliged to leave her. Even after that, however, life went on very much as before, the husband continuing to reside in the matrimonial home with his wife, and continuing to share the same bed with her. He said in the course of his evidence that two or three weeks before the final separation he voluntarily and willingly had intercourse with his wife. A distinction is drawn in the evidence between that occasion and certain others when he had intercourse with his wife, not because he wanted to, but for the sake of peace, in the circumstances to which I have alluded. It is not without significance, I think, that even after the solicitors' letter was written the husband is still found to be willingly and voluntarily having intercourse with his wife.

It is said (and this much is common ground between the parties) that, on the night of Sept. 28/29, i.e., the night before the husband left for the last time, an act of sexual intercourse took place between the parties. The husband says that that act, like many other acts previously, was induced by the wife pestering him far into the night, showing some degree of violence to him, pulling his hair and so forth and, finally, as I understand it, rolling on top of him, so that eventually, towards the small hours of the morning, and for the sake of peace, he did have intercourse with her. Thereafter, the parties appear to have gone straight to sleep, and the next thing that happened was the alarm clock going off at a quarter to six in the morning. The husband promptly got up, dressed and left the house at six o'clock in order to go to work. He kissed his wife and said good-bye, all in accordance with his usual procedure, the wife saying good-bye to him. I mention those facts as to what took place after the last act of intercourse because it was at one time suggested that, if that act of intercourse did amount to condonation, conduct subsequent thereto on the part of the wife was sufficient to bring about a revival. Clearly, however, on the evidence there never could have been any merit in that suggestion. The only question is whether or not the husband, by having intercourse with his wife in the circumstances which I have described on the night of Sept. 28/29, must be held to have condoned the prior cruelty found against the wife.

When the case came on ultimately in this court, it was pointed out that the notice of appeal was defective in that it did not state what the grounds of appeal were, as required by R.S.C., Ord. 58, r. 3. Counsel accordingly asked for leave to amend the notice of appeal, and after the mid-day adjournment an amended notice was put before us which alleges two grounds. The second ground referred to that which I have already dealt with, viz., the question of revival, and alleged that, if there was condonation, the cruelty was revived by the wife's subsequent conduct. As it did not appear that that had ever been pleaded or argued below we did not give leave to amend; we did give leave to amend as to the first ground, however, which was in the following terms:

> "That the learned commissioner misdirected himself in law in that the last act of intercourse which occurred between the parties on the night of Sept. 28, 1958, could not have constituted condonation by reason of the fact that it constituted an important element of the cruelty complained of, and/or by reason of the fact that it took place when the petitioner was under duress and/or was not a free agent."

So stated, that ground of appeal runs two or three arguments together, and I will do my best to keep them separate. In the first place, it is said that this act of intercourse on the part of the husband could not be held to amount to condonation, because it was one and the same with an act which was of itself relied on as part of the cruelty alleged. It was contended that an act which the husband relied on as an act of cruelty cannot be said at one and the same time to be an act of condonation. So far as we have looked at the evidence, I do not think that that point was ever made in the evidence given before the learned commissioner. Certainly there is no finding by the learned commissioner that the last act of intercourse relied on as condonation was one with the cruelty alleged by the husband against the wife. Furthermore, as it seems to me, and as I indicated during the argument, the contention is really the result of muddled thinking, because it confuses the actual act of sexual intercourse, which constitutes the evidence of condonation, with the prior conduct complained of on the part of the wife, whereby she induced the act of intercourse. I can well understand that pestering in such circumstances on the part of the wife, in such a way as to deny the husband sleep, more particularly if accompanied by the pulling of his hair, might very well be capable of amounting to cruelty. But, whether that be so or not, I find it impossible to say that the subsequent action of the wife in submitting herself to an act of sexual intercourse could in any circumstances amount to an act of cruelty against the husband. Therefore, I do not think it is possible to accept the argument that that which was relied on as condonation was itself one and the same with conduct alleged to amount to cruelty.

Then it was said that this act of intercourse was induced by duress on the part of the wife, and that the husband was not to be regarded as a free agent. It is well established that, whatever may be the position of a wife, in the case of a husband the fact of having intercourse with the wife, with full knowledge of the matrimonial offence of which complaint is made, is conclusive evidence of condonation by the husband of the wife. It is conclusive evidence because it is the best possible way of showing that the wife has been reinstated as a wife. Only one exception to that rule was accepted by the House of Lords in the leading case of *Henderson* v. *Henderson & Crellin* (1), and that is the case where the act of intercourse is induced by fraud on the part of the wife. Subject to that, however, as I read the speech of VISCOUNT SIMON, L.C., he was accepting the view expressed by MCCARDIE, J., in *Cramp* v. *Cramp & Freeman* (2), where the learned judge reviewed the authorities very fully, that intercourse by a husband with his wife after knowledge of the matters complained of is conclusive evidence of condonation.

It is sought to say, however, that some other exception to the rule ought to be accepted, which would cover facts such as have arisen in this case. As I see it, the difficulty in the way of the husband is that the facts found by the learned commissioner will not support the argument which has been put before us. The learned commissioner towards the end of his judgment, said:

> "But, having seen the two parties concerned in this case, and the husband not saying that he acted under fear or apprehension for his safety and had no

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(1) [1944] 1 All E.R. 44; [1944] A.C. 49.

(2) [1920] P. 158.

> alternative, I cannot help thinking that the reason why he had intercourse with her on that particular occasion was that he was so tired and exhausted and knew that his prospect of rest and sleep was very small, if it existed at all, until he had done that which his wife required of him."

Then, later on the same page, the learned commissioner expressed this view:

> "Leaving aside questions of hysteria or hypnotism, or other such matters, if a man, through whatever blandishment or irritation, decides to have sexual intercourse, that must be a voluntary act, and I must hold that the act of intercourse in this case was a voluntary act."

I agree with the learned commissioner, and I doubt whether the matter can be better stated than in the commissioner's own words.

All that has been proved in this case is that the wife used means, to which exception may well be taken, for the purpose of persuading her husband to have intercourse with her. He was free to submit or to resist. He was free, I suppose, to have run away, but in the end he decided that the best course to take was to submit to her wishes. I dare say he did show unwillingness, but to say that he showed unwillingness is not to say that he acted involuntarily. It might be otherwise in the case of a wife; but in the case of a husband who has sexual intercourse it can only be said of him that what he does he does on purpose, and that sexual intercourse with his wife must be a voluntary act on his part.

In those circumstances, it seems to me that, for the reasons given by the learned commissioner, we cannot do other than agree with his conclusion. However much the husband disliked what he was doing, he did in fact voluntarily have intercourse with his wife on this occasion of the last night, and by doing so he must be conclusively held to have condoned the cruelty of which complaint is made. In the absence of any evidence of revival afterwards, a matter to which I have already referred, that is an end of the case. It follows, therefore, that in my judgment this appeal, which was always a difficult appeal, fails and must be dismissed.

HARMAN, L.J.: I agree. It seems to me to dispose of this appeal that the arguments put before us here today were not really agitated before the commissioner at all. In the court below the point taken as to the events of the night before the husband left was that he was under duress, but that plea, which was debated to some extent before us, was perfectly hopeless in my view. Duress means a degree of fear which operates on the mind to such an extent that a person who is under it is not a free agent. This husband never was in anything like that condition. No doubt he was badgered into having intercourse with his wife: no doubt he submitted to it in the end as the easiest issue out of all his afflictions, for all which one cannot have anything but sympathy. But the rule that an act of intercourse on the part of the husband will operate as a reinstatement of the wife and therefore will be a condonation of her previous misconduct is so well established that we could not possibly go behind it.

There being no fraud alleged here, and there being no duress proved, the statement of VISCOUNT SIMON, L.C., in *Henderson* v. *Henderson* (3) seems to me to be conclusive. After saying that it might possibly not be a bar to a wife's suit, he proceeded (4):

> "But I know of nothing in the earlier decision, either in the ecclesiastical courts or in the Divorce Court in England, which supports the view that a husband who has intercourse, which is not induced by the fraud of the wife . . . should not thereby be regarded as condoning his wife's misconduct."

In my view, this appeal was doomed to failure from the first and must be dismissed.

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(3) [1944] 1 All E.R. 44; [1944] A.C. 49.

(4) [1944] 1 All E.R. at p. 45; [1944] A.C. at p. 53.

SELLERS, L.J.: I, too, would dismiss this appeal. As long ago as 1842 (5) Dr. LUSHINGTON, sitting in the Divorce Court of those days, said that there was danger in abandoning the general rule. The general rule here is clear, and on the way this case was conducted in the court below and on the findings which the learned commissioner reached, to which reference has been made in the judgments which my Lords have delivered, I think that there is not sufficient justification for abandoning the general rule and acting on any special circumstances which would enable the husband to succeed in this case.

Appeal dismissed.

Solicitors: *Wheeler & Co.*, Brighton (for the husband); *Miller, Parris & Cornwell*, Croydon (for the wife).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

DIRECTOR OF PUBLIC PROSECUTIONS *v.* MILBANKE TOURS, LTD.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Donovan and Davies, JJ.), May 17, 18, 1960.]

Carriage by Air—Carriage of passengers—Scheduled journey—Passenger carried as member of association, although only joining association for the purposes of holiday tour—Whether benefit of air services was available to members of the public—" Members of the public " means members of the public as such —Air Corporations Act, 1949 (12, 13 *&* 14 *Geo.* 6 *c.* 91), *s.* 24 (2).

A travel agency advertised holidays on the continent, which would include air travel. The air travel was to be arranged by H. Ltd. who were air transport carriers but were not associates of the nationalised air corporations. The travel agency were also agents for the International English Language Association (I.E.L.A.), which any member of the public could join on payment of a subscription and one of whose objects was the advancement throughout the world of a greater knowledge of the English language. I.E.L.A. ran tours, chartering air transport of H. Ltd. H. Ltd. applied for, but were refused, by the Minister of Transport and Civil Aviation, approval of arrangements to carry parties of passengers for the travel agency, such approval having been sought under s. 24 (3) (c)* of the Air Corporations Act, 1949. Members of the public, who had booked holidays on the travel agency's private tours, were accordingly told by the travel agency that in view of this refusal their tours would be cancelled. The travel agency drew the attention of these clients to I.E.L.A., who organised similar flights at similar times for similar holidays for their members. The clients accordingly joined I.E.L.A. and travelled on air transport of H. Ltd. chartered for I.E.L.A. Informations having been laid against the travel agency charging offences under s. 24 of the Act of 1949 in respect of these clients of the travel agency, the justices found that the clients were bona fide members of I.E.L.A. and travelled as such. Under s. 24 (1) (5) of the Act of 1949, it was an offence for a person, other than the air corporations and their associates, to carry passengers by air for reward on a " scheduled journey "; and, by s. 24 (2), a scheduled journey was (so far as is relevant) one of a series amounting to a service the benefits whereof were " available to members of the public from time to time seeking to take advantage of it."

Held: since the service under which the clients were carried was available only to members of I.E.L.A., and not to members of the public as such, none of the clients was carried on a " scheduled journey " and the offences charged were not proved.

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(5) *Snow* v. *Snow*, (1842), 2 Notes of Cases, Supp. i at p. xviii.

* The relevant terms of s. 24 are set out at p. 470, letter H, post.

Appeal dismissed.

[**Editorial Note.** The court did not decide the submission that the travel agency were guilty of aiding and abetting the carrying by H. Ltd. or I.E.L.A. of the passengers (for which submission see p. 469, letter I, post). On this point reference may be made to *Ackroyds Air Travel, Ltd.* v. *D.P.P.* ([1950] 1 All E.R. 933).

As to air services excepted from the monopoly of air corporations, see 5 Halsbury's Laws (3rd Edn.) 39, para. 80.

For the Air Corporations Act, 1949, s. 24, see 28 Halsbury's Statutes (2nd Edn.) 293.]

Case Stated.

This was an appeal by the Director of Public Prosecutions by way of Case Stated by justices of the county of Middlesex sitting at Feltham before whom sixteen informations were preferred on Feb. 9, 1959, against Milbanke Tours, Ltd., that they, not being one of the corporations or associates dealt with by the Air Corporations Act, 1949, carried passengers for reward on a scheduled journey, contrary to s. 24 of the Act. The following facts were given in evidence and were not disputed by the respondents. The respondents were a limited company and at all material times carried on the business of a travel agency at an address in Piccadilly, London, W.1. For the 1958 holiday season the respondents advertised as " Flair Holidays " arrangements for holiday accommodation at certain hotels on the continent together with air transport at inclusive prices. For the purpose of providing this transport the respondents made arrangements with Hunting Clan Air Transport, Ltd. (hereafter called " Hunting Clan "), which was a limited company owning and operating aircraft and carrying on the business of passenger and goods air transport carriers. It was not an associate, servant or agent of the corporations within the meaning of s. 15 (3) and s. 24 of the Air Corporations Act, 1949. To obtain the approval of the Minister of Transport and Civil Aviation, under s. 24 (3) (c) of the Air Corporations Act, 1949, for arrangements to carry parties of passengers on a series of journeys organised as a tour application had to be made to the Air Transport Advisory Council, and the Minister generally granted or refused the application in accordance with the advice given by that council. Hunting Clan, at the request of and on behalf of, the respondent, made applications as aforesaid for the Minister's approval of arrangements under s. 24 (3) (c) of the Air Corporations Act, 1949, to carry parties on a series of journeys between London Airport and Palma, Nice and Perpignan. These applications were made in May and September, 1957, and February, 1958, and all were refused. The respondents were notified of these refusals, notification in respect of the refusal of the last application being made to them about May 12, 1958.

The respondents were also the official travel agents for the International English Language Association (hereafter called " I.E.L.A.") which was an association formed in 1954 and having as its objects, inter alia, the advancement throughout the world of a greater knowledge of the English language. Any member of the public who was willing to declare his support for the objects and aims of I.E.L.A. and to pay an annual subscription of one guinea was eligible for election to membership. I.E.L.A. also advertised as available to its members holiday accommodation and air transport; and in connexion therewith the respondents acted as agents for I.E.L.A. The hotels so advertised were the same hotels as those advertised by the respondents for " Flair Holidays ". For the purpose of providing air transport for its members, I.E.L.A. chartered aircraft from Hunting Clan to fly on three or more journeys between London Airport and, inter alia, Palma, Nice and Perpignan. Aircraft were chartered for flights between

London and Palma weekly on Fridays between Apr. 4 and Nov. 14, 1958, between London and Nice weekly on Sundays between May 4 and Nov. 9, 1958; and between London and Perpignan on July 27, Aug. 10, Aug. 24, Sept. 7 and Sept. 21, 1958. Hunting Clan had no knowledge of the fact, if it were a fact, that any persons other than bona fide members of I.E.L.A. were carried by Hunting Clan on the aircraft chartered by I.E.L.A. Between October, 1957, and September, 1958, the respondents accepted bookings for "Flair Tours" from persons who at the date of booking were members of the public.

At various dates in January and February, 1958, the respondents accepted bookings for "Flair Holidays" and received payment of a deposit. At various dates in July and August the intending travellers were notified by the respondents that the Ministry of Transport and Civil Aviation had refused to grant Hunting Clan the necessary licence for the "Flair Holiday" which had been booked, and that their holiday arrangements would have to be cancelled. Either by letter or otherwise the traveller's attention was drawn to I.E.L.A. In the majority of cases letters were sent by the respondents, but in some they were letters from I.E.L.A. Letters of the respondents were in similar form, undated, and included the following:

> "It so happens that we are the official travel agents for this organisation and with a view to extending the facilities which they offer to their members they have set up several holidays by air for their benefit for which they have such authorisations as are necessary. As their official travel agents we were asked to give our professional advice on the setting up of these arrangements, and in view of the arrangements which we already had with a number of hotels on the continent we recommended to the association that they should use these same hotels. One can say, therefore, that the holidays which have been set up by the association are identical with our own 'Flair Holidays', although as you will note they are somewhat cheaper, and although the membership subscription to the association is one guinea, the overall cost to you would be the same."

The travellers applied for membership of I.E.L.A. and received membership forms. Later they flew as members of I.E.L.A. from London Airport on the same date and for the same destination as had originally been booked on "Flair Holidays".

It was contended on behalf of the appellant that the flights of aircraft referred to in the evidence constituted scheduled journeys within the meaning of s. 24 (2) of the Air Corporations Act, 1949, and that the evidence disclosed that the respondents had committed the offences charged either as principals acting through their innocent agent or as aiders and abettors of Hunting Clan or I.E.L.A. It was contended for the respondents that: (a) as I.E.L.A. was a bona fide organisation in which all the persons who travelled on the occasions referred to in the informations had either applied for or accepted membership and as travelling on such occasions had been confined to members of I.E.L.A., the prosecution had not proved that the benefit of such systematic service (if any) as there was had been made available to members of the public from time to time seeking to take advantage of it; and (b) as the allegation against the respondents in each case was that they had carried passengers for reward on scheduled journeys, it was necessary for the prosecution to prove that the respondents had in fact carried passengers, but the prosecution had failed to do this because it was clear from the charter agreements that Hunting Clan had carried the passengers, not the respondents or I.E.L.A. It was further submitted that the prosecution could not overcome this difficulty by submitting that although the respondents were charged as principals they could be convicted for having aided and abetted someone else to commit the offence charged, since the only other persons who could have committed the offence were Hunting Clan and the evidence relating to them was that they had no knowledge of the fact (if it were a fact) that any persons other than bona fide members of I.E.L.A. had travelled on aircraft chartered by that association. At the close of the appellant's case a submission was made on behalf of the respondents that on the evidence called by the prosecution there was no case in law to answer and alternatively that the said evidence was not sufficient to prove beyond reasonable doubt that the offences charged, or any of them, had been committed. The magistrates were of opinion that (i) all the persons who travelled on the occasions referred to in the informations were bona fide members of I.E.L.A. (ii) that Hunting Clan were entitled to carry such persons as passengers for reward on scheduled journeys (iii) that the respondents were not such carriers. They dismissed the summonses without calling on the respondents to call evidence. The court were asked to determine whether they came to a correct determination and decision in point of law.

J. M. G. Griffith-Jones for the appellant.
F. H. Lawton, Q.C., and *C. Lawson* for the respondents.

LORD PARKER, C.J.: This is an appeal by way of Case Stated by justices of the county of Middlesex sitting at Feltham, before whom sixteen informations were preferred by the appellant against the respondents for that the respondents, not being one of the corporations or associates dealt with by the Air Corporations Act, 1949, carried passengers for reward on a scheduled journey, contrary to s. 24 of the said Act. At the end of the case for the prosecution a submission was made that there was no case in law to answer, or alternatively that the evidence was not sufficient to prove beyond reasonable doubt that the offences charged had been committed. The magistrates upheld that submission and, without calling on the respondents, dismissed the informations.

Before dealing with the facts it is convenient to refer to the Air Corporations Act, 1949. By s. 24 it is provided that, except as therein set out, the corporations and their associates shall in effect have a monopoly. Subsection (1) reads:

> " Subject to the provisions of this section, it shall not be lawful for any person, other than the corporations, their associates, and the servants and agents of the corporations and their associates, to carry passengers or goods by air for hire or reward upon any scheduled journey between two places of which at least one is in the United Kingdom."

By sub-s. (2) " scheduled journey " is defined in this way:

> " In this Act the expression ' scheduled journey ' means one of a series of journeys which are undertaken between the same two places and which together amount to a systematic service operated in such a manner that the benefits thereof are available to members of the public from time to time seeking to take advantage of it."

Then by sub-s. (3), in so far as it is material, an exception is made, because by sub-s. (3) it is provided that:

> " Nothing in this section shall restrict the right of any person . . . (c) in accordance with arrangements for the time being approved by the Minister as being in the public interest, to carry a party of passengers and their baggage (if any) upon a series of three or more journeys organised as a tour for the common enjoyment of those passengers."

By sub-s. (5), " A person who carries a passenger, or carries any goods, in contravention of the provisions " shall be guilty of an offence.

[His Lordship stated the facts and continued:] Whether or not that is (and I think it is) highly reprehensible conduct on the part of travel agents—booking tours without knowing whether they can carry them out, and when they hear they cannot be carried out still not telling the unfortunate people who have booked and then, at the end, saying " Well, you either sacrifice your holiday or you join I.E.L.A."—is really not a matter for this court. The sole question is: Has it been shown that they are guilty of an offence against s. 24?

On that a number of matters arise. First of all, was there a systematic service? As to that counsel for the respondents admits that there was. The second question is, if there was a systematic service was it operated in such a manner that the benefits thereof were available to members of the public from time to time seeking to take advantage of it? Finally the third question is, did the respondents carry persons on such a scheduled journey or, if they did not, who did, and can they be held guilty of aiding and abetting?

For my part I find it only necessary to consider what I call the second question: Was this a service operated in such a manner that the benefits thereof were available to members of the public from time to time seeking to take advantage of it? The magistrates stated that they found that all the persons who travelled on the occasions referred to in the informations were bona fide members of I.E.L.A. It is clear that I.E.L.A. was a perfectly genuine, reputable association. There was clearly evidence on which the magistrates could find that all those who travelled were in fact bona fide members of I.E.L.A. Can it then be said, nevertheless, that this service was available to members of the public? I find it very difficult in this case to say that it was available to members of the public. Of course it was available to members of the public in the same sense as when any reputable organisation advertises tours and indicates as one of the inducements to join the association that if the member of the public pays his guinea, or two guineas, or whatever it may be, he could have the advantage of cheap tours. To that extent the service would be operated to the benefit of members of the public, namely, such members of the public as took advantage of their offer and joined the organisation. I think that it is clear that in sub-s. (2) one must read in some such words as "as such" after "public", so that it would read, "a systematic service operated in such a manner that the benefits thereof are available to members of the public *as such* from time to time seeking to take advantage of it". Here it was not available to members of the public as such, but only available to such members of the public as joined the organisation—in this case joined I.E.L.A.

One can imagine cases where it could be said that the whole thing was a sham, where in effect there was no proper organisation, but where the price of the tour was split up, that is to say as to £49 fare and £1 fee to join some bogus organisation in an attempt to get round the section. As I have said, there is no suggestion of that here, and I cannot see that the magistrates could have held otherwise than they did, namely, that those who travelled were bona fide members of I.E.L.A.; and I would add, although they have not found it, that the only way in which it could be said that it was available to members of the public was that the net was cast pretty wide and it was made clear that any member of the public who paid his guinea was eligible, and for that guinea he would have the advantage of this holiday.

Reprehensible as the conduct of these respondents may have been I agree with the magistrates that no prima facie case was made out, and accordingly I would dismiss this appeal. I would only add that in these circumstances I find it unnecessary to consider the further question who were the carriers in this case and whether it can be said that the respondents, if they were not the carriers, were aiders and abettors.

DONOVAN, J.: I agree and I add only a few words because of the importance of the case. It is easy to understand the annoyance felt by the appellant in this matter because the arrangements made for sidestepping the Air Corporations Act, 1949, were, as my Lord has said, blatant, but they may none the less be effective.

The crucial question is whether the benefits of these services were available to members of the public. They were, says the appellant, because anyone can join this association, and the persons here concerned, namely, the passengers, joined simply to get their holiday and, in some cases, as a matter almost of coercion. That may well be true, but the fact that anyone can join an association and he does so not because he wants to further the association's objects but for purely selfish reasons of his own, does not prevent him from being a member once he has joined. The Case here finds that the passengers in question travelled as bona fide members of the association.

The contrast which s. 24 (2) of the Air Corporations Act, 1949, draws is, in my opinion, a contrast between members of the public as such and persons who can benefit from a service not available to members of the public as such. Here these services were available only to members of the association, and none the less so because, as members of the public, they could join the association with ease.

There is, as my Lord pointed out during the course of the argument, a number of perfectly reputable and genuine associations, other than I.E.L.A., who no doubt number among their members persons who have joined solely, or principally, for the benefit of the incidental advantages which membership confers—among them, perhaps, cheap travel—and the proposition for which the appellant here contends will look very different when it is applied to such associations. Ease of membership and the motive of joining are really, in my view, irrelevant considerations, and in a case like this I think that the appellant must go the whole length of saying that the association or the membership—either will do—is a sham or, as has been said in some cases, a mere simulacrum or cloak. That is not being contended here and, indeed, it is expressly found that the passengers were bona fide members, which involves also that the association was a bona fide association.

In these circumstances I also agree that the appeal must be dismissed, and I, too, find it unnecessary to say who in law was the carrier or were the carriers here.

DAVIES, J.: I agree. In my opinion there was evidence here on which the magistrates were entitled to make their first finding on the evidence given by the prosecution, that all the persons who travelled on the occasions referred to in the informations were bona fide members of I.E.L.A. Applying that to the Air Corporations Act, 1949, it seems to me to mean this, that, on the date of each of these sixteen carriages which were the subject of these sixteen informations the benefits of the service were not available to members of the public as such, and that being so the offences charged were not proved.

I also agree that it is unnecessary to, and I do not, consider whether the magistrates were right in the opinions which they expressed whether or not the respondents were the actual carriers in this case.

Appeal dismissed.

Solicitors: *Director of Public Prosecutions* (for the appellant); *Forsyte, Kerman & Phillips* (for the respondents).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

VAUGHAN *v*. BIGGS.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Donovan and Davies, JJ.), May 16, 1960.]

Criminal Law—Litter—Depositing and leaving litter—Whether continuing offence—Appellant charged with depositing and leaving litter on or before a specified date—Information laid three months after date specified—No proof of date on which litter deposited—Jurisdiction of justices to hear information—Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 55), *s.* 104—*Litter Act*, 1958 (6 *&* 7 *Eliz.* 2 *c.* 34), *s.* 1 (1).

On July 3, 1959, an information was preferred against the appellant charging him with depositing and leaving a derelict motor car on a public open space on or before Apr. 2, 1959, contrary to s. 1 (1)* of the Litter Act, 1958. The appellant had deposited the car (which was held to constitute litter) in the public open space without authority, but the date on which he had done so was not proved. By s. 104 of the Magistrates' Courts Act, 1952†, a magistrates' court must not try an information unless it was laid within six months from the time when the offence was committed. On appeal against conviction,

Held: s. 1 (1) of the Litter Act, 1958, did not create a continuing offence, because the offence included both of two elements, the depositing and the leaving of the litter, the former of which was an act that was fixed in point of time; accordingly, as it was not shown that the car had been deposited within six months before the date when the information was laid, the justices had no jurisdiction to hear the information.

Appeal allowed.

[As to the time limit within which an information before justices must be laid not applying to continuing offences, see 25 HALSBURY'S LAWS (3rd Edn.) 166, para. 299.

As to offences under the Litter Act, 1958, see SUPPLEMENT, 10 HALSBURY'S LAWS (3rd Edn.), para. 1743A.

For the Magistrates' Courts Act, 1952, s. 104, see 32 HALSBURY'S STATUTES (2nd Edn.) 503.

For the Litter Act, 1958, s. 1 (1), see 38 HALSBURY'S STATUTES (2nd Edn.) 920.]

Case Stated.

This was a Case Stated by justices for the county of Pembroke in respect of their adjudication as a magistrates' court sitting at Fishguard on Aug. 14, 1959.

On July 3, 1959, an information was preferred by the respondent against the appellant that he did deposit and leave a derelict motor car on a public open space known as Blaen-y-delyn Quarry, Fishguard, on or before Apr. 2, 1959, contrary to s. 1 of the Litter Act, 1958. The justices found the following facts. On Apr. 2, 1959, there was a derelict motor car on the quarry, which was a public open space. The car was deposited there by the appellant, who had no lawful authority to deposit it there. The date on which it was deposited was not proved. The car constituted litter.

The appellant contended that the information was not proved to have been laid within six months of the date of the alleged offence, as required by the Magistrates' Courts Act, 1952, s. 104. The respondent contended that the offence charged was a continuing offence and that the information was laid within the requisite period. The justices were of the opinion that the information was laid within the requisite period and accordingly fined the appellant £5.

D. H. Farquharson for the appellant.

The respondent did not appear and was not represented.

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* The relevant terms of s. 1 (1) are printed at p. 474, letter E, post.

† The relevant terms of s. 104 are printed at p. 474, letter C, post.

LORD PARKER, C.J.: This is an appeal by way of Case Stated by justices for the county of Pembroke, sitting at Fishguard, before whom an information was preferred by the respondent against the appellant:

> " . . . that he did deposit and leave a derelict motor car on a public open space [at a quarry in Fishguard] on or before Apr. 2, 1959, contrary to s. 1 of the Litter Act, 1958."

The justices heard the evidence. They were satisfied that the quarry was an open space, that the car constituted litter, that it had been deposited there by the appellant and that the appellant had no authority so to deposit it. It was then submitted by the appellant that the information was not shown to have been laid within six months of the date of the offence as required by the Magistrates' Courts Act, 1952, s. 104. That section provides:

> " Except as otherwise expressly provided by any enactment, a magistrates' court shall not try an information or hear a complaint unless the information was laid, or the complaint made, within six months from the time when the offence was committed . . ."

Here, all that was proved was that the appellant had left the motor car in the quarry on or before Apr. 2, 1959; in other words, he might have so left it more than six months before the information, which was laid on July 3, 1959. It was contended by the respondent that, notwithstanding that, the justices were entitled to convict, in that what was charged was a continuing offence. That argument appealed to the justices; they found the information proved and fined the appellant £5.

Whether the offence in question is a continuing offence or not depends on the words of s. 1 (1) of the Litter Act, 1958. The subsection provides:

> " If any person throws down, drops or otherwise deposits in, into or from any place in the open air to which the public are entitled or permitted to have access without payment, and leaves, anything whatsoever in such circumstances as to cause . . . the defacement by litter of any place in the open air, then, unless that depositing and leaving was authorised by law or was done with the consent of the owner, occupier or other person or authority having the control of the place in or into which that thing was deposited, he shall be guilty of an offence . . ."

Observe that there are two ingredients there, the throwing down, dropping or otherwise depositing and the leaving. It is quite clear that not only the depositing but also the leaving is necessary, because it was not intended that an offence should be committed if somebody deposited litter and immediately cleared it up. Accordingly, although the act constituting the offence consists of throwing down, dropping or otherwise depositing, it is only an offence if it is not removed. The offence is not committed unless both of these things, the depositing and the leaving, occur. Depositing is an act fixed in point of time and not a continuing matter, and, accordingly, I am quite satisfied that this cannot be treated as a continuing offence and it was not shown that the justices had any jurisdiction to deal with it. Accordingly, I would allow this appeal.

DONOVAN, J.: I agree.

DAVIES, J.: I also agree.

Appeal allowed.

Solicitors: *Denton, Hall & Burgin*, agents for *Walter L. Williams & Sons*, Fishguard (for the appellant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

R. *v.* EDMONTON JUSTICES, *Ex parte* BROOKS.

[Queen's Bench Division (Lord Parker, C.J., Byrne and Donovan, JJ.), May 24, 1960.]

Road Traffic—Notice of intended prosecution—Objection that notice not given—Whether issue must be raised as preliminary point—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5 *c.* 43), *s.* 21.

At a trial of an information against B. that he drove a motor vehicle on a road without due care and attention, the justices refused to allow cross-examination of a prosecution witness, or to hear evidence for the defence, on the question whether notice of intended prosecution under s. 21 of the Road Traffic Act, 1930, had been given, that question not having been raised as a preliminary issue.

Held: although it was a convenient practice to raise as a preliminary point the issue whether notice of intended prosecution had been given, yet a defendant was not bound so to do but could wait until the appropriate prosecution witness gave evidence; the conviction was therefore contrary to natural justice and would be quashed.

[As to notice of intended prosecution, see 31 Halsbury's Laws (2nd Edn.) 680, para. 1008.

For the Road Traffic Act, 1930, s. 21, see 24 Halsbury's Statutes (2nd Edn.) 594.]

Motion for certiorari.

This was a motion on behalf of Mr. Henry Gordon Brooks for an order of certiorari to bring up and quash a conviction recorded by the justices for the Petty Sessional Division of Edmonton, sitting at Tottenham on Nov. 26, 1959, finding him guilty of careless driving, fining him and disqualifying him from holding a driving licence for two months. The facts appear in the judgment of Lord Parker, C.J.

J. A. Nevin for the applicant.

The respondents did not appear and were not represented.

LORD PARKER, C.J.: The grounds on which this application is made are that the justices refused to permit the prosecution witness to be cross-examined or the defendant to give evidence as to the issue whether there had been a compliance with s. 21 of the Road Traffic Act, 1930, which provides that there must have been a previous notice of intended prosecution. Apparently no preliminary point was raised. The prosecution began to call their evidence; one of the police officers asserted that a warning had been given and it was sought to cross-examine him, the suggestion being that in fact no warning had been given. That was disallowed, as also was evidence (1) which the defendant desired to give that he had not received a warning. The justices were apparently advised by their clerk " that it was the practice of the court not to permit the raising by the defence of issues relating to notice of intended prosecution unless the defence had stated at the beginning of the case that there was an issue on this score and that he believed this to be the correct practice ". The justices have put in an affidavit to the same effect.

For my part, I think that it is a very convenient practice that in these cases defendants should be asked whether any issue is going to be raised in regard to notice of intended prosecution, because if the issue is to be raised, it is clearly convenient to dispose of that issue at once without having to go into all the facts. But, although that is a very convenient practice, I can see no ground on which one can prevent a defendant raising the matter at any stage of the proceedings. Section 21 only says that the defendant shall not be convicted unless there has been a notice of intended prosecution and, by the second proviso, it is provided:

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(1) The defendant was, however, permitted to give, and gave, evidence on other issues.

" the requirement of this section shall in every case be deemed to have been complied with unless and until the contrary is proved ". If, therefore, a defendant chooses not to raise the issue at once but to wait until the appropriate prosecution witness gives evidence and then cross-examines him, I myself see no possible power to prevent that cross-examination. Accordingly, I feel in this case that while there is no reflection on the justices, there has in fact been a conviction contrary to natural justice and, in those circumstances, I would allow the order to go and the conviction to be quashed.

BYRNE, J.: I agree.

DONOVAN, J.: I also agree.

[Costs were applied for against the justices, reference being made to *R.* v. *Liverpool JJ., Ex p. Roberts* (p. 384, ante), but such costs were refused.]

Order accordingly.

Solicitors: *Adler & Adler* (for the applicant).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

R. *v.* LEWES JUSTICES, *Ex parte* TRUSTEES OF THE PLUMPTON AND DISTRICT CLUB.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Donovan and Davies, JJ.), May 17, 1960.]

Licensing—Forfeiture of intoxicating liquor and vessels—Members' club—Only one member convicted—Whether forfeiture incurred—Licensing Act, 1953 (1 *&* 2 *Eliz.* 2 c. 46), *s.* 152 (2).

Certiorari—Evidence—Admissibility of affidavit evidence on application for certiorari—Automatic forfeiture of intoxicating liquor and vessels if owner or occupier convicted—Evidence to show that conviction was of only one member of a members' club.

Intoxicating liquor removed from a place under s. 152 (1) of the Licensing Act, 1953*, is not forfeited under s. 152 (2) unless all owners or occupiers of the place are convicted of an offence referred to in s. 152 (2).

Intoxicating liquor was removed from a members' club by a constable pursuant to s. 152 (1). One member of the club, who was also a member of its managing committee, was convicted by a magistrates' court of selling by retail intoxicating liquor without holding a justices' licence at the club, contrary to s. 120 (1) (a)† of the Act, and the magistrates made an order under s. 160 (3)‡ directing the sale of the liquor. On application by three trustees of the club for certiorari it was objected that affidavits could not be looked at on the question whether the person convicted was the owner or occupier of the place in question.

Held: (i) there was no forfeiture under s. 152 (2) of the Licensing Act, 1953, and accordingly no jurisdiction under s. 160 (3) to order a sale, unless there had been a conviction of " the owner or occupier of the place ", viz., of all the owners or occupiers where they were more than one; on the question of jurisdiction affidavit evidence could be received, and, therefore, the affidavits could be looked at to see whether the person convicted was " the owner or occupier ".

(ii) as all the owners or occupiers of the club premises had not been convicted, the intoxicating liquor had not been forfeited.

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* The relevant parts of s. 152 (1) and (2), are printed at p. 478, letters B and E, post.

† Section 120 (1) (a) is printed at p. 477, letter I, post.

‡ The terms of s. 160 (3) are printed at p. 478, letter G, post.

[As to seizure and forfeiture of intoxicating liquor, see 22 HALSBURY'S LAWS (3rd Edn.) 667, para. 1405.

For the Licensing Act, 1953, s. 152, see 33 HALSBURY'S STATUTES (2nd Edn.) 280.]

Cases referred to:

R. v. *Bolton*, (1841), 1 Q.B. 66; 10 L.J.M.C. 49; 5 J.P. 370; 113 E.R. 1054; 16 Digest 110, *94*.

R. v. *Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128; 91 L.J.P.C. 146; 127 L.T. 437; 16 Digest 419, *2795*.

Application for certiorari.

The trustees of the Plumpton and District Club applied, by leave granted on July 3, 1959, for an order of certiorari to quash an order of Lewes petty sessions, dated Jan. 27, 1959, declaring that certain intoxicating liquor and vessels seized from the club were forfeited and directing a sale thereof. The facts are stated in the judgment of LORD PARKER, C.J.

P. M. O'Connor, Q.C., for the applicants, the trustees of the club.

F. B. Purchas for the respondent, the prosecutor on whose information the order had been made.

LORD PARKER, C.J.: In these proceedings counsel moves on behalf of three gentlemen who are trustees of the Plumpton and District Club for an order of certiorari to remove into this court and quash an order of the magistrates for the petty sessional division of Lewes, dated Jan. 27, 1959, whereby they declared that certain intoxicating liquor and vessels seized under s. 152 (1) of the Licensing Act, 1953, were forfeited and directed that the sale thereof should take place by the informant under s. 160 (3).

The matter arises in this way: the Plumpton and District Club is a working men's club, and on Nov. 22, 1958, they gave a dance. On that evening the police, armed with a warrant under s. 152 (1) of the Licensing Act, 1953, raided the club and found that liquor was being served to non-members. As the result of that two things happened. First, the police seized the liquor and the vessels containing the same and, secondly, they brought before the magistrates certain persons whom they found in the club selling liquor to non-members. Those persons, including in particular a Mr. Sasse, pleaded guilty. Mr. Sasse was fined £2, and in the memorandum of the conviction entered in the register is found this:

> "Edward William Sasse: Selling by retail intoxicating liquor without holding justices' licence. Date of offence, 22.11.1958. Plea or consent to order, guilty. Minute of adjudication: Defendant convicted, fined £2. Intoxicating liquor and vessels forfeited under s. 152 of the Licensing Act, 1953, directed to be sold by informant."

The submissions made on behalf of the applicants are twofold. First, it is said that that record is bad on its face. Secondly, it is said that in any event the magistrates had no jurisdiction to give that direction in that Mr. Sasse was not the owner or occupier of the place from which the liquor had been removed and that, accordingly, forfeiture could not take place. Having said that, it is necessary to look in a little more detail at the relevant sections of the Licensing Act, 1953. By s. 120 (1) it is provided:

> "Subject to the provisions of this Act, if any person—(a) sells or exposes for sale by retail any intoxicating liquor without holding a justices' licence authorising him to hold an excise licence for the sale of that liquor, or (b) holding a justices' licence sells or exposes for sale by retail any intoxicating liquor except at the place for which the justices' licence authorises him to hold an excise licence for the sale of that liquor, he shall be guilty of an offence under this section."

By sub-s. (6) of that section it is provided:

> "Where intoxicating liquor is sold in contravention of this section on any premises, every occupier of the premises who is proved to have been privy or consenting to the sale shall be guilty of an offence under this section."

Section 152 is not dealing with licensed premises. It provides by sub-s. (1), so far as it is material, that

> "If a justice of the peace is satisfied by information on oath that there is reasonable ground for believing that any intoxicating liquor is sold by retail or exposed or kept for sale by retail at any place in the county or borough for which he is justice, being a place where that liquor may not lawfully be sold by retail, he may issue a search warrant . . ."

Thereupon, the police may search the place for intoxicating liquor and

> "remove any intoxicating liquor that the constable has reasonable grounds for supposing to be in the place for the purpose of unlawful sale there or elsewhere, and the vessels containing the liquor."

It was pursuant to the search warrant that the police raided this dance on Nov. 22, 1958, and seized a quantity of liquor and the vessels containing the same.

The persons whom they thereafter brought before the court were persons who were found selling the liquor to non-members and who were guilty of an offence under s. 120 (1) (a).

Subsection (2) of s. 152 then goes on in this way:

> "If the owner or occupier of the place from which any intoxicating liquor has been removed under the preceding subsection is convicted of selling by retail, or of exposing for sale by retail, any intoxicating liquor that he is not authorised to sell by retail, or is convicted of having in his possession intoxicating liquor that he is not authorised to sell, any intoxicating liquor so removed, and the vessels containing it, shall be forfeited."

Observe in passing that that is an automatic forfeiture. It does not depend on any finding of the magistrates or any discretion on the part of the magistrates. It is something which follows automatically if the owner or occupier of the place from which the liquor has been removed is convicted of selling by retail any intoxicating liquor that he is not authorised to sell. Finally, by s. 160 (3), it is provided:

> "Liquor or vessels forfeited under this Act shall be sold or otherwise disposed of as the court imposing the forfeiture may direct; and the proceeds shall be applied as if they were a fine."

There are other provisions in the Act giving the magistrates a discretion to forfeit, and that is no doubt why there is a reference to the court imposing the forfeiture.

In the present case, as I have said, the forfeiture is automatic, but I think that the magistrates would even so have to make an order providing, as they did, that the liquor should be sold. It was as the result of that that this entry to which I have referred appears in the register of the magistrates' court. It is to be observed that the magistrates did not therein impose the forfeiture but they recited that the intoxicating liquor and vessels had been forfeited under s. 152 of the Act and directed that they be sold by the informant.

The first point taken by counsel for the applicants is that that record is bad in that it does not disclose that Edward William Sasse was the owner or the occupier. Whether one looks at that or at the information preferred against him, he is not charged with selling by retail without a licence "being the owner or the occupier" of any premises, and in the minute of adjudication it is not stated that the defendant, being the occupier, the liquor and vessels are forfeited. Counsel for the applicants maintains that the record is incomplete

A in that respect and bad. I am not prepared to say that this record is bad in the sense that it contains an error of law on its face. I think that it would have been far better if it had been recited that the defendant, being the owner or occupier, the liquor and vessels were forfeited automatically. Also, I think, it would have been better if the quantity of liquor and the number of vessels had been inserted, but certiorari will only go if there is an error of law on its B face, and although this record is incomplete, when I look at it I cannot say that it is necessarily bad because, for all I know, Mr. Edward William Sasse might well have been the owner or the occupier. Accordingly, I would not allow this application on that ground.

The other ground is a ground which is said to go to jurisdiction. It is said that if this court looks at affidavits they will find that Mr. Sasse was not the C owner or the occupier within s. 152 (2), that accordingly there could not have been any automatic disqualification and, once more, that there could not have been an order for sale under s. 160 (3). On the other side, it is argued by counsel for the prosecutor that this is not a case in which the court is entitled to look at affidavit evidence. He says that this is the type of case in which the magistrates have jurisdiction to inquire into the matter. If they have gone wrong D in law or in fact, that is not a matter for certiorari because the remedy by way of certiorari is not a remedy by way of appeal, and he points to the well-known passages in *R.* v. *Bolton* (1) and the very well-known passage of LORD SUMNER in *R.* v. *Nat Bell Liquors, Ltd.* (2). I read the passage in that speech to make counsel's point clear. LORD SUMNER said this:

> "It has been said that the matter may be regarded as a question of E jurisdiction, and that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of essential evidence, if ascertained somehow, is on the same footing as want of qualification in the magistrate, and goes to the question of his right to enter on the case at all. Want of evidence on which to convict is the same as want of jurisdiction to take evidence at all. This, clearly, is erroneous. A justice who F convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not. How a magistrate, who has acted within his jurisdiction up to the point at which the missing evidence should have G been, but was not, given, can, thereafter, be said by a kind of relation back to have had no jurisdiction over the charge at all, it is hard to see."

Counsel for the prosecutor maintains that applying that principle this was a case in which the magistrates had jurisdiction to inquire whether the person convicted was the owner or the occupier within the subsection, and that if they have gone wrong in fact or in law that is not a matter for this court. For H my part, I am quite satisfied that this is not a case which comes within that principle. In particular, this is not a case where it has been left to the magistrates to be satisfied that the person convicted is the owner or the occupier. The subsection provides that there is an automatic forfeiture if the owner or occupier is convicted. That has to be so before there is any forfeiture and then the forfeiture is automatic, and the magistrates by wrongly deciding that the I person convicted is an owner or occupier cannot bring about that automatic forfeiture. Accordingly, I am quite satisfied that this is a case where we are entitled to look at the affidavit evidence in order to see whether the magistrates had jurisdiction, which means to ascertain whether Mr. Sasse was the owner or occupier of the place from which the liquor was removed.

All that appears on the affidavit evidence is that Mr. Sasse was a member of this club. It was a members' club, and he was one of many, many members.

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(1) (1841), 1 Q.B. 66.

(2) [1922] 2 A.C. 128 at p. 151.

It also appears that he was one of a number of members of the managing committee. The freehold of the club and the assets of the club were vested in three trustees, the applicants in the present case. The application of s. 152 (2) raises great difficulties in the case of members' clubs, and I do not find it necessary in this case to say who exactly were the occupiers, whether it be the members of the managing committee or all the members of the club. I am quite clear, however, that Mr. Sasse was, at most, only one of many occupiers. Indeed, he may not have been an occupier at all, but I am assuming that he was, and indeed it is to be observed that it was admitted before the magistrates that he was. Even on that assumption, however, I am quite clear that he is not "the occupier" within the meaning of s. 152 (2). The opening words of that subsection are clear, and when it says "If the owner or occupier of the place . . . is convicted of selling by retail" it means, if there is more than one owner or more than one occupier, all the owners or all the occupiers. In the ordinary way, under the Interpretation Act, 1889, the singular includes the plural but, much more important, there would be manifest injustice done if it were possible for this automatic forfeiture to take place with only one of many occupiers or one of many owners before the court. I think that on the plain meaning of those words all the owners or all the occupiers must have been brought before the court and convicted.

This raises obvious difficulties with regard to members' clubs, but the section covers many other premises besides members' clubs and one must look at the matter of construction strictly. In these circumstances I am satisfied that the magistrates here had no jurisdiction to treat the case as one in which an automatic forfeiture had taken place and to make an order for sale under s. 160 (3). For these reasons I would allow the order to go to quash that part of the record which sets out the forfeiture and the direction for sale.

DONOVAN, J.: I agree. Like my Lord I would reserve the question whether Mr. Sasse was an occupier by virtue of his membership of the club or by virtue of his membership of the managing committee. Obviously many matters would have to be considered, but it matters little in this case either way, for in my view he was only one of several such occupiers.

DAVIES, J.: I agree and can express my agreement in two or three sentences really repeating what my Lord has said. It is obviously a fundamental condition precedent to the power of the magistrates to direct a sale under s. 160 (3) of the Licensing Act, 1953, that the liquor and vessels should be forfeited, but unless the owner or occupier has been convicted the liquor and vessels are not forfeited. Mr. Sasse, one member of the club, would not be the owner or occupier for the reasons my Lord has indicated. He might be an occupier. In my opinion, therefore, there is no forfeiture and, consequently, there was no jurisdiction in the magistrates to make the order for sale. I agree with the order proposed.

Order for certiorari.

Solicitors: *Taylor, Jelf & Co.*, agents for *Adams*, Lewes, Sussex (for the applicants); *Walmsley & Stansbury*, agents for *J. E. Dell & Loader*, Shoreham-by-Sea, Sussex (for the respondent).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

INDEPENDENT TELEVISION AUTHORITY AND ANOTHER *v.* INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Lord Radcliffe, Lord Tucker, Lord Cohen, Lord Keith of Avonholm and Lord Morris of Borth-y-Gest), March 30, 31, May 26, 1960.]

Stamp Duty—Bond, covenant, or instrument—Security—Executory agreement creating obligation—Agreement providing for services—Total amount ultimately payable ascertainable—Specified sum subject to increase or decrease in certain eventualities—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *Sch.* 1.

On May 23, 1955, an agreement under seal was entered into by the appellants, whereby the first appellants (the authority) constituted the second appellants (the contractor) a programme contractor for one of the authority's television broadcasting stations pursuant to the Television Act, 1954, s. 2, during a period commencing on the date of the agreement and ending (unless previously avoided or terminated under the terms of the agreement) on July 29, 1964. The contractor was to pay the authority a fee of £495,600 per annum until Mar. 31, 1958, or the expiration of two and a half years from the commencement of broadcasting, whichever was the later, and a fee of £536,900 per annum thereafter. These fees were liable to be increased or decreased by reference to increases and decreases of five per cent. or more in the half-yearly index of retail prices published by the Board of Trade, but no such increase or decrease could take effect in respect of any half-yearly period commencing before Apr. 1, 1956. On presentation of the agreement for adjudication for stamp duty, the Commissioners of Inland Revenue assessed the duty payable on the basis of the ad valorem stamp duty chargeable under the head in the Stamp Act, 1891, Sch. 1, " Bond, covenant, or instrument of any kind whatsoever: (i) Being the only or principal or primary security for any annuity . . . or for any sum or sums of money at stated periods . . . For a definite and certain period, so that the total amount to be ultimately payable can be ascertained ". The commissioners computed the amount on the total of the sums specified as annual fees (£495,600 and £536,900) for the period Nov. 15, 1955, to July 29, 1964. On appeal,

Held: the stamp duty was properly computed, because—

(i) the agreement was a security within the words " Being the only . . . security " in the head " Bond, covenant, or instrument " in Sch. 1 to the Stamp Act, 1891, notwithstanding that it was an executory agreement and that the payments were in consideration of services to be rendered (*National Telephone Co.* v. *Inland Revenue Comrs.* ([1900] A.C. 1) followed; *Jones* v. *Inland Revenue Comrs.* ([1895] 1 Q.B. 484) approved), and

(ii) the sum of £495,600 per annum payable in the first two and a half years and the sum of £536,900 per annum payable thereafter under the agreement were " sums of money at stated periods " prima facie payable, on which ad valorem duty under the head " Bond, covenant, or instrument . . . whatsoever " might be computed, and the contingency that those sums might be subject to an increase or a decrease in certain events did not affect the calculation of the proper ad valorem duty, notwithstanding the words " so that the total amount to be ultimately payable can be ascertained " in the head of charge.

Underground Electric Rys. Co. v. *Inland Revenue Comrs.* ([1905] 1 K.B. 174; [1906] A.C. 21) and *Underground Electric Rys. Co. of London, Ltd.* v. *Inland Revenue Comrs.* ([1914] 3 K.B. 210; [1916] 1 K.B. 306) applied.

Per LORD RADCLIFFE, LORD TUCKER and LORD MORRIS OF BORTH-Y-GEST: I take it to be a well-settled principle that the money payable is ascertained for the purposes of charge [to stamp duty] without regard to the fact that the agreement in question may itself contain provisions which will, in certain circumstances, prevent it being payable at all (see p. 486, letter B, post).

Decision of the COURT OF APPEAL ([1959] 1 All E.R. 464) affirmed.

[For stamp duty payable on a bond, covenant, or other instrument, see 28 HALSBURY'S LAWS (2nd Edn.) 477, para. 1008, and 3 HALSBURY'S LAWS (3rd Edn.) 330, para. 621; and for cases on the subject, see 39 DIGEST 275, 276, *604-612*.

For the Stamp Act, 1891, Sch. 1, " Bond, covenant, or instrument ", see 21 HALSBURY'S STATUTES (2nd Edn.) 662.]

Cases referred to:

British Italian Corpn., Ltd. v. *Inland Revenue Comrs.*, [1921] W.N. 220; SERGEANT ON STAMP DUTIES (3rd Edn.) 334; 39 Digest 277, *615*.

County of Durham Electrical Power Distribution Co. v. *Inland Revenue Comrs.*, [1909] 2 K.B. 604; 78 L.J.K.B. 1158; 101 L.T. 51; 73 J.P. 425; 39 Digest 276, *613*.

Jones v. *Inland Revenue Comrs., Sweetmeat Automatic Delivery Co.* v. *Inland Revenue Comrs.*, [1895] 1 Q.B. 484; 64 L.J.Q.B. 84; 71 L.T. 763; 39 Digest 276, *607*.

Limmer Asphalte Paving Co. v. *Inland Revenue Comrs.*, (1872), L.R. 7 Exch. 211; 41 L.J.Ex. 106; 26 L.T. 633; 39 Digest 259, *433*.

National Telephone Co. v. *Inland Revenue Comrs.*, [1899] 1 Q.B. 250; 68 L.J.Q.B. 222; 79 L.T. 514; *affd.* H.L., [1900] A.C. 1; 69 L.J.Q.B. 43; 81 L.T. 546; 39 Digest 276, *608*.

Underground Electric Rys. Co. v. *Inland Revenue Comrs.*, [1904] 2 K.B. 198; *revsd.* C.A., [1905] 1 K.B. 174; *affd.* H.L., [1906] A.C. 21; 75 L.J.K.B. 117; 93 L.T. 819; 39 Digest 282, *655*.

Underground Electric Rys. Co. of London, Ltd. & Glyn, Mills, Currie & Co. v. *Inland Revenue Comrs.*, [1914] 3 K.B. 210; *affd.* C.A., [1916] 1 K.B. 306; 85 L.J.K.B. 356; 114 L.T. 111; 39 Digest 276, *614*.

Appeal.

Appeal by Independent Television Authority and Associated-Rediffusion, Ltd. from an order of the Court of Appeal (JENKINS, ROMER and PEARCE, L.JJ.), dated Feb. 9, 1959, and reported [1959] 1 All E.R. 464, affirming an order of WYNN-PARRY, J., dated July 15, 1958, and reported [1958] 3 All E.R. 126, dismissing the appellants' appeal on Case Stated by the Commissioners of Inland Revenue under the Stamp Act, 1891, s. 13. By the Case Stated, the decision of the court was sought on the amount of stamp duty chargeable on an agreement under seal dated May 13, 1955* and made between Independent Television Authority of the one part and Associated-Rediffusion, Ltd. of the other part, which had been presented to the commissioners under s. 12 of the Act of 1891 for their opinion as to the stamp duty with which the instrument was chargeable. By the agreement, Independent Television Authority appointed Associated-Rediffusion, Ltd. to be a programme contractor to Independent Television Authority for the purposes of the Television Act, 1954. WYNN-PARRY, J., and the Court of Appeal upheld the assessment of the commissioners computing the stamp duty at £11,431. The facts are stated in the opinion of LORD RADCLIFFE.

Heyworth Talbot, Q.C., and *J. G. Monroe* for the appellants.

John Pennycuick, Q.C., and *E. Blanshard Stamp* for the Crown.

Their Lordships took time for consideration.

May 26. The following opinions were read.

LORD RADCLIFFE: My Lords, on May 23, 1955, the appellants entered into an agreement under their respective seals whereby the first of them, the

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* The main provisions of the agreement are summarised at [1959] 1 All E.R. at pp. 466, 467.

Independent Television Authority (hereinafter referred to as "I.T.A."), constituted the second of them, Associated-Rediffusion, Ltd. (hereinafter referred to as "A-R."), programme contractors for one of I.T.A.'s television broadcasting stations during a period ending on July 29, 1964, in consideration of a fee of £495,600 per annum for the first 2½ years, and a fee of £536,900 per annum thereafter. According to the appellants, the only stamp duty payable on this document under the Stamp Act, 1891, is the deed stamp of 10s. This contention was rejected by the Crown, who assessed the duty ad valorem on a total sum of £4,572,193, made up of £495,600 per annum for 2½ years and £536,900 per annum for six years seventy-six days, and required payment of £11,431 on this basis including the 10s. stamp. Their decision was upheld by WYNN-PARRY, J., in the High Court and by the Court of Appeal (JENKINS, ROMER and PEARCE, L.JJ.). I think that the opinions expressed in all the courts below were plainly right; and, as the two points argued on behalf of the appellants in this House are directly covered by authorities of long standing which I have no wish to disturb, I propose to deal with them as briefly as is consistent with respect for the argument that was put before us.

The head of charge in Sch. 1 to the Stamp Act, 1891, under which the ad valorem duty is claimed is "Bond, covenant, or instrument of any kind whatsoever". This head falls into three sub-divisions, of which sub-division (1) runs as follows:

> "Being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale or security, and except a superannuation annuity), or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack:

"For a definite and certain period, so that the total amount to be ultimately payable can be ascertained.	The same ad valorem duty as a bond or covenant for such total amount.
"For the term of life or any other indefinite period: For every £5, and also for any fractional part of £5, of the annuity or sum periodically payable	£ s. d. 0 5 0"

Is the agreement that we have here a "security" for this purpose? It is not denied that an instrument may constitute a security, even though it is itself the original and only source of the obligation to pay periodical sums of money which is the basis of the ad valorem charge of duty. This has long been settled law and, having regard to the actual wording that I have set out, I do not see how any other construction could well have been adopted by the courts.

But then, it is said, you have here an agreement which is fundamentally executory on both sides; and so it is. I need not go into any detailed analysis of the complicated provisions of the agreement; it is clear enough that A-R.'s obligation to pay its fee, which is due by monthly instalments, forms a promise in exchange for I.T.A.'s promise to broadcast the programmes supplied from the station installed and maintained by it for the purpose. If I.T.A. should fall down on its obligation, A-R.'s obligation to pay the fee would be in abeyance. The argument put before us is that a covenant of this kind which is executory and, therefore, in a sense, conditional cannot be described as a "security" for a sum or sums of money at stated periods within the meaning of "Bond, covenant, or instrument" in the Stamp Act, 1891, all the less so, perhaps, because of the presence of the qualifying or explanatory words "so that the total amount to be ultimately payable can be ascertained" which come after the words "For a definite and certain period ". Indeed, to make the distinction effective, the argument goes so far as to say that an instrument is not a security for money unless the payee is either gratuitous or has executed by the date of the instrument all the consideration that is to move from him.

Certainly the law has never hitherto recognised a distinction on these lines. As long ago as 1872, an agreement for the payment of periodical sums in consideration of the supply of asphalte from time to time was held to be chargeable ad valorem as a " Covenant in relation to any annuity . . . or other periodical payments " under the Stamp Act, 1870 (*Limmer Asphalte Paving Co.* v. *Inland Revenue Comrs.* (1)). In *Jones* v. *Inland Revenue Comrs.* (2), an agreement between a telephone company and a theatre ticket agent for periodical payments for the use of telephone lines and apparatus to be erected and maintained in working order was held chargeable ad valorem as a " Bond, covenant, or instrument " within the meaning of the Stamp Act, 1891. Then came the decision in *National Telephone Co.* v. *Inland Revenue Comrs.* (3), the agreement there in question being one for the hire of a private wire and apparatus to be installed and maintained by the telephone company. The point that agreements for periodical payments in executory contracts could not be " securities " was expressly put to the Court of Appeal by Mr. Asquith, Q.C., of counsel (4): Would you charge as a security, he said, an agreement to pay for the hire of a carriage? The point was noticed by A. L. SMITH, L.J., at the outset of his judgment (5). It somewhat troubled him, he admitted, but the real question was, not what " security " meant in ordinary parlance, but what it meant in Sch. 1 to the Stamp Act. All the members of the Court of Appeal agreed that the agreement before them was chargeable ad valorem as a " Bond, covenant, or instrument ". The case came to this House (6). It is very briefly reported, and only the EARL OF HALSBURY, L.C., delivered any reasoned opinion. Evidently, the arguments raised before the Court of Appeal were repeated; the appellants' printed Case put as its first reason that the instrument was " an agreement for the hire and use of a chattel and for services . . . in connexion therewith " and so not a " security " for the payment of money; there was the judgment of A. L. SMITH, L.J., before them: and all the members of the House, LORDS HALSBURY, MACNAGHTEN, BRAMPTON and ROBERTSON, agreed in dismissing the appeal. LORD HALSBURY'S words (7):

> " The real truth is that this taxing Act intended, as it appears to me, to apply taxation to every document of this kind; it mentions in the first instance those under seal . . ."

appear to me to be about as explicit a determination of the matter as one could expect to find from authority.

No doubt, the inclusion of executory contracts in this category for the purposes of the Stamp Act has created some anomalies which remain unresolved. The " Bond, covenant, or instrument " category, with its ad valorem charge, looks as if it had trenched very far on the category of simple " agreement ", with its 6d. stamp. If a written agreement promising periodical payments in return for supplies (see *County of Durham Electrical Power Distribution Co.* v. *Inland Revenue Comrs.* (8)) or services is chargeable ad valorem, can it be right that a written service agreement between, say, a manager and his employer or a managing director and his company should be stamped only with the 6d. " agreement " stamp, as is still the standing practice? And, if by the statute agreements for the hire of labourers or menial servants or for the sale of goods are exempted from the 6d. agreement stamp altogether, could they nevertheless be charged ad valorem on any periodical payments or instalments provided for as being

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(1) (1872), L.R. 7 Exch. 211.
(2) [1895] 1 Q.B. 484.
(3) [1899] 1 Q.B. 250.
(4) [1899] 1 Q.B. at p. 254.
(5) [1899] 1 Q.B. at p. 257.
(6) [1900] A.C. 1.
(7) [1900] A.C. at p. 2.
(8) [1909] 2 K.B. 604.

A covenants or instruments forming the security for payments of money? I do not think that we are here concerned to give the answer to these questions. It is possible that, at some future date, counsel for the Commissioners of Inland Revenue may be able to convince a court of law that ad valorem duty, if ever claimed, has been rightly claimed in respect of service agreements; on the other hand, some other counsel appearing for a taxpayer may be able to demonstrate B that, having regard to the provisions of the Act as a whole and the specific exemptions set out under the head "Agreement", no agreement for the sale of goods or for the rendering of services by servants or labourers is liable to the ad valorem charge, notwithstanding that it may provide for instalments or recurrent payments. I think that it is enough for this House to recognise these possibilities without exploring them. In my opinion, the present appeal relating C to this agreement between I.T.A. and A-R. is untouched by such questions by reason of two considerations which are enough to conclude it. The first is that there is no plausible analogy between the treaty between these two corporations concerning the running of one of the commercial television programme areas and a hiring of a labourer or menial servant. The other is that the chargeability of an agreement of the kind now before us has twice been affirmed by the Court D of Appeal in *Jones* v. *Inland Revenue Comrs.* (9) and *National Telephone Co.* v. *Inland Revenue Comrs.* (10), and once by this House, when the latter case was on appeal (11); and there is no reason of any compelling force why the principle that was applied to them should now be challenged. Indeed, I have not myself been able to see why, if the recording of an enforceable promise for the payment of money under seal or in a written instrument constitutes a "security" for the E payment of that money under the Stamp Act, such a document is any the less a security for that purpose because the promise is contingent or conditional or dependent for its enforceability on the performance of some parallel engagement by the promisee.

I turn now to the second point which the appellant relied on. The agreement between them, they said, was so constructed that, except for an initial period F covering the 4½ months from Nov. 15, 1955, to Mar. 31, 1956, no fixed fee or other sum to be paid thereunder was ascertainable at the date when the document was tendered for stamping and, consequently, no "total amount to be ultimately payable" could be determined as the basis for an ad valorem charge. Certainly it would be impossible to tell from studying the agreement how much money will eventually be paid under it before it expires. Quite apart from several provisions G which could operate to determine it on either side and provisions (Sch. 3, para. 3 and para. 4) allowing I.T.A. to raise the fee for the time being payable in certain specified contingencies, the agreement included a general variation clause (Sch. 3, para. 2 (2)), whereunder the basic figures of £495,600 per annum and £536,900 per annum would rise or fall according to variations of five per cent. or more in the average of the index figures for all items in the Board of Trade H Interim Index of Retail Prices as at Jan. 15, 1952. It was on the presence of this variation clause that the appellants' argument concentrated to make good its claim that there could be no total ascertainable amount under the agreement.

My Lords, in my opinion, this argument misconceives the significance of such words as "money payable" when used in the Stamp Act in relation to the stamping ad valorem of contracts or other instruments. The true principle I to be applied is, I think, well set out in the judgment of COLLINS, M.R., in *Underground Electric Rys. Co.* v. *Inland Revenue Comrs.* (12):

> "The question is the principle underlying the construction of the Act, and it seems to me that we can get at a definite principle from those cases. The principle is that the word 'debt' applies to money payable whether upon a contingency or as an absolute and unconditional certainty . . . It

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(9) [1895] 1 Q.B. 484. (10) [1899] 1 Q.B. 250. (11) [1900] A.C. 1.
(12) [1905] 1 K.B. 174 at p. 182.

> seems to me, therefore, that the words 'money payable for an indefinite period' include money which may never become payable unless the particular event happens . . ."

I think it clear that the same principle was adopted in the decision of the case when it later reached this House (13).

I take it, therefore, to be a well-settled principle that the money payable is ascertained for the purposes of charge without regard to the fact that the agreement in question may itself contain provisions which will, in certain circumstances, prevent it being payable at all. If that if so, there is at least no better reason for adopting a different principle when there are found clauses which merely vary the amount to be paid according to specified contingencies. Nor does it matter for this purpose whether the effect of such a clause is to make it possible for the sum to be increased or to be diminished. In *County of Durham Electrical Power Distribution Co.* v. *Inland Revenue Comrs.* (14), any variation would have been downwards; in the *Underground Electric Rys. Co.* case (15), the variation might have been upwards or downwards. What is necessary is that it should be possible to ascertain from the agreement that there is some specified sum agreed on as the subject of payment which may, perhaps, fairly be called the prima facie or basic payment. Even that minimum condition may have to be restated in relation to certain kinds of securities, such, for example, as guarantees, in which the ad valorem charge is calculated according to the maximum sum contingently payable, or, to put it in another way, the amount of the guarantee: see *Underground Electric Rys. Co. of London, Ltd. & Glyn, Mills, Currie & Co.* v. *Inland Revenue Comrs.* (16).

Applying these principles to the agreement now before us, I think it plain that the £495,600 per annum rate for the first 2½ years and the £536,900 per annum thereafter were the sums prima facie payable, and that the contingency that the Board of Trade price index figure might alter sufficiently from time to time to bring about variations of those figures does not affect the proper ad valorem calculation of duty.

I would dismiss the appeal with costs.

My Lords, my noble and learned friends, **LORD TUCKER** and **LORD MORRIS OF BORTH-Y-GEST**, who are unable to be present today, have asked me to say that they agree with this opinion and conclusions.

LORD COHEN: My Lords, the question at issue on this appeal is as to the stamp duty payable on an agreement made between the two appellants on May 23, 1955, under which the second appellants (the contractor) were appointed a programme contractor pursuant to s. 2 of the Television Act, 1954, for a term commencing on the date of the agreement and (unless previously avoided or terminated under the provisions of the agreement) ending on July 29, 1964. By cl. 9 of the agreement, it was provided that, in consideration of the right and duty of the contractor to provide programmes to be broadcast by the first appellants (the authority), the contractor was to make payments to the authority as provided in Sch. 3 to the agreement. Clause 1 of Sch. 3 was in the following terms:

> "The contractor shall as from the date of commencement of broadcasting from the station described in the table (hereinafter called 'the commencement date') pay to the authority a fee at the rate of £495,600 per annum until Mar. 31, 1958, or the expiration of 2½ years from the commencement date (whichever is the later) and a fee at the rate of £536,900 thereafter."

Under cl. 2 (2), the fees fixed by cl. 1 were liable to be increased or decreased by reference to increases and decreases of five per cent. or more in the half-yearly index figure as in sub-cl. (1) of cl. 2 defined of the interim index of retail prices published by the Board of Trade. Having regard, however, to the definitions in the said sub-cl. (1), no increase or decrease could take effect in respect of any half-yearly period commencing before Apr. 1, 1956. Schedule 3 contained other provisions as to the increase of fees in certain events with the details of which I need not trouble your Lordships.

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(13) [1906] A.C. 21.

(14) [1909] 2 K.B. 604.

(15) [1905] 1 K.B. 174; [1906] A.C. 21.

(16) [1914] 3 K.B. 210.

The agreement was presented for adjudication, and the commissioners assessed it to duty under the head of charge

> " Bond, covenant, or instrument of any kind whatsoever: (1) Being the only or principal or primary security for any annuity . . . or for any sum or sums of money at stated periods . . ."

in Sch. 1 to the Stamp Act, 1891. They were further of opinion that it was " for a definite and certain period, so that the total amount to be ultimately payable can be ascertained ". It followed that, in accordance with the terms of the said head of charge, the agreement was chargeable with the " same ad valorem duty as a bond or covenant for such total amount ". Taking as their basis the figures given in cl. 1 of Sch. 3 to the agreement, the commissioners assessed the liability at £11,430 10s. to which was added the " deed " stamp of 10s. payable under s. 4 of the Stamp Act, 1891. No objection was taken by the appellants to the fixed duty of 10s. but they disputed the liability to the duty of £11,430 10s. on three grounds, only two of which are now maintained. They are as follows:—(i) That the agreement is not liable to ad valorem duty at all as not being a " security " liable to ad valorem duty within the meaning of the above-mentioned head of charge " Bond, covenant ", etc. (ii) That if, contrary to this contention, the agreement is liable for ad valorem duty as a security for a definite and certain period, it is chargeable only in respect of the fee payable during the period from Nov. 15, 1955, to Mar. 31, 1956, that being the only period the fee for which could be ascertained with certainty at the date of the agreement. The matter came before the court on a Case Stated, and, on July 15, 1958, WYNN-PARRY, J., rejected both contentions, and, on Feb. 9, 1959, his decision was upheld by the Court of Appeal.

Before your Lordships, both points were again argued. I shall deal first with the question whether the agreement of May 23, 1955, was a security liable to ad valorem duty within the meaning of the head of charge " Bond, covenant ", etc. Before your Lordships, as in the Court of Appeal, the appellants contended that the agreement was wholly outside the scope of this head of charge because it was not an agreement securing the payment of periodical sums recoverable by the obligee as a debt merely on proof of the agreement and of the fact of non-payment, but was an executory agreement for the payment of periodical sums by way of remuneration for services to be rendered. I agree with JENKINS, L.J. (17), that this argument was concluded against the appellants so far as the Court of Appeal was concerned by the decisions in *Jones* v. *Inland Revenue Comrs.* (18), *National Telephone Co.* v. *Inland Revenue Comrs.* (19), *County of Durham Electrical Power Distribution Co.* v. *Inland Revenue Comrs.* (20), and *British Italian Corpn., Ltd.* v. *Inland Revenue Comrs.* per ROWLATT, J., and the Court of Appeal (21).

It was argued that your Lordships are not bound by those decisions. That is correct, but the decision in the *National Telephone Co.* case (19) was affirmed by this House (22). It is true, as WYNN-PARRY, J., said in the present case (23), that the point now in issue was not dealt with by the EARL OF HALSBURY, L.C., in his very short speech in which the other learned Lords concurred. LORD HALSBURY dealt only with the question whether the head " Bond, covenant, or instrument of any kind whatsoever " covered documents not under seal, but it would have been

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(17) [1959] 1 All E.R. at p. 468.
(18) [1895] 1 Q.B. 484.
(19) [1899] 1 Q.B. 250.
(20) [1909] 2 K.B. 604.
(21) See SERGEANT ON STAMP DUTIES (3rd Edn.) 334.
(22) [1900] A.C. 1.
(23) [1958] 3 All E.R. at p. 130.

open to the appellants, despite the adverse decision on that point, to have argued A
that duty was not chargeable because the agreement was executory in character
and covered payments for services. This point had been taken and fully argued
in the court below, it was raised in the first of the reasons included in the Case
presented on behalf of the appellants to your Lordships' House, and it is difficult
to believe that Mr. Asquith and Mr. Roskill abandoned it at the hearing; all
the more so, since the report of the proceedings in the House of Lords states (24) B
that "The facts and arguments are set forth carefully, elaborately and in detail
in the report below". In my opinion, therefore, their Lordships must be taken
to have approved the ratio decidendi of the Court of Appeal on the point now in
issue and, if so, your Lordships are not free to hold that that decision was wrong.
I desire to add, however, that I think the ratio decidendi of the Court of Appeal
was correct and that it governs the present case. The effect of the agreement C
under consideration in the *National Telephone* case (25) is conveniently stated
in the headnote as follows:

> "By an agreement in writing not under seal it was agreed between a telephone
> company and one R. that the latter should pay to the company the
> sum of £12 per annum in advance for the hire of a private wire between his
> premises and the company's local exchange system, and the telephonic D
> apparatus relating thereto, and that either the company or the lessee might
> put an end to the agreement by giving three calendar months' notice in
> writing expiring on the day previous to the rent being due in any year, and
> the company agreed to erect and maintain in working order the said wire
> and telephonic apparatus:—"

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The commissioners held that the agreement was chargeable under the head
"Bond, covenant, or instrument of any kind whatsoever", and assessed the
duty accordingly. On appeal, the Divisional Court gave judgment in favour of
the Crown and the Court of Appeal affirmed that decision. Mr. Asquith argued
that, if the decision stood, any executory agreement providing for periodical
payments such as an agreement for hire of a carriage and the services of a coachman F
from a livery-stable keeper in consideration of periodical payments, would
be chargeable with ad valorem duty as a security, but A. L. SMITH, L.J., was not
frightened by that analogy. After referring to the argument, he continued (26):

> "The question, however, is, not what in ordinary parlance could be called
> a security, but what is the meaning of the word 'security' in this taxing
> Act; and it seems to me that, when the Act is fully considered, the meaning G
> of the word as used therein is fairly defined by the Act itself."

Then, after setting out the relevant provisions of the head of charge, he continued (26):

> "I will take the words 'bond' and 'covenant' first of all. A bond given
> for the payment of a sum of money at stated periods, or a covenant given
> for such payment, is clearly a security within the meaning of the Act. Then H
> I come to the subsequent words, upon which the question in the present
> case depends, 'or instrument of any kind whatsoever: (1) Being the only or
> principal or primary security . . . for any sum or sums of money at stated
> periods.' Those words, in my opinion, cover a contract in writing, such as
> this, for the payment of a sum of money at stated periods. I cannot sever the
> word 'instrument' from the words 'bond' and 'covenant' which accompany I
> it; and, as a bond or a covenant for the payment of a sum of money
> at stated periods is within the Act, I cannot see how I can hold that a contract
> in writing to the same effect is not within it. It was argued that a
> 'security' only means something auxiliary to an antecedent obligation, and
> therefore that a simple contract for the payment of £12 a year for the use of
> a telephone is not a security within the meaning of the Act . . . I think that

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(24) [1900] A.C. 1. (25) [1899] 1 Q.B. 250. (26) [1899] 1 Q.B. at p. 257.

A the word ' security ', as used in the Act, clearly includes an instrument by which the obligation to pay is originally created."

Finally, after giving further reasons for this conclusion based on another part of the Schedule under the heading " Mortgage, bond, debenture, covenant ", he concludes (27):

> B " On these grounds I am of opinion that, upon the true construction of the statute, a contract in writing, whereby, as in this case, an obligation is undertaken to pay a certain sum of money at stated periods for an indefinite period, is chargeable under the heading ' Bond, covenant, or instrument of any kind whatsoever ', in Sch. 1 to the Stamp Act, 1891. I am alive to the far-reaching result of this judgment, but, if alteration is to be made, it must C be by legislation. The above being in my judgment the true construction of the statute, I think that the case of *Limmer Asphalte Paving Co.* v. *Inland Revenue Comrs.* (28), and the case of *Jones* v. *Inland Revenue Comrs.* (29) which was decided by my brothers WRIGHT and COLLINS, were rightly decided. I have read the judgments delivered in the latter case, and I agree with them entirely."

D I find this reasoning (in which RIGBY, L.J., and COLLINS, L.J., concurred) satisfactory. Even if, therefore, your Lordships are not bound to hold that the decision of this House in the *National Telephone* case (30) approved the ratio decidendi of the Court of Appeal in that case, I would still reject the appeal on the first point taken for the appellants.

I must not overlook the argument of the appellants based on the exemptions E to be found under the head " Agreement or any memorandum of an agreement " in Sch. 1 to the Act of 1891. The second exemption is any " agreement or memorandum for the hire of any labourer, artificer, manufacturer or menial servant ". It was argued that, if your Lordships upheld the decision in this case, it would follow that a service agreement for the hire of, e.g., an artificer, though exempt from liability to the 6d. stamp under the heading " Agreement " would be liable F to ad valorem duty under the head " Bond, covenant ", etc. I do not think this necessarily follows. Your Lordships are dealing with an agreement for services, not a service agreement, and I note that, in *British Italian Corpn., Ltd.* v. *Inland Revenue Comrs.* (31), ROWLATT, J., said:

> " Now it is perfectly well known to everybody that these documents [contracts for the engagement of servants to be paid certain sums at intervals G over a period of time] are simply stamped as agreements and there is material . . . for thinking they are rightly so stamped, because if such a document is made between an employer and an artificer or menial worker, it is obviously treated as stampable only as an agreement because there is an exemption under the heading of ' Agreement ' for it, and a document does not fall under the heading of ' Agreement ' if it is independently stampable in some other H character."

For the reasons indicated by ROWLATT, J., it may well be that, if the question of the stamp on a service agreement arises for your Lordships' decision, your Lordships may be able to hold that it is not liable to duty under the head " Bond, covenant ", etc., but, like ROWLATT, J., I do not think that this reasoning would I justify your Lordships in holding that the agreement for services now under consideration is not so liable.

I turn, therefore, to the second point. Counsel for the appellants argued that, assuming the agreement is a security within the meaning of the head " Bond, covenant ", etc., and admitting that it is for a definite and certain period, it is chargeable only in respect of the fee payable for the period from Nov. 15, 1955

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(27) [1899] 1 Q.B. at p. 258.
(28) (1872), L.R. 7 Exch. 211.
(29) [1895] 1 Q.B. 484.
(30) [1900] A.C. 1.
(31) SERGEANT ON STAMP DUTIES (3rd Edn.) at pp. 337, 338.

(the latest date by which broadcasting was to begin), until Mar. 31, 1956 (the first, though broken, half-yearly period contemplated under the agreement). His contention is that, on the true construction of the agreement, it was impossible at the date of the agreement to predicate as regards the period subsequent to Mar. 31, 1956, what sums would be payable because of the provisions in cl. 2 (2) of Sch. 3 to the agreement for the increase or diminution of the sums specified in cl. 1 of that Schedule. My Lords, if the matter were res integra, I should have seen much force in the argument that a condition of liability to charge was that, by an examination of the instrument, the total amount payable thereunder must be ascertainable as at the date of agreement, with the consequence that, if the total amount was not so ascertainable, the charge would not operate, but the question is not free from authority, and I agree with WYNN-PARRY, J., and the Court of Appeal that the decisions in the two *Underground Ry.* cases (32) make it impossible for us to accept this argument or allow the present appeal. These cases have been carefully reviewed by WYNN-PARRY, J. (33), and by JENKINS, L.J., delivering the judgment of the court in the Court of Appeal (34) and I will not detain your Lordships by repeating what they have so clearly stated. Suffice it to say that—(i) I agree with JENKINS, L.J., that no material distinction can be drawn between the words " payable periodically " in s. 56 (2), which was the material section calling for consideration in the first *Underground Ry.* case (35) and the words " any sum or sums of money at stated periods " in the head of charge with which we are now concerned and that, accordingly, the latter phrase includes money payable on a contingency. (ii) I agree with JENKINS, L.J., that one contingency possible at the date of the agreement was that the half-yearly index figure mentioned in cl. 2 (2) of Sch. 3 would remain constant within five per cent. either way. (iii) I accept and adopt the proposition based on the two *Underground Ry.* cases (32) stated by WYNN-PARRY, J., in the concluding paragraph of his judgment as follows (36):

> " In the case of a deed, being a security within the meaning of that word as used in Sch. 1 to the Stamp Act, 1891, under the heading ' Bond, covenant, or instrument of any kind whatsoever ', where it appears on the face of the deed that there is a specified sum payable by one party to the deed to the other party, then, notwithstanding that such specified sum (a) may be increased on the happening of a contingency or (b) may be reduced in part or to nothing on the happening of a contingency, the deed is liable to be charged to stamp duty calculated on such specified sum."

I agree with WYNN-PARRY, J., that the agreement which your Lordships have to consider falls within this proposition and, for the reasons that I have given, I would dismiss the appeal.

LORD KEITH OF AVONHOLM: My Lords, under s. 1 of and Sch. 1 to the Stamp Act, 1891, ad valorem stamp duty is charged at a prescribed rate on (I omit certain words not material for the purpose of this case) any

> " Bond, covenant, or instrument of any kind whatsoever: (1) Being the only or principal or primary security for . . . any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack: For a definite and certain period, so that the total amount to be ultimately payable can be ascertained . . ."

The Commissioners of Inland Revenue have held that an agreement under seal dated May 23, 1955, between the Independent Television Authority (called " the

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(32) [1904] 2 K.B. 198; [1905] 1 K.B. 174; [1906] A.C. 21; and [1914] 3 K.B. 210; [1916] 1 K.B. 306.

(33) [1958] 3 All E.R. at pp. 131-134.

(34) [1959] 1 All E.R. at pp. 469-474.

(35) [1905] 1 K.B. 174; [1906] A.C. 21.

(36) [1958] 3 All E.R. at p. 134.

A authority ") and Associated-Rediffusion, Ltd. (called " the contractor ") (appellants in this appeal) comes under this head of charge, and that the ad valorem duty amounts to £11,431, calculated on a fee payable by the contractor to the authority at the rate of £495,600 per annum under para. 1 of Sch. 3 to the agreement for the period from Nov. 15, 1955, to May 14, 1958 (two and a half years), and on a fee of £536,900 per annum, similarly payable, for the period from B May 15, 1958, to July 29, 1964 (six years and seventy-six days). November 15, 1955, was taken by the commissioners as the date when broadcasting under the agreement commenced, and July 29, 1964, was the date on which, under the agreement, the contractor should (subject to avoidance or prior determination under certain clauses of the agreement) cease to be programme contractor.

The two questions in the case are (first) whether the agreement is a security C falling under the head of charge set out above; and (secondly) if it is, whether the duty payable has been correctly calculated by the commissioners. In view of the course of authority going back nearly one hundred years and culminating in the decision of this House in *National Telephone Co.* v. *Inland Revenue Comrs.* (37), it is impossible, in my opinion, to say that the agreement is not a security and the only security for the payments mentioned therein, within the meaning D of the statute. All the considerations which might tell against an instrument like this being a security were advanced and weighed by the Court of Appeal in the *National Telephone Co.'s* case (38) and the opinions of the lords justices must, in my opinion, have been regarded by their Lordships who heard the appeal as calling for no elaboration in speeches in this House. It is not possible, in my opinion, to regard the sole speech of the Lord Chancellor (the EARL OF HALS-E BURY), short as it is, as indicating that the argument before the House and the decision of the House were directed solely to the question whether an instrument had to be under seal in order to be a security. Nor do I find it necessary to consider whether there can be agreements for sums of money at stated periods which do not come under this head of charge as securities. I am satisfied that the fact of an agreement being for services as this one is, is not, per se, a reason for F excluding it from being a security, and that this agreement is indistinguishable in character from the agreements held, in the line of authority to which I have referred, to be securities.

On the second point the answer is also, I think, concluded, in principle, by authority, including a decision of this House. But before proceeding to authority I should say that I find no difficulty in applying a strict and literal reading of the G words in the head of charge to the sums stated in the agreement. The sums in question are sums at the rate of £495,600 and £536,900 per annum accruing from day to day and payable by equal monthly instalments on the last day of each calendar month (Sch. 3, para. 5). They are thus " sums of money at stated periods " as mentioned in the head of charge. They are to run, the £495,600, from the commencement date of broadcasting to Mar. 31, 1958, and the £536,900, H from Mar. 31, 1958, till July 29, 1964 (cl. 10 and Sch. 3, para. 1). They thus run " for a definite and certain period ". The controversy turns on the next succeeding words in the head of charge, " so that the total amount to be ultimately payable can be ascertained ". The reason is that the agreement contains provisions under para. 2 (2) of Sch. 3 for increasing or reducing the contractor's fees by a percentage corresponding to a certain increase or decrease in the half-yearly I index figure of retail prices published by the Board of Trade over the index figure of the preceding six months; under para. 3 for increasing the fee from time to time within certain limits at the discretion of the authority after 3½ years; and under para. 4 for increasing the fees at any time by agreement or by arbitration in the event of the authority's revenue being insufficient to meet its expenditure. There are other provisions for terminating the agreement in certain contingencies, but these were not relied on by the appellants. In this situation, the appellants say it is not possible at the date of the agreement, at which time the stamp duty falls to be fixed, to ascertain the total amount that will be ultimately payable. This is not, in my opinion, the outlook of the Act. The words, I consider, are meant merely to indicate the arithmetical result of the continuance of the stated sums for a definite period in producing a total sum on which duty can be assessed. They are in contrast with the reference to an annuity or other periodical sum payable for the term of life or any other indefinite period for which another method of assessment is necessarily directed in the same head of charge.

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(37) [1900] A.C. 1.

(38) [1899] 1 Q.B. 250.

Authority, I think, supports this point of view. I do not feel it necessary to examine in detail *Underground Electric Rys. Co.* v. *Inland Revenue Comrs.* (39) and *Underground Electric Rys. Co. of London, Ltd. & Glyn, Mills, Currie & Co.* v. *Inland Revenue Comrs.* (40) which were very fully considered by the Court of Appeal (41) and Wynn-Parry, J. (42). It is true that these cases were not directed to the precise point that arises here, inasmuch as they were concerned with payments for an indefinite period payable in certain contingencies and which might, in other contingencies, fluctuate in amount within certain limits and the question rather was whether they could be regarded as periodical payments or sums payable at stated periods. If so, no question of qualification arose. But the problem is, I think, in principle the same. If sums which might not be payable at all in certain contingencies, or sums which might be increased (or diminished) in certain contingencies, are regarded as periodical payments, or sums payable at stated periods, for an indefinite period, I can see no distinction in the case of sums payable at stated periods for a time certain, albeit in certain contingencies these sums may likewise be increased or diminished. The only distinction I see between the present case and the cases referred to is that the limits of increase or decrease are, in certain contingencies, unknown. But that, in my opinion, makes no real difference. It does not appear to me to matter whether sums payable at stated periods are maximum sums capable of decrease or minimum sums capable of increase under the terms of an agreement. They are still sums the total of which are capable of ascertainment, unless they are payable for life or for an indefinite period. The sums here are sums which, I think, may be regarded as maximum sums capable of decrease or minimum sums capable of increase. That fact, is, in my opinion, immaterial and irrelevant. They are, in my opinion, sums to which the rules of calculation under the Act can be applied. I, accordingly, agree that the appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *Allen & Overy* (for the appellants); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

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(39) [1905] 1 K.B. 174; [1906] A.C. 21.

(40) [1916] 1 K.B. 306.

(41) [1959] 1 All E.R. at pp. 469-474.

(42) [1958] 3 All E.R. at pp. 131-134.

D. (an infant) *v.* PARSONS.

[Queen's Bench Division (Lord Parker, C.J., Donovan and Davies, JJ.), May 19, 1960.]

Road Traffic—Motor vehicle—Taking and driving away without owner's consent—Appellant, boy fifteen years old, not present when motor cycle wrongfully taken by another boy of same age—Whether riding on cycle, some hours later, as pillion passenger, sufficient to constitute offence—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5 *c.* 43), *s.* 28 (1).

Insurance—Motor insurance—Third-party risks—Using vehicle taken and driven away without owner's consent—Appellant, boy fifteen years old, not party to original wrongful taking of motor cycle by another boy of same age—Riding on cycle subsequently as pillion passenger—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5 *c.* 43), *s.* 35 (1).

On Mar. 1, 1959, a motor cycle was taken without authority from outside its owner's house. At about 4 p.m. on the same day, F., a boy of fifteen years old, was seen driving the cycle, with another boy of fifteen, the appellant, as a pillion passenger. The appellant and F. had been friends for four years. After they were stopped by the police, the appellant said that he knew nothing about the cycle being stolen. Both F. and the appellant were charged with taking and driving away a motor vehicle without lawful authority, contrary to s. 28 (1) of the Road Traffic Act, 1930, and with using a motor vehicle on a road without there being in force in relation to the user an insurance policy in respect of third-party risks, contrary to s. 35 (1) of the Act. F. pleaded guilty. The appellant pleaded not guilty and said in evidence that F. had told him that the cycle belonged to F. and had offered him a ride on it. The appellant was convicted of both offences on the footing that the two boys were acting in concert. On appeal,

Held: (i) the appellant could not be convicted of an offence against s. 28 (1) of the Road Traffic Act, 1930, because there was no evidence that he was concerned in the original taking by F.

R. v. *Stally* ([1959] 3 All E.R. 814) applied.

(ii) since it was not established that the original taking of the motor cycle was a joint enterprise on the part of the appellant and F., the fact that the appellant accepted a ride as a pillion passenger was not sufficient to justify his being convicted of an offence against s. 35 of the Act of 1930 on the ground that he was knowingly aiding and abetting the driving of the motor cycle without the necessary insurance policy.

Appeal allowed.

[As to the offence of taking and driving away a motor vehicle without authority, see 31 Halsbury's Laws (2nd Edn.) 676, para. 1002.

As to compulsory insurance in regard to motor vehicles, see 22 Halsbury's Laws (3rd Edn.) 363, para. 748.

For the Road Traffic Act, 1930, s. 28 and s. 35, see 24 Halsbury's Statutes (2nd Edn.) 598, 602.]

Cases referred to:

R. v. *Richardson*, (May 19, 1958), unreported.

R. v. *Stally*, [1959] 3 All E.R. 814; 124 J.P. 65; 44 Cr. App. Rep. 5; [1960] 1 W.L.R. 79.

Case Stated.

This was a Case Stated by the deputy chairman of the appeal committee of the County of London Quarter Sessions at the instance of the appellant.

On Mar. 10, 1959, at the North London Juvenile Court, on informations laid by the respondent, a police constable, the appellant was convicted (i) of taking and driving away, on Mar. 1, 1959, a motor cycle without the consent of the owner or other lawful authority, contrary to s. 28 of the Road Traffic Act, 1930 and (ii) of unlawfully using a motor cycle on a road, on Mar. 1, 1959, A without there being in force in relation to the user of the vehicle a policy of insurance or such other security in respect of third-party risks as complied with Part 2 of the Road Traffic Act, 1930, contrary to s. 35 of the Act. The appellant appealed to the appeal committee of the County of London Quarter Sessions.

At the hearing of the appeal on May 12, 1959, the following facts were found. On Mar. 1, 1959, between 3.30 a.m. and 7 a.m., a Triumph motor cycle, the B property of Joseph Barnett, was unlawfully taken and driven away from Mr. Barnett's house at 35, Mount Pleasant Lane, E.5, without the owner's consent or other lawful authority. At 4 p.m. on Mar. 1, 1959, at Endymion Road, N.4, police constables saw a youth called Fuller driving the motor cycle with the appellant as his pillion passenger. When a police constable gave them a signal to halt, Fuller made no attempt to stop but drove on and round a corner. A C police constable who chased them on a police motor cycle saw the Triumph motor cycle parked by the side of the road and Fuller and the appellant walking away from it. When the police constable asked Fuller and the appellant to whom the Triumph motor cycle belonged, Fuller replied: " A friend lent it to us ". Fuller further stated that he thought that borrowing the cycle from a friend was sufficient to relieve him from obtaining a driving licence or policy D of insurance. Neither Fuller nor the appellant was covered by the requisite policy of insurance in regard to driving the motor cycle, and neither had a driving licence: they were both fifteen years of age, and had known each other for about four years. When told that they would be detained pending further inquiries, Fuller made no reply and the appellant said: " I don't know anything about it being a stolen motor cycle ". Later Fuller said: " The motor cycle E belongs to Bob Parker ", but could not give Bob Parker's address. When they were told at the police station that the motor cycle was stolen, Fuller (who later pleaded guilty to the offences) said: " I haven't stolen it ", and the appellant said: " I don't know anything about a stolen motor cycle ".

In evidence before the appeal committee, the appellant said that Fuller had told him that he (Fuller) was the owner of the motor cycle and had parked F it in Hillside Road (which was about one mile from Fuller's home) while he had his dinner, and that Fuller had offered a ride to the appellant when they met at about 1.30 p.m. on Mar. 1. It appeared that Fuller did not know his way to Hillside Road, and he and the appellant had to ask the way when returning to the motor cycle at about 2.50 p.m. on Mar. 1.

It was contended on behalf of the appellant that there was no evidence to G support either of the summonses. The opinion of the appeal committee was expressed in these terms:

> " The . . . committee (i) being of the opinion that the evidence clearly established that both Fuller and the appellant were acting in concert in together taking and driving away the [motor cycle] without the owner's consent and in together using the same without there being in force the H necessary policy of insurance, and (ii) not believing the appellant's story to us that he thought that Fuller was the owner of the [motor cycle] or that he was merely an innocent passenger without any control over Fuller's movements, dismissed the . . . appeal. The committee were satisfied that the appellant had committed these offences through sheer stupidity and that his behaviour could not be described as criminal." I

S. Lincoln for the appellant.

Paul Wrightson for the respondent.

DAVIES, J., delivering the first judgment at the request of LORD PARKER, C.J., said: This is an appeal by way of Case Stated by the appeal committee of the County of London Sessions, who dismissed the appellant's appeal from two convictions by the North London Juvenile Court, the first under s. 28 of the Road Traffic Act, 1930, for taking and driving away a motor cycle without the consent of the owner, and the second under s. 35 of the Road Traffic Act, 1930, for using the motor cycle without there being in force a policy of third-party insurance.

[HIS LORDSHIP, after stating the facts found by the appeal committee and the opinion of the committee, continued:] The submission on the part of the appellant in this court, so far as it concerns the first charge of taking and driving away the motor cycle, is that there was no evidence before the appeal committee on which they could come to the conclusion that, whatever Fuller did with regard to the cycle, the appellant was a party to the taking and driving away of it. The contention on behalf of the prosecution is that, as Fuller must have been guilty of the offence of taking and driving away the cycle, not necessarily perhaps between 3.30 a.m. and 7 a.m.—possibly somebody else may have taken it—but whenever he did take it away without the consent of the owner or other lawful authority, then, when the appellant is found to be riding on the cycle in company with Fuller in circumstances in which the appellant must have known, not only that the cycle was improperly come by, but also that it had been taken away without the consent of the owner, that fact is a fact on which the appeal committee were entitled to convict the appellant of the offence. For my part, I am unable to subscribe to that proposition. The authority principally relied on in support of the proposition is a decision of the Court of Criminal Appeal, *R.* v. *Richardson* (1), decided in May, 1958. The facts of that case were entirely different from the present facts. In that case there were three men found in possession of a motor car which had been taken away without the consent of the owner. In the motor car there was what LORD GODDARD, C.J., described as " a regular arsenal of housebreaking implements ". When the appellant was tackled with the matter he said: " We did not nick it. We got it from another bloke ". LORD GODDARD, C.J., after stating these facts, went on to say:

> " What does that matter? Here were three men who were out on a housebreaking expedition and were found, as I have said, with a whole arsenal of housebreaking tools. They were driving a car that they had no business to be driving, and it was shown that the car had been taken away from the owner's house or from the street without the owner's consent, and they were found driving it. Whether man 1, man 2 or man 3 took the car does not matter in the least; nor does it matter whether they took it from some friend whom they had met in the street. All three knew, as the jury found, that the car was being driven without the owner's consent."

It is said, therefore, that that decision is an authority for the proposition that, even though one man was not actually a party to the original illegal taking of the car, if he subsequently gets into it and partakes of the use of it, that makes him guilty of taking the car. That, in my judgment, is not right. The fact that a man is found riding in a car which has been illegally taken, or sitting on the pillion seat of a motor cycle which has been illegally taken, may be evidence from which a bench of magistrates or a jury can infer that he was a party to the original taking, but it does not of itself prove that he was a party to the original taking and is guilty of the offence. That proposition is, I think, clearly laid down in *R.* v. *Stally* (2), another case in the Court of Criminal Appeal, decided subsequent to the decision of the appeal committee in the present case. I think that it is sufficient if I read the last paragraph of the judgment of the court delivered by BARRY, J., and that I need not refer to the citations from the summing-up in that case of the deputy chairman of the County of London Sessions. BARRY, J., said (3):

> " In the opinion of this court, the two passages to which I have referred

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(1) (May 19, 1958), unreported.
(2) [1959] 3 All E.R. 814.
(3) [1959] 3 All E.R. at p. 816.

> state the law in very much too broad a way and, in fact, amount to a misdirection. If the learned deputy chairman had made it clear that, once the jury were satisfied that the appellant was a party to the taking in the sense that the taking had been a joint enterprise even though he himself was not present when the vehicle was actually removed, no complaint could possibly have been made. The difficulty, as we see it, is that the learned deputy chairman indicated to the jury that they would be entitled to find the appellant guilty of this offence on the mere ground, and the sole ground, that he entered the vehicle some time after it had been taken knowing that the driver of the vehicle had, in fact, taken it and driven it away without the consent of the owner. In very many cases the fact that a man entered a car which he knew had been stolen and then drove in it might well lead the jury to the conclusion that that man had been a party to the original taking in the sense that the taking had been a joint enterprise between him and the driver of the car. In the passages in the summing-up to which I have referred, the learned deputy chairman did not direct the jury that on the evidence they must be satisfied that the appellant was in fact a party to the taking. It might well have been on this evidence that the jury would have so found, if so directed. It is, however, also possible that the jury took the view in this case that the appellant played no part at all in the taking of the van, and that, although when he came up to the van, which had already been taken by Wise, he was aware that Wise had taken it without the owner's consent, he had, none the less, been quite unaware that Wise was going to take it: in those circumstances, to say that the mere fact of entering the van and being driven in it would constitute a taking and driving away seems to this court to be an inaccurate statement of the law."

Applying that to the facts of the present case, it is true that, as the appeal committee found, the appellant told lies when he was challenged by the police, but, giving the strongest weight to evidence of that kind against the appellant, it seems to me that it is impossible here to say that there was any real evidence that the appellant had anything to do with the taking of the motor cycle or knew in advance or knew at the time that Fuller was going to take, or was taking, or took the motor cycle. The highest, as it seems to me, that it can be put against the appellant on that charge is that at some time—we do not know when—Fuller having taken the motor cycle, the appellant, being in company with Fuller, had very good reason to believe that there was something wrong with it; he might even have realised that Fuller had taken the cycle without the owner's consent, but that is all that the evidence proves. In my judgment, following the decision of the Court of Criminal Appeal in *R.* v. *Stally* (4), that would not be enough to constitute the charge and there was no evidence on which the appeal committee, on that charge, could come to the decision to which they came. It is to be observed that the committee approached this case on the basis that it was a joint undertaking throughout; and there was not really any evidence that the appellant was concerned in the original taking by Fuller.

The position with regard to the second charge may be a little different. That charge was using the motor cycle without there being in force a valid third-party insurance. It was Fuller who was driving the cycle and the appellant, if guilty, would be guilty of aiding and abetting Fuller to drive it. The way in which the case is put is this. Here were these two boys, old acquaintances of four years' standing, each being fifteen years old. It must, therefore, be the fact that the appellant would know that Fuller could not have a driving licence and could not have a third-party insurance policy, and, therefore, going on the cycle when he went, he must be taken to be guilty of aiding and abetting the driving without an insurance policy. For my part, I think that that is really

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(4) [1959] 3 All E.R. 814.

A straining matters in this case. I suppose that technically the appellant, a boy of fifteen, must be taken to know the law, but really all the evidence against him on this charge is that he was riding as a passenger on a motor cycle driven by Fuller. To come back to the decision of the appeal committee, their opinion in this case is based on the footing that this was a joint enterprise throughout. The evidence, as I have said, does not prove that it was a joint enterprise throughout. B Supposing that the fact be, and there was really no evidence to the contrary, that this was merely an offering of a lift by Fuller to the appellant, it seems to me that the evidence would not justify the conviction of the appellant for knowingly aiding and abetting the commission of this offence by Fuller.

In those circumstances I am of opinion that on neither of these charges was there evidence before the appeal committee on which they, properly directing C themselves, could properly arrive at the decision at which they did arrive, and I would allow the appeal.

DONOVAN, J.: I agree. I add a word only on the second charge on which the appeal committee found the appellant guilty, again on the ground that the evidence established a joint venture. Since the evidence did not do so, D the basis of that footing goes also, and in those circumstances I do not think that the court ought to convict, even if it could convict, the appellant on some ground relating to this second charge not apparently put forward at the trial, namely, that in any event, by merely riding on the pillion, the appellant was guilty of an offence under s. 35 of the Road Traffic Act, 1930. I, therefore, say no more.

E **LORD PARKER, C.J.:** I also agree, and only add a word on the first charge. There are two possibilities. The appeal committee may be saying in their Case that they were satisfied that the appellant had been acting in concert with Fuller when Fuller originally took and drove away the motor cycle. If that is what they intended to find, I can see no evidence which would justify that conclusion. On the other hand, they may have found, and I think that this F is most likely, that Fuller at some time took and drove away the motor cycle and that at a later stage the appellant joined with him, knowing full well that the motor cycle had been taken away without the owner's consent. I think that, on that, the appeal committee held that the appellant himself was guilty of taking and driving away. It is to be observed that the decision in this case was given before *R.* v. *Stally* (5) was heard in the Court of Criminal Appeal. G Applying the law as they conceived it to be before *R.* v. *Stally* (5), the appeal committee may well have said that the mere joining up of the appellant with Fuller after the original taking and driving away made the appellant also guilty of taking and driving away. For my part, I accept the decision in *R.* v. *Stally* (5), and, accordingly, it would not be enough to show that the appellant was guilty of the offence.

H [After argument on the question of costs, LORD PARKER, C.J., said that the appellant would have his costs in this court and his costs before the appeal committee to be taxed out of court, but not his costs before the juvenile court.]

Appeal allowed.

Solicitors: *Burnett L. Elman* (for the appellant); *Solicitor, Metropolitan Police* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(5) [1959] 3 All E.R. 814.

R. *v.* McVITIE.

[Court of Criminal Appeal (Lord Parker, C.J., Stable, Donovan, Ashworth and Salmon, JJ.), May 9, 23, 1960.]

Criminal Law—Indictment—Defect—Count charging possession of explosives contrary to s. 4 (1) *of Explosive Substances Act,* 1883 (46 *&* 47 *Vict. c.* 3)—"*Knowingly*" *omitted from particulars of offence—Arraignment of accused by reading particulars, but not statement, of offence—Knowledge admitted by accused at trial—No substantial miscarriage of justice—Whether indictment defective or bad—Indictments Act,* 1915 (5 *&* 6 *Geo.* 5 *c.* 90), *s.* 3, *Sch.* 1, *r.* 4—*Whether proviso should be applied—Criminal Appeal Act,* 1907 (7 *Edw.* 7 *c.* 23), *s.* 4 (1), *proviso.*

The appellant was indicted on a count wherein the statement of offence was "Possessing explosives contrary to s. 4 (1)* of the Explosive Substances Act, 1883", which enactment makes it a felony for a person "knowingly" to have in his possession an explosive substance in particular circumstances. The particulars of offence omitted the word "knowingly". On arraignment only the particulars of the offence were read to the appellant and the statement of offence was not read to him. The appellant, who pleaded not guilty, admitted at the trial that he had known that the contents of a bag in his possession at the time of the alleged offence were explosives, and the summing-up referred to that admission, though the jury were not directed that they must be satisfied of the appellant's knowledge. The appellant appealed against conviction on the ground that the indictment was bad and that he had been arraigned on a non-existent offence.

Held: (i) though the word "knowingly" should have been included in the particulars of the offence, its omission did not make the indictment bad but only defective or imperfect, and

(ii) knowledge, which was an essential ingredient of the offence, was established at the trial, and, as no embarrassment or prejudice had been caused to the appellant by the omission from the indictment and the omission on arraignment, there had been no substantial miscarriage of justice; accordingly, the proviso to s. 4 (1)† of the Criminal Appeal Act, 1907, would be applied and the appeal would be dismissed.

R. v. *Thompson* ([1914] 2 K.B. 99) followed.

R. v. *Hyde* ((1924), 24 Cr. App. Rep. 149) not followed.

Appeal dismissed.

[As to the necessary contents of an indictment and particulars of an offence, see 10 Halsbury's Laws (3rd Edn.) 385, 386, paras 697, 699 and Supplement; and for cases on the subject, see 14 Digest (Repl.) 241, 242, *2082-2085*.

As to possession of explosive substances, see 10 Halsbury's Laws (3rd Edn.) 881, para. 1707; and for cases on the subject, see 15 Digest (Repl.) 1216, *12,402-12,405* and 3rd Digest Supp.

For the Explosive Substances Act, 1883, s. 4 (1), see 5 Halsbury's Statutes (2nd Edn.) 900 and Supplement.

For the Criminal Appeal Act, 1907, s. 4 (1), see 5 Halsbury's Statutes (2nd Edn.) 929 and Supplement.

For the Indictments Act, 1915, s. 3, Sch. 1, r. 4, see 5 Halsbury's Statutes (2nd Edn.) 994, 998.]

Cases referred to:

R. v. *Cohen & Bateman*, (1909), 73 J.P. 252; 2 Cr. App. Rep. 197.

R. v. *Franks*, [1950] 2 All E.R. 1172n.; 115 J.P. 21; 34 Cr. App. Rep. 222; 14 Digest (Repl.) 38, *86*.

R. v. *Hallam*, [1957] 1 All E.R. 665; [1957] 1 Q.B. 569; 121 J.P. 254; 41 Cr. App. Rep. 111; [1957] 2 W.L.R. 521; 3rd Digest Supp.

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* Section 4 (1) is printed at p. 500, letter B, post.

† The proviso is printed at p. 499, letter G, post.

R. v. *Harris*, [1922] 2 K.B. 543; sub nom. *R.* v. *Harris*, *R.* v. *Edwards*, *R.* v. *Jones*, *R.* v. *Wilkins*, *R.* v. *Wilcock*, (1922), 91 L.J.K.B. 587; 126 L.T. 639; 86 J.P. 105; 16 Cr. App. Rep. 91; 14 Digest (Repl.) 580, *5797*.

R. v. *Hughes*, (1927), 136 L.T. 671; 91 J.P. 39; 14 Digest (Repl.) 267, *2358*.

R. v. *Hyde*, (1934), 151 L.T. 20; 98 J.P. 213; 24 Cr. App. Rep. 149; 15 Digest (Repl.) 1215, *12,374*.

R. v. *Miller and Hanoman, Ltd.*, (Nov. 11, 1958), "The Times".

R. v. *Schweller*, (1924), 18 Cr. App. Rep. 52; 14 Digest (Repl.) 234, *2001*.

R. v. *Taylor*, (1924), 93 L.J.K.B. 912; 88 J.P. 152; 18 Cr. App. Rep. 105; 14 Digest (Repl.) 242, *2083*.

R. v. *Thompson*, [1914] 2 K.B. 99; 83 L.J.K.B. 643; 110 L.T. 272; 78 J.P. 212; 9 Cr. App. Rep. 252; 14 Digest (Repl.) 280, *2518*.

Appeal.

The appellant, Jack Dennis McVitie, with three other men, was charged at Cambridge Quarter Sessions on Apr. 3, 1959, before the chairman (His Honour Judge Lawson Campbell) and a jury, on two counts, of which one only was relevant to this appeal, namely, a charge of possessing explosives contrary to s. 4 (1) of the Explosive Substances Act, 1883. The appellant was given leave to appeal against conviction out of time on Mar. 26, 1960. He appealed only in regard to the charge previously mentioned. The ground of appeal was that because the word "knowingly" was omitted from the particulars of offence given in the indictment, he had been indicted, tried, convicted and sentenced of a non-existent offence in law, namely, the possession of explosives. The appeal first came before the Court of Criminal Appeal (Lord Parker, C.J., Ashworth and Salmon, JJ.) on Apr. 26 and 27, 1960. The Lord Chief Justice stated on that occasion that the court felt, if unhampered by authority, that the case would be one for the application of the proviso[*], but there was, in particular, *R.* v. *Hyde*[†] which purported to say that in no case of this sort could the proviso be applied, and in such circumstances the present case ought to be heard by a court of five judges. The appeal was adjourned accordingly for a court of five judges to be constituted.

The facts of the case appear in the judgment. The authorities and cases listed below[‡] were cited in argument in addition to those mentioned in the judgment.

C. G. L. Du Cann for the appellant.

F. H. Lawton, Q.C., and *J. G. Leach* for the Crown.[§]

Cur. adv. vult.

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[*] I.e., the proviso to s. 4 (1) of the Criminal Appeal Act, 1907. The proviso reads: "Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

[†] (1934), 24 Cr. App. Rep. 149.

[‡] I.e., Hale's Pleas of the Crown, Vol. 2 (1736), ch. 28, especially the reference to *Mortimer's Case*; Blackstone's Commentaries on the Laws of England (8th Edn.), Vol. 4, p. 323; Hawkins Pleas of the Crown (1824), Vol. 2, ch. 28; Sir James Fitzjames Stephen's History of Criminal Law of England, (1883), Vol. 1, p. 297; Archbold's Criminal Pleading Evidence and Practice (34th Edn.), paras. 401, 911, 922, 935; *R.* v. *Dyson*, [1908] 2 K.B. 454; *R.* v. *Stoddart*, (1909), 2 Cr. App. Rep. 217; *R.* v. *Garland*, [1910] 1 K.B. 154; *R.* v. *Harris*, (1910), 5 Cr. App. Rep. 285; *R.* v. *Edwards*, [1913] 1 K.B. 287; *Frailey* v. *Charlton*, [1920] 1 K.B. 147; *Crane* v. *Director of Public Prosecutions*, [1921] 2 A.C. 299; *R.* v. *Fraser*, (1923), 17 Cr. App. Rep. 182; *Stirland* v. *Director of Public Prosecutions*, [1944] 2 All E.R. 13; [1944] A.C. 315; *R.* v. *Haddy*, [1944] 1 All E.R. 319; [1944] 1 K.B. 442; *R.* v. *Johnson*, [1945] 2 All E.R. 105; [1945] K.B. 419; *R.* v. *Oster-Ritter*, (1948), 30 Cr. App. Rep. 191; *R.* v. *Neal*, [1949] 2 All E.R. 438; [1949] 2 K.B. 590; *R.* v. *Furlong*, [1950] 1 All E.R. 636; *R.* v. *Middlesex JJ., Ex p. Director of Public Prosecutions*, [1952] 2 All E.R. 312; [1952] 2 Q.B. 758; *R.* v. *Harris*, *R.* v. *Lewis*, (Nov. 10, 1959), "The Times"; *R.* v. *Stewart*, (1960), 44 Cr. App. Rep. 29.

[§] Counsel appearing for the Crown on the appeal were not counsel for the Crown at the trial.

May 23. **DONOVAN, J.**, delivering the judgment of the court at the request of LORD PARKER, C.J., said: The full court dismissed this appeal against conviction on May 9, 1960. We now give our reasons for that decision.

McVitie, together with three other men, namely, Martin Harris, Thomas Harris and Bernard Stewart, was convicted at Cambridge Quarter Sessions on Apr. 3, 1959, of the offence of possessing explosives contrary to s. 4 (1) of the Explosive Substances Act, 1883. All four men were sentenced to seven years' imprisonment. Section 4 (1) provides as follows:

> "Any person who makes or knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be guilty of felony, and, on conviction, shall be liable to [imprisonment] for a term not exceeding fourteen years . . . and the explosive substance shall be forfeited."

McVitie did not seek to appeal against his conviction within the time limit; but he did apply for leave to appeal against his sentence, and on Oct. 20, 1959, this was refused. At the same time the other three prisoners applied for leave to appeal against conviction and sentence. Leave to appeal against conviction only was granted to Thomas Harris and to Stewart. Martin Harris was refused leave to appeal both as regards conviction and sentence. The appeals of Thomas Harris and Stewart were heard on Nov. 9, 1959, with the result that their convictions were quashed. To understand why, it is necessary briefly to summarise the events which led to the prosecution. All four men were stopped by the police after the motor car in which they were driving had been chased for some distance by a police car. On a shelf in the back of the men's car was a paper bag which was found to contain gelatine and detonators. Other circumstances, which need not be detailed, raised a reasonable suspicion that these explosives were not intended for any lawful object; and accordingly all four men were prosecuted under s. 4 (1) of the Explosive Substances Act, 1883.

The defence of Thomas Harris and Stewart from the outset was that they did not know that any explosives were in the car, and in this they were supported by the evidence of Martin Harris and McVitie. On this point the learned chairman in summing-up the case to the jury said:

> " So you have to be satisfied not only that the explosives were in the motor car, but that each one of the men knew they were there, and if you are satisfied on that then that is the first hurdle surmounted by the prosecution."

This direction was given, however, not in relation to the essential ingredient of knowledge, but of possession. It was not explained to the jury that the prosecution must establish, not only that the contents of the paper bag were in the possession of each of the accused men, but that each one knew that the contents were explosives (see hereon *R.* v. *Hallam* (1)). This omission was of particular importance in the case of Thomas Harris and Stewart whose defence was that they did not know that explosives were in the car. It was also of importance for another reason, namely, that while the " Statement of Offence " in the indictment was " Possessing explosives contrary to s. 4 (1) of the Explosive Substances Act, 1883 ", the particulars of the offence omitted the word " knowingly ". This omission may have been in part the reason why the learned chairman in summing-up did not emphasise in the case of Thomas Harris and Stewart that it must be shown that they knowingly had explosives in their possession. In the case of the other two prisoners, Martin Harris and McVitie, this hardly mattered because both made statements admitting they knew they were carrying explosives. But in all the circumstances the court felt that it would not be right to sustain the convictions of Thomas Harris and Stewart and they were accordingly quashed.

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(1) [1957] 1 All E.R. 665; [1957] 1 Q.B. 569.

Thereupon McVitie sought leave to appeal against his conviction, and the necessary extension of time for making the application. Leave so to appeal was granted to him on Mar. 26, 1960. The ground of his appeal was that due to the omission of the word " knowingly " from the particulars of the offence given on the indictment, he had been tried and convicted in respect of an offence unknown to the law. When the appeal was first argued on Apr. 26 and 27, 1960, the court, consisting of Lord Parker, C.J., Ashworth and Salmon, JJ., being satisfied that this was not a case for a venire de novo, indicated that they felt the appeal called for the application of the proviso (2) to s. 4 (1) of the Criminal Appeal Act, 1907 (hereinafter called " the proviso "), but that in view of certain existing authorities which appeared to preclude such a course, the case would be re-listed for hearing by the full court of five judges. The case was accordingly re-argued before us on May 9, 1960.

Counsel for the appellant pointed out that on the arraignment of the accused, the words of the indictment which constituted the " Statement of Offence " were not read to the accused. The words, as we have said, were " Possessing explosives contrary to s. 4 (1) of the Explosive Substances Act, 1883 ". The " Particulars of the Offence " were alone read and these, so far as material, were:

> " You had in your possession a certain explosive substance . . . to wit a four ounce slab of plaster gelatine and four electric detonators under such circumstances as to give rise to a reasonable suspicion that it was not in your possession for a lawful object."

This, therefore, was all that the accused and the jury heard as a statement of the offence. All four prisoners pleaded not guilty and the trial proceeded. Counsel for the appellant now says that due to the omission of the word " knowingly " the appellant was arraigned, tried and convicted for a non-existing offence, and accordingly this conviction also should be quashed. Counsel for the prosecution, while conceding that the omission of the word " knowingly " from the particulars made the indictment defective or imperfect, argues that this is a clear case for the application of the proviso.

It is conceded by the appellant that he was in no way embarrassed by the omission in question. He admitted that he knew he had explosives in his possession, and he certainly did not prove, even on a balance of probabilities, that he had them for any lawful purpose. But he says that he was tried on an indictment which was not merely defective but bad, since it disclosed no offence, and this must be a substantial miscarriage of justice precluding the application of the proviso.

Section 3 (1) of the Indictments Act, 1915, provides as follows:

> " Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge."

Rule 4 (3) of the rules contained in Sch. 1 to that Act provides:

> " The statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by statute, shall contain a reference to the section of the statute creating the offence ";

and r. 4 (4) of the same rules provides:

> "After the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary."

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(2) Printed at p. 499, letter G, ante.

The indictment in the present case conformed to these provisions, save only in one respect. If the words in s. 3, " necessary for giving reasonable information ", import an objective test (which we think they do) then the word " knowingly " should have been included in the particulars. In our opinion this did not make the indictment a bad indictment, but simply a defective or imperfect one. A bad indictment would be one disclosing no offence known to the law, for example where it was laid under a statute which had been repealed and not re-enacted.

In the present case the indictment described the offence with complete accuracy in the " Statement of Offence ". Only the particulars, which merely elaborate the " Statement of Offence ", were incomplete. The question of applying the proviso is to be considered, therefore, not on the basis that the indictment disclosed no known offence but that it described a known offence with incomplete particulars. In *R.* v. *Thompson* (3), an objection to the indictment on the ground of duplicity was overruled at the trial and the accused was convicted. On appeal, this court held that the indictment was in fact bad as alleged, but nevertheless applied the proviso and dismissed the appeal. In doing so the court said this (4):

> " One of the objects of s. 4 was to prevent the quashing of a conviction upon a mere technicality which had caused no embarrassment or prejudice. Whilst giving the right of appeal upon any wrong decision of any question of law, the object of the legislature was that justice should be done in spite of a wrong decision and that the court should not interfere if it came to the conclusion that, notwithstanding the wrong decision, there had been no substantial miscarriage of justice. The court must always proceed with caution when it is of opinion that a wrong view of the law has been taken by the judge presiding at the trial, but when it is apparent, and indeed undisputed, as it is and must be in this case, that no embarrassment or prejudice had in fact been suffered in consequence of the pleader having made the manifest error above mentioned, the court must act upon the proviso in this section of the Act."

In the present case also no embarrassment or prejudice was caused to the accused by the defect in the indictment, but he relies on a later decision of this court in *R.* v. *Hyde* (5). Hyde was convicted on an indictment in the following terms: " Statement of Offence: Arson, contrary to s. 7 Malicious Damage Act, 1861. Particulars of Offence: Cecil Hyde on Jan. 7, 1930, unlawfully and maliciously set fire to certain straw then being in a building, namely, 32 Union Street, Dowlais." It will thus be seen that the offence was not fully described in the particulars, because the following words which appear in the said s. 7 were omitted, namely, " under such circumstances that if the building were thereby set fire to the offence would amount to felony ". During the argument Avory, J., asked counsel for the Crown: " Is there any case where the proviso has been applied where the indictment is so defective that it discloses no offence? ". The answer was: " There appears to be no such case ". Giving judgment Lord Hewart, C.J., said, inter alia (6):

> " . . . This count does not disclose any offence at all . . . In our opinion the point taken by [counsel for the appellant] is a good point and there is no escape from the conclusion that the conviction cannot stand. It may well be that if the indictment had been in the proper form and that if the summing-up had directed the jury to those crucial words—which it omitted to do—the verdict would have been the same. This, however, is not a case where the court can apply the proviso . . ."

This decision clearly proceeded to some extent on the view that the indictment disclosed no offence. And this view, in turn, was founded on the insufficiency of the particulars. But nevertheless the indictment alleged the offence of " arson

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(3) [1914] 2 K.B. 99.

(4) [1914] 2 K.B. at p. 105.

(5) (1934), 24 Cr. App. Rep. 149.

(6) (1934), 24 Cr. App. Rep. at p. 151.

A contrary to s. 7" of the Malicious Damage Act, 1861; and the particulars themselves, though inadequate, used the expression "unlawfully and maliciously". This court, therefore, cannot share the opinion expressed in the case that the indictment disclosed no offence; and accordingly cannot treat *R.* v. *Hyde* (7) as one which ought to be followed in the present case.

In *R.* v. *Franks* (8), decided in 1950, the indictment charged the accused with B being concerned in dealing in goods the import of which was prohibited or restricted, contrary to s. 186 of the Customs Consolidation Act, 1876, but did not contain, as it should have done, an allegation of intent to defraud or to evade the prohibition or restriction. The court therefore quashed the conviction on the ground that the indictment did not disclose the offence. The question of applying the proviso did not, apparently, arise.

C In a more recent case a different decision was reached, though it must be said that the two cases last mentioned were not apparently cited to the court. In *R.* v. *Miller and Hanoman, Ltd.* (9) the statement of offence was defective in that it alleged that the accused were "Being knowingly concerned in attempting to evade a prohibition on the export of goods contrary to s. 56 (2) of the Customs and Excise Act, 1952", instead of being "knowingly concerned in the exportation D . . . of goods with intent to evade" the prohibition imposed by the Act. The offence was, however, accurately described in the particulars. At the trial an objection was taken to the statement of offence as it was worded, but the objection was overruled. On appeal it was contended that the indictment disclosed no offence, and that the conviction should therefore be quashed. But seeing that the particulars accurately described the offence, it was clear that the accused E were not prejudiced or embarrassed at all, and this court, holding that no substantial miscarriage of justice had occurred, applied the proviso. Other cases were cited to us, but it is unnecessary to do more than mention them. They included: *R.* v. *Cohen & Bateman* (10), *R.* v. *Wilcock* (11), *R.* v. *Schweller* (12), *R.* v. *Taylor* (13) and *R.* v. *Hughes* (14).

F In the present case it is clear that no embarrassment or prejudice was caused to the accused by the omission of the word "knowingly" from the particulars, or from the arraignment. He had been properly charged in the first place, and properly committed for trial and the Attorney-General's fiat (15) was in proper form. If the word "knowingly" had been in the particulars and the chairman had said to the jury

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> "You must be satisfied that McVitie knew that there were explosive substances in the paper bag in the car"

the chairman would inevitably have gone on to say, as indeed he did, "but McVitie admits he had this knowledge." This essential ingredient of the offence was therefore established, despite the omission of the word in question. The H present case is, therefore, a clear case where no substantial miscarriage of justice has occurred, and the court accordingly applied the proviso and dismissed the appeal.

In the course of the argument the question was raised, but not fully explored, whether once the court reaches the conclusion that there has been no substantial I miscarriage of justice, there is any fetter on the way the court may decide to exercise its discretion as regards applying the proviso. Section 4 itself leaves the court free in the matter (16), and there is no restriction unless previous decisions of the court in comparable cases are to be regarded as binding precedents. It is unnecessary to pursue this point in the present case, for we are satisfied, whatever be the right view on this point, that no previous decision, properly appreciated, precludes the application of the proviso here.

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(7) (1934), 24 Cr. App. Rep. 149.
(8) [1950] 2 All E.R. 1172n.; 34 Cr. App. Rep. 222.
(9) (Nov. 11, 1958), "The Times."
(10) (1909), 2 Cr. App. Rep. 197.
(11) (1922), 16 Cr. App. Rep. 91.
(12) (1924), 18 Cr. App. Rep. 52.
(13) (1924), 18 Cr. App. Rep. 105.
(14) (1927), 136 L.T. 671.
(15) See the Explosive Substances Act, 1883, s. 7.

Since leave to appeal was eventually obtained by the appellant his sentence will run from the date of conviction.

Appeal dismissed.

Solicitors: *W. & B. Blackwell & Co.* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

HUGHES *v.* HALL.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Byrne and Donovan, JJ.), May 24, 1960.]

Road Traffic—Pedestrian crossing—Uncontrolled crossing—Failure of motorist to stop before reaching crossing—Whether motor car is within limits of crossing when it has crossed approach studs—Pedestrian Crossings Regulations, 1954 (*S.I.* 1954 *No.* 370), *reg.* 4.

A pedestrian, who looked neither to the right nor to the left, stepped on to an uncontrolled pedestrian crossing at a moment when a car, which was being driven at a proper speed and without negligence, was either wholly or partly over the studs indicating the approach to the crossing. The driver braked at once but the car could not be stopped within the distance remaining before the crossing and the pedestrian was struck by the car. The driver was charged with failing to accord precedence to a foot-passenger on the carriageway within the limits of an uncontrolled crossing, contrary to reg. 4* of the Pedestrian Crossings Regulations, 1954. There would have been no contravention of reg. 4 unless the pedestrian was on the carriageway within the limits of the crossing before any part of the car had crossed those limits. On appeal from the dismissal of the charge by the magistrates,

Held: the driver had committed an offence because—

(i) the limits of an uncontrolled crossing were the studs bordering the striped way and not the approach studs, so that no part of the car had crossed the limits of the crossing before the pedestrian stepped on to it, and

(ii) reg. 4 imposed an absolute duty on the motorist, so that it was immaterial that the driver was not negligent.

Appeal allowed.

[**Editorial Note.** An uncontrolled pedestrian crossing is, broadly speaking, one where traffic is not controlled fairly regularly by a police officer in uniform or by traffic lights; the full definition can be found in the Pedestrian Crossings Regulations, 1954 (S.I. 1954 No. 370), reg. 2 (1) and Sch. 1, Part 2, para. 3.

For the Road Traffic Act, 1934, s. 18, see 24 HALSBURY'S STATUTES (2nd Edn.) 723.

For the Pedestrian Crossings Regulations, 1954, reg. 4, see 10 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 68.]

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(16) Section 4 (1) reads: " The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal " [Then follows the proviso printed, ante, p. 499, letter G].

* The terms of reg. 4 are printed at p. 506, letter B, post.

A Case referred to:

Leicester v. *Pearson*, [1952] 2 All E.R. 71; [1952] 2 Q.B. 668; 116 J.P. 407; 3rd Digest Supp.

Appeal.

This was an appeal by way of Case Stated by the justices for the county of Denbigh in respect of their adjudication as a magistrates' court sitting at Colwyn B Bay before whom an information was preferred on Aug. 6, 1959, by John Owen Hughes, the appellant, against David Benjamin Hall, the respondent, that on June 20, 1959, the respondent, being the driver of a motor car, failed to accord precedence to a foot-passenger on the carriageway within the limits of an uncontrolled crossing in Conway Road, Colwyn Bay, contrary to regs. 4 and 9 of the Pedestrian Crossings Regulations, 1954, and s. 18 of the Road Traffic Act, C 1934.

The information was heard on Aug. 19, 1959, when the following relevant facts were found. On June 20, 1959, the respondent was driving a motor car along the Conway Road. The respondent was a learner driver holding a provisional licence and was accompanied by a fully licensed driver. The respondent was driving at a reasonable and proper speed approaching a slight bend in the road beyond which D was situated an uncontrolled pedestrian crossing. As the car driven by the respondent was approaching the crossing a lady, who looked neither to right nor left, stepped on to the crossing and had proceeded thereon some nine to twelve feet when she was hit by the car. When the lady stepped on to the crossing the respondent's car had either wholly or in part passed over the studs indicating the approach to the crossing. The respondent applied his footbrakes on seeing E the lady step on to the crossing and was rapidly pulling up when the lady was hit, and there was insufficient distance between the car and the crossing in which to stop. There was insufficient evidence of driving on the part of the respondent without due care and attention.

It was contended by the appellant (a) that reg. 4 of the Pedestrian Crossings Regulations, 1954, imposes an absolute duty to afford precedence to a foot-F passenger on the carriageway within the limits of an uncontrolled crossing and that as the lady was hit on the carriageway at the crossing an offence against the regulations had been committed; (b) that the limits of the crossing were defined by and comprised only that portion of the carriageway which was marked by studs across the carriageway and a pattern of black and white stripes as provided in Sch. 1 to the Regulations of 1954, Part 2, para. 5. The respondent referred to G reg. 4 and contended (a) that the limits of an uncontrolled crossing were not defined by the portion of the carriageway marked by the pattern of black and white stripes but by the studs which marked the approaches to the crossing, and that if a vehicle or any part thereof had come on to the carriageway within the limits indicated by the approach studs before a foot-passenger had come on to the carriageway no offence under the said regulation had been committed; (b) that H the respondent's car or a part thereof had passed over the approach studs at this particular crossing before the lady stepped on to the carriageway and therefore no offence had been committed and that there was no case to answer; and (c) that on the authority of *Leicester* v. *Pearson* (1) the duty imposed by reg. 4 was not an absolute duty and, as there was no evidence of negligence or failure to take reasonable care, no offence had been committed. The magistrates were of opinion I that the respondent's motor car had either wholly or in part passed over the approach studs to the crossing before the foot-passenger stepped on to the crossing and that the motor car was then within the limits of the crossing; and that there was no evidence of a failure on the part of the respondent to keep a proper look-out or of negligence. They upheld the respondent's contention that there was no case to answer and they dismissed the information. The court was asked to determine whether the magistrates were correct in deciding that when a motor car had wholly or in part passed over the approach studs to the crossing it was within the limits of the crossing and that therefore no offence under reg. 4 had been committed. A

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(1) [1952] 2 All E.R. 71; [1952] 2 Q.B. 668.

D. T. Lloyd-Jones for the appellant.

The respondent did not appear and was not represented.

LORD PARKER, C.J., recited the facts and continued: Regulation 4 of the Pedestrian Crossings Regulations, 1954, is in these terms: B

> " Every foot-passenger on the carriageway within the limits of an uncontrolled crossing shall have precedence within those limits over any vehicle and the driver of the vehicle shall accord such precedence to the foot-passenger, if the foot-passenger is on the carriageway within those limits before the vehicle or any part thereof has come on to the carriageway within those limits." C

If the limits of an uncontrolled crossing are the approach studs on either side, then there is a finding here that either wholly or in part the respondent's car had entered the limits of the uncontrolled crossing and, accordingly, would not be bound to afford precedence to this lady. If, on the other hand, the limits are not the approach studs but the studs which border the striped crossing, then it is clear that this lady was on that crossing before the motor car had come within the limits of the crossing. Looking at reg. 4, reg. 6 and reg. 8, I should have thought that it was clear beyond doubt that the limits of an uncontrolled crossing are the studs bordering the striped way. The approach studs are dealt with in these regulations not as within the limits of the uncontrolled crossing but as something on each side indicating the approach to the uncontrolled crossing. I find it unnecessary to read those regulations in detail. It seems to me plain beyond doubt that the contention for the appellant is correct and that an offence was committed. D E

I would only add this, that the justices have said, although it is not referred to in the question left to the court, " that there was no evidence of a failure on the part of the respondent to keep a proper look-out or of negligence and we upheld the respondent's contention that there was no case to answer and dismissed the information ". It is clear on the latest decisions of this court, that reg. 4 imposes an absolute duty, and that it is quite immaterial whether there is any evidence of negligence or failure to take reasonable care. In these circumstances, I would refer the case back to the justices with a direction that the offence charged was proved. F G

BYRNE, J.: I agree.

DONOVAN, J.: I agree.

Appeal allowed.

Solicitors: *Bell, Brodrick & Gray*, agents for *Guest, Vaughan & Pritchard*, Colwyn Bay (for the appellant).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

EVANS *v.* ROPER.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Donovan and Davies, JJ.), May 19, 1960.]

Agriculture—Agricultural holding—Notice to quit—Desirable in the interests of sound management of the estate—Land to be taken from one farm on the estate and added to another—Whole estate to be considered—Whether relevant that tenant of farm from which land taken would suffer—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 63), *s.* 25 (1) (*b*), *as amended by the Agriculture Act,* 1958 (6 *&* 7 *Eliz.* 2 *c.* 71), *s.* 3 (1) (2).

The landlord of agricultural land which included the B. farm and the H. farm (farmed by different tenants) desired to subtract some fifty-four acres from the B. farm and add it to the H. farm. The landlord gave the tenant of B. farm notice to quit the fifty-four acres and applied to the Agricultural Land Tribunal for their consent to the operation of the notice to quit under the Agricultural Holdings Act, 1948, s. 25 (1) (b), as amended by the Agriculture Act, 1958, s. 3, viz., on the ground that the carrying out of the notice was desirable in the interests of sound management of the estate of which the land formed part. The tribunal refused consent on the ground that they were not satisfied that the transfer of the fifty-four acres had been proved to be in the interest of sound management of the estate, basing that conclusion on a finding, among others, that the tenant of B. farm had over the years brought the B. farm to a high state of productivity and that to take away the fifty-four acres might well adversely affect his farming and the production from and state of the fifty-four acres. By the proviso to s. 25 (1) the tribunal were bound to withhold consent if it appeared to them that a fair and reasonable landlord would not insist on possession, but they did not decide the case under this proviso. On appeal,

Held: (i) in considering whether they were satisfied of the ground enacted in s. 25 (1) (b) of the Act of 1948, the tribunal ought to consider what the effect of the transfer would be on the whole estate, not only on H. farm but also on B. farm and on any other part of the landlord's estate, and were entitled to consider the production from, and state of, the fifty-four acres (see p. 510, letters D and F, post); but

(ii) they were not entitled, however, to take into account that the tenant of the B. farm would himself suffer, although that might be considered in deciding whether or not to withhold consent under the proviso to s. 25 (1) (see p. 510, letters B and F, post), and as they had in fact taken this consideration into account for their decision under s. 25 (1) (b), and not for the purposes of the proviso to s. 25 (1), the case would be remitted to them to reconsider their decision.

Appeal allowed.

[For the Agricultural Holdings Act, 1948, s. 25 (1), see 28 HALSBURY'S STATUTES (2nd Edn.) 48; and for the Agriculture Act, 1958, s. 3, see 38 HALSBURY'S STATUTES (2nd Edn.) 70.]

Case Stated.

This was a Case Stated by the Agricultural Land Tribunal for the West Midland Area pursuant to s. 6 of the Agriculture (Miscellaneous Provisions) Act, 1954. By their decision dated May 27, 1959, the tribunal refused their consent to a notice to quit served by the landlord on the tenant. The facts are set out in the judgment of LORD PARKER, C.J.

P. H. R. Bristow for the landlord.

R. V. Cusack, Q.C., for the tenant.

LORD PARKER, C.J.: This is an appeal by way of Case Stated from a refusal by the Agricultural Land Tribunal for the West Midland Area to consent to the operation of a notice to quit served by a landlord on a tenant. The powers of the tribunal are to be found in s. 25 of the Agricultural Holdings Act, 1948, as amended by the Agriculture Act, 1958, s. 3. The section as amended, so far as it is relevant to this case, provides:

> " (1) The Agricultural Land Tribunal shall consent under the last foregoing section to the operation of a notice to quit an agricultural holding or part of an agricultural holding if, but only if, they are satisfied as to one or more of the following matters, being a matter or matters specified by the landlord in his application for their consent, that is to say—(a) that the carrying out of the purpose for which the landlord proposes to terminate the tenancy is desirable in the interests of good husbandry as respects the land to which the notice relates, treated as a separate unit; or (b) that the carrying out thereof is desirable in the interests of sound management of the estate of which the land to which the notice relates forms part or which that land constitutes . . . Provided that, notwithstanding that they are satisfied as aforesaid, the tribunal shall withhold consent to the operation of the notice to quit if in all the circumstances it appears to them that a fair and reasonable landlord would not insist on possession."

The facts, so far as they are material, are as follows. The landlord owns a considerable amount of land at Clifton-on-Teme near Worcester. Part of the estate consists of a farm, Burton Court Farm, comprising 406 acres being farmed by a tenant, Mr. Roper, who is the respondent. The landlord also has a farm, Hatt House Farm, of which the tenant is a Mr. Skyrm. That farm comprises about ninety-eight acres, but negotiations have been carried on between the Glebe Commissioners and the landlords for an exchange of glebe lands on the estate which would if completed reduce Hatt House Farm by about fourteen acres. It appeared to the landlord that Hatt House Farm in its present state, and presumably still more so if it were reduced by fourteen acres, would not be an efficient farming unit and that good estate management would involve a transfer of some of the Burton Court Farm land to Hatt House Farm. In those circumstances, the landlord gave the tenant notice to quit some fifty-four acres of land of Burton Court Farm, the object being to attach that to Hatt House Farm and build the necessary buildings. In applying to the tribunal for their consent the landlord accordingly stated that the reason for serving the notice was the reason stated in s. 25 (1) (b), to which I have referred, namely,

> " that the carrying out thereof is desirable in the interests of sound management of the estate of which the land to which the notice relates forms part. . ."

The application was opposed by the tenant and in due course on May 27, 1959, the tribunal refused their consent, giving their reasons, which are annexed to the Case. I need not read reasons 1, 2, 3 and 4, but reasons 5 to 7 are:

> " (5) That the tenant of Burton Court Farm has over the years brought it to a high state of productivity and that to take the fifty-four acres which includes some of his best land and the cottage from him might well adversely affect his farming and the production from and state of the land in question. (6) That the landlord's proposals for the provision of fixed equipment for Hatt House Farm even as enlarged by the land in question, were not proved to be a sound economic proposition. (7) That though the tribunal were sympathetic towards the landlord's long-term policy they were not satisfied that the purposes for which the landlord proposes to terminate the tenancy had been proved to be in the interests of sound management of the estate, particularly in present circumstances."

Accordingly, not being satisfied in regard to the ground comprised in s. 25 (1) (b) it was unnecessary for them to consider, and they did not consider, whether under the proviso as a matter of discretion they would grant or refuse consent. In the Case in para. 7 they state the matter in this form:

> " We found that Mr. Roper [the tenant] had over the years brought Burton Court Farm to a high state of productivity and that to take away from his farm the disputed land, which included some of his best land and the cottage, might well adversely affect his farming and the production from and state of the disputed land, that the [landlord's] proposals for the provision of fixed equipment for Hatt House Farm as enlarged by the inclusion of the disputed land were not proved to be a sound economic proposition, and that we were not satisfied that the proposed transfer of the disputed land had been proved to be in the interests of sound management of the estate, particularly in present circumstances, though we were sympathetic towards the landlord's long-term policy."

The two questions left to the court are in this form, whether

> " we were entitled as a matter of law to take into account the effect that the transfer of land from one farm on the estate to another might have (a) on the production from and state of the land so to be transferred and (b) on the farming of the remainder of the land (part of the landlord's estate) of the tenant from whom the land in question was proposed to be transferred."

Counsel for the landlord maintains that the tribunal were not entitled to take into account those two considerations. He concedes that if he is right, since there were other matters which influenced the tribunal, in particular that they were not satisfied that the fixed equipment to be provided would make Hatt House Farm a sound economic proposition, the matter would have to go back to them to decide on the matters which they could take into consideration whether it was a prima facie case for consent to be given, and finally whether as a matter of discretion under the proviso they would grant it.

I will deal first with the finding

> " that Mr. Roper [the tenant] had over the years brought Burton Court Farm to a high state of productivity and that to take the fifty-four acres which includes some of his best land and the cottage from him might well adversely affect his farming."

For my part, I am satisfied that that consideration so stated was not a matter to which the tribunal should pay any regard unless and until they came to decide whether under the proviso they should as a matter of discretion give consent. In considering the grounds set out in s. 25 (1) (b) it is quite immaterial, in my judgment, whether the tenant of the farm from whom the disputed land is sought to be severed will suffer in any way. That is not to say that in considering what is good management of the estate the whole and every part of the estate must not be taken into consideration. To take the present case, in considering whether it was in the interests of sound management to take the fifty-four acres from Burton Court Farm and attach them to Hatt House Farm, the tribunal clearly ought to consider the whole of the estate, not only Hatt House Farm, but what the effect would be on Burton Court Farm or, indeed, on any other part of the landlord's estate; but, as stated in the reasons and in the Case, namely, that the tenant and his farm will suffer is, I think, a matter which they were not entitled to take into consideration. Counsel for the tenant has pointed out, however, that in the form of the question left to this court, which I have already read, they refer to the farming of the remainder of the land by the tenant, and it may be that on one reading of that question the consideration was quite unobjectionable. However, I can only read that question which is posed for the court in the light of the two passages both from the reasons and para. 7 of the Case, which stress the fact that the tenant has spent years in bringing Burton Court Farm to a high state of productivity and to take the fifty-four acres away from him will affect him and his farming. I am reinforced in that view when I find that the tenant in his written reply, which is annexed to the Case, states:

> "I have been tenant of Burton Court for twenty years. When I became tenant the farm was in very bad condition (graded as Class C) and I have spent the best years of my life bringing the farm to a high state of cultivation."

That, as I have said, is a matter, as indeed it appeared in the tenant's application, of discretion (1) and not a matter to be considered under s. 25 (1) (b) of the Act.

The other question posed for the court is whether the tribunal were entitled to take into consideration the effect on the farming of the remainder of the land of the tenant from whom the land in question, i.e., the fifty-four acres, was proposed to be transferred. Counsel for the landlord maintains that that is a consideration of good husbandry which is only relevant to an application under s. 25 (1) (a), which I have read, and that any question of good husbandry is immaterial in the case of an application under s. 25 (1) (b). For my part, I cannot accede to that argument. I think that the tribunal were entitled to take into account the production from and state of the disputed land being part of the estate. In considering good management it is open to consider each and every part of the estate, and I think that it was perfectly proper for them to take into consideration the production on the estate of the fifty-four acres which it was proposed to transfer.

I have come to the conclusion that in regard to the question (b) the answer is that the tribunal took into account that matter, which they had no right to take into account. Accordingly, in my judgment the case should go back with an intimation that the tribunal should reconsider their decision, putting out of their minds the consideration that to take this land away from the tenant will affect his farming, leaving it to them to arrive at their decision without considering that matter, though it may well be a matter which would fall to be considered if they had to consider their discretion under the proviso.

DONOVAN, J.: I agree. Sound management of the estate involves, in my view, looking at the whole estate and each part of it, but it does not involve taking into account the attributes of the tenant from whom the land is taken and the effect of doing so on his personal conditions and fortunes as a farmer. These things have been taken into account here and, like my Lord, I think erroneously.

DAVIES, J.: I agree.

Appeal allowed.

Solicitors: *S. R. Freed & Co.*, Richmond (for the landlord); *Ellis & Fairbairn* (for the tenant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(1) I.e., relevant to a decision under the proviso to s. 25 (1) of the Agricultural Holdings Act, 1948, as substituted by the Agriculture Act, 1958, s. 3 (2).

WINE SHIPPERS (LONDON), LTD. *v.* BATH HOUSE SYNDICATE, LTD.

[Chancery Division (Buckley, J.), May 3, 4, 5, 1960.]

Discovery—Originating summons—Landlord and tenant—New tenancy—Originating summons adjourned into court for trial with witnesses—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2 *c.* 56), *s.* 30 (1) (*f*).

The landlords of business premises gave as their reason for opposing the grant of a new tenancy to their tenants, that they intended to demolish or reconstruct the premises on the termination of the tenancy, which was the ground of opposition provided by s. 30 (1) (f) of the Landlord and Tenant Act, 1954. The tenants applied by originating summons for the grant of a new tenancy. The landlords filed affidavit evidence stating their intention of redeveloping the premises with adjoining premises, and the tenants filed affidavit evidence not admitting that the landlords had the requisite intention. The evidence so filed was not the whole evidence intended to be given. The master decided that the originating summons should be adjourned into court in due course for hearing with witnesses. On a summons by the tenants for discovery,

Held: the affidavit evidence not being the full evidence and the mode of trial being with witnesses giving oral evidence, the tenants should have discovery, analogously to discovery in an action begun by writ, to enable them to cross-examine witnesses.

Re Borthwick ([1948] 2 All E.R. 635) distinguished.

[As to the discretion of the court in granting discovery, see 12 Halsbury's Laws (3rd Edn.) 5, para. 5, and as to discovery in actions commenced by originating summons, see ibid., p. 6, para. 5, text and note (p).

For the Landlord and Tenant Act, 1954, s. 30 (1), see 34 Halsbury's Statutes (2nd Edn.) 414.]

Cases referred to:

Betty's Cafés, Ltd. v. *Phillips Furnishing Stores, Ltd.*, [1958] 1 All E.R. 607; [1959] A.C. 20; [1958] 2 W.L.R. 513; 3rd Digest Supp.

Borthwick, Re, Borthwick v. *Beauvais*, [1948] 2 All E.R. 635; [1948] Ch. 645; [1949] L.J.R. 50; 18 Digest (Repl.) 12, *70*.

Cunliffe v. *Goodman*, [1950] 1 All E.R. 720; [1950] 2 K.B. 237; 31 Digest (Repl.) 378, *5070*.

Fisher v. *Taylors Furnishing Stores, Ltd.*, [1956] 2 All E.R. 78; [1956] 2 Q.B. 78; [1956] 2 W.L.R. 985; 3rd Digest Supp.

Herbert v. *Blakey* (*Bradford*), *Ltd.*, (Jan. 11, 1956), unreported.

Reohorn v. *Barry Corpn.*, [1956] 2 All E.R. 742; [1956] 1 W.L.R. 845; 3rd Digest Supp.

St. Martins Theatre, Re, Bright Enterprises, Ltd. v. *Willoughby de Broke* (*Lord*), [1959] 3 All E.R. 298; [1959] 1 W.L.R. 872.

Procedure Summons.

The applicants, Wine Shippers (London), Ltd., who were tenants of No. 83, Piccadilly, instituted proceedings by originating summons under Part 2 of the Landlord and Tenant Act, 1954, for the grant to them by their landlords, Bath House Syndicate, Ltd., of a new tenancy of the premises. The landlords had given notice dated Sept. 28, 1959, to the tenants, determining their tenancy on Mar. 31, 1960, and stating as the ground for opposing an application to the court for the grant of a new tenancy that provided by s. 30 (1) (f) of the Act of 1954, viz., that on the termination of the current tenancy the landlords intended to demolish or reconstruct the whole of the premises. The tenants gave a counter-notice that they were not willing to give up possession on Mar. 31, 1960. The landlords filed an affidavit deposing that they were entitled to the reversion expectant on the leases of the adjoining properties Nos. 82 and 84, Piccadilly, and that they had been given planning permission by the London County Council to erect buildings on the site provided that all three buildings were demolished. The tenants by affidavit deposed that they did not admit that the landlords had the intention required by s. 30 (1) (f). At the hearing before the master, the tenants asked for discovery. The master directed a pro forma summons to be taken out applying for discovery and adjourned this into court. He also adjourned the originating summons into court to be heard on oral evidence with witnesses.

T. J. Sophian for the tenants, the applicants.
J. L. Harman for the landlords, the respondents.

BUCKLEY, J.: The landlords, Bath House Syndicate, Ltd., gave notice on Sept. 28, 1959, to the tenants, Wine Shippers (London), Ltd., determining their tenancy of No. 83, Piccadilly, London, on Mar. 31, 1960. They gave as their ground for opposing an application to the court under Part 2 of the Landlord and Tenant Act, 1954, for the grant of a new tenancy that, on the termination of the current tenancy, they intended to demolish or reconstruct the whole of the premises, and that they could not reasonably do so without obtaining possession of the premises. That is a ground of opposition open to a landlord under s. 30 (1) (f) of the Landlord and Tenant Act, 1954. The tenants in due course served a notice under the Act, informing the respondents that they were not willing to give up possession of the premises on Mar. 31, 1960; and in their affidavit in support of the originating summons in this matter they set out proposals for a new lease to be granted to them under the Act.

The landlords filed an affidavit of a Mr. Maurice Wohl, in which he said that the landlords were entitled to the reversion immediately expectant on the tenants' lease, and were also entitled to the reversion of the adjoining premises, Nos. 82 and 84, Piccadilly. Bath House Syndicate Ltd. (the landlords) was formed, so he said, with the intention and for the purpose of carrying out the redevelopment of the properties facing Piccadilly between Bolton Street and Clarges Street. He stated that the landlords had instructed architects to prepare plans and act on their behalf in obtaining all necessary permissions to enable the proposed redevelopment to be carried out. He deposed to the fact that application has been made to the London County Council for town planning permission, and he exhibited the permission obtained from the council. That is permission for the erection of an office, showroom and residential building on the site of 82, 83 and 84, Piccadilly, and it is subject to certain conditions. The first condition is:

> "The submission to, and approval by, the council before any building work is commenced, of details of the external facing materials to be used on the infilling panels between the windows, and the type of rendering proposed for the roof structure on the Bolton Street block."

That is not a very important condition for present purposes; but the second condition is important. It is in the following terms:

> "No works (including works of demolition) being commenced unless and until the developers have acquired and are to the satisfaction of the council in possession of the necessary interests in 83 and 84, Piccadilly to ensure that they are able to proceed with the entire development and that no part of Bath House [Bath House is the same as 82, Piccadilly] shall be demolished until the aforementioned properties have been demolished."

The reasons given for imposing these conditions include the following:

> "To ensure that the whole of the site, particularly the frontage to Piccadilly between Clarges Street and Bolton Street, shall be treated com-

A prehensively and in such a way as may justify the demolition of Bath House."

The deponent went on to say that the architects had proceeded with preparing the necessary agreements for the demolition of No. 83, and he exhibited a letter from the architects to the respondents, setting out the steps which were being taken to procure the carrying out of the demolition and eventual reconstruction B of No. 83. Owing to the interposition of these proceedings—that is to say, the proceedings by originating summons—the programme originally contemplated is already running a little behind time.

The tenants put in evidence in answer to that an affidavit in which they said, amongst other things:

> C "The [tenants] do not admit that the [landlords] have the requisite intention to demolish or reconstruct the said premises on the termination of the [tenants'] current tenancy."

On the present application the tenants ask for discovery of a large number of documents, including correspondence and other matters, which it is suggested have a bearing on the true quality of the landlords' intention to redevelop; and D in support of that application the tenants have filed a further affidavit in which they draw attention to a number of matters, as to which they say they have no knowledge and in relation to which they seek to have the discovery referred to in the summons.

It is, of course, unusual in proceedings commenced by originating summons for there to be any discovery of documents. That question was discussed by the E Court of Appeal in *Re Borthwick, Borthwick* v. *Beauvais* (1). That was a case under the Inheritance (Family Provision) Act, 1938, and the argument to some extent turned on the particular rules governing the procedure under that Act, R.S.C., Ord. 54F, r. 3 (2) (a), r. 9 and r. 14. Lord Greene, M.R., said this (2):

> "Roxburgh, J., took the view that the ordinary practice and rules in the Chancery Division referred to in r. 14 [i.e. of Ord. 54F] meant the ordinary F practice and rules in that Division in relation to procedure by originating summons. That is the form of procedure which, under Ord. 54F, is required in these cases. I see no reason for differing from that view of the learned judge. In the procedure by originating summons where the issues are not defined in the way in which they are defined in pleadings, but are shown in general affidavits in which the relevant evidence appears, affidavits which G can, if necessary, be cross-examined to, there is really no room in practice for the application of the rather strict rules relating to discovery which take place in ordinary actions conducted with pleadings. The view that Roxburgh, J., took, and I think rightly took, was that the discovery in proceedings in the Chancery Division by originating summons ought only to be ordered in very special cases where the facts are such as to justify such an H order being made."

Of course, I loyally accept that statement.

I have to consider whether the present case is of such a special nature as to justify an order for discovery being made. I would point out that the Master of the Rolls, in dealing with the normal practice in the Chancery Division, was there I referring to proceedings in which the issues, though not defined in pleadings, had been shown in general affidavits in which the relevant evidence appeared, affidavits on which there could, if necessary, be cross-examination. In the present case when the evidence to which I have referred (which is of a very short, simple, and I might almost say elementary character) had been filed, the master thought that it would be a convenient course to adjourn the originating summons into court to be tried on oral evidence, not merely on cross-examination of the deponents on their affidavits, but on evidence to be given orally in chief and subject to cross-examination in the ordinary way as evidence would be given in an action. So that the present case is not, in my view, the sort of case which the Master of the Rolls had in his mind when he made the observations that I have read in *Re Borthwick* (3).

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(1) [1948] 2 All E.R. 635; [1948] Ch. 645.
(2) [1948] 2 All E.R. at p. 636; [1948] Ch. at p. 649.

The issue in relation to which I have to consider whether it is proper that there should be discovery or not is the issue whether the landlords intend, on the termination of the current tenancy, to demolish or reconstruct the premises comprised in the holding or a substantial part thereof.

It has been pointed out in a number of cases (of which the first that I should mention is *Cunliffe* v. *Goodman* (4)) that the character of a party's intention, and the quality of that intention, must be considered in the light of the surrounding circumstances, so far as they affect his power to implement that intention. In *Cunliffe* v. *Goodman* (4) the question was one which arose under s. 18 of the Landlord and Tenant Act, 1927, which provided that no damages should be recovered for a breach of covenant to leave or put premises in repair at the end of a lease if it was shown that the premises would at or shortly after the end of the lease be pulled down or altered in such a way as to render valueless the repairs covered by the covenant. In that case the tenant was seeking to establish that his landlord in fact intended to demolish the premises. ASQUITH, L.J. (5), stated that the word " intention " connoted a state of affairs in which the party said to hold that intention did more than merely contemplate carrying out the proposal, and that the word " intention " connoted a state of affairs in which that party decided, so far as in him lay, to bring about the proposed result, the proposed result being one which, in point of possibility, he had a reasonable prospect of being able to bring about by his own act of volition. He pointed out that if there were formidable conditions or obstacles to be complied with or overcome before the proposed result could be achieved, it might well be unmeaning to say that the party intended that result; and he also pointed out that it would be inappropriate to say that the party held the intention if at the material date he was in effect not deciding to proceed, but feeling his way and reserving his decision until he should be in possession of financial data sufficient to enable him to determine whether the project would be commercially worth while.

Those observations of ASQUITH, L.J., have been mentioned with approval in the House of Lords in *Betty's Cafés, Ltd.* v. *Phillips Furnishing Stores, Ltd.* (6); and in *Reohorn* v. *Barry Corpn.* (7), a similar problem has been considered by the Court of Appeal. That was a case under the section, subsection and paragraph with which I am concerned in the present case. The applicants there were tenants. The landlords gave notice determining their tenancy, and when the applicants applied for a new tenancy under the Act, the landlords opposed the application on the ground that they intended to develop the site, together with adjoining land, as part of a comprehensive scheme. DENNING, L.J., after he had stated the facts, said this (8):

> " Such being the facts, the question is whether the intention required by the Act is satisfied. In *Fisher* v. *Taylors Furnishing Stores, Ltd.* (9) I pointed out (10) that the intention must be ' . . . a firm and settled intention, not likely to be changed . . . It must be remembered that, if the landlord, having got possession, honestly changes his mind and does not do any work of reconstruction, the tenant has no remedy.' In considering whether the court should be satisfied of the landlord's intention, I think that it may readily be satisfied when the premises are old and worn out or are ripe for development,

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(3) [1948] 2 All E.R. 635; [1948] Ch. 645.
(4) [1950] 1 All E.R. 720; [1950] 2 K.B. 237.
(5) [1950] 1 All E.R. at p. 724; [1950] 2 K.B. at p. 253.
(6) [1958] 1 All E.R. 607; [1959] A.C. 20.
(7) [1956] 2 All E.R. 742.
(8) [1956] 2 All E.R. at p. 744.
(9) [1956] 2 All E.R. 78; [1956] 2 Q.B. 78.
(10) [1956] 2 All E.R. at p. 80; [1956] 2 Q.B. at p. 84.

> the proposed work is obviously desirable, plans and arrangements are well in hand, and the landlord has the present means and ability to carry out the work. Such was the position in *Fisher* v. *Taylors Furnishing Stores, Ltd.* (11), and in several other cases which have come before this court. However, the court will not be so readily satisfied when the premises are comparatively new or the desirability of the project is open to doubt, when there are many difficulties still to be surmounted, such as the preparation and approval of plans or the obtaining of finance, or when the landlord has in the past fluctuated in his mind as to what to do with the premises. In those circumstances, even though he should assert at the hearing that he has a firm and settled intention, the court is not bound to accept it because of the likelihood that he may change his mind once he obtains possession. Such was the position in *Herbert* v. *Blakey* (*Bradford*), *Ltd.* (12) (a case under s. 30 (1) (g)) which was before this court on Jan. 11, 1956. In the present case, the premises are ripe for development and the proposed work is obviously desirable: the difficulty is to be satisfied that the landlords have the present means and ability to carry out the work. 'Intention' connotes an ability to carry it into effect. A man cannot properly be said to 'intend' to do a work of reconstruction when he has not the means to carry it out. He may *hope* to do so: he will not have the *intention* to do so."

Later in his judgment he makes reference (13) to the observations of ASQUITH, L.J., in *Cunliffe* v. *Goodman* (14) to which I have referred.

Those are the matters which the court will have to consider and on which the court will adjudicate when the substantive application in this case comes on for hearing. The question which I have to determine today is whether, for the proper disposing of those questions, it is right for me to order the landlords to make discovery of any documents in their possession which may relate to their ability to carry out their proposal, both from the point of view of having complied with any necessary conditions attaching to their planning consent, and matters of that nature, and with regard to their own ability, financial or otherwise, to make a profitable use of this property, if and when they obtain possession of it.

I ought, I think, to make reference to one other authority, *Re St. Martins Theatre, Bright Enterprises, Ltd.* v. *Lord Willoughby de Broke* (15), a case decided by DANCKWERTS, J. That, again, was a case under the Landlord and Tenant Act, 1954. It was a case in which the landlords were resisting the grant of a new lease, on the grounds open to them under s. 30 (1), paras. (a), (c) and (g). They had at one time proposed to resist the application under para. (f), which is the paragraph relevant to the present case, but they had abandoned that ground of opposition. There was evidence that considerable dilapidations had accrued under the lease, the liability of the tenant in respect of which amounted to £16,000. Cross-applications for discovery were made, the tenant asking for discovery and inspection of the landlord's income tax returns and pass sheets over three years, on the ground that they were relevant to the question whether the landlord could carry on a theatrical business himself. The landlord, on the other hand, asked for discovery and inspection of the tenant's balance sheets and profit and loss accounts during the period of the tenancy. DANCKWERTS, J., held that it was proper to order discovery by the tenant, because discovery of the tenant's financial position was relevant to the tenant's ability to fulfil his obligations under the covenants in the lease, but that it was inappropriate to order discovery by the landlord because the landlord was proposing to occupy the property himself, it was his own property, and the learned judge did not think that his financial position was, prima facie, a relevant matter. I refer to that case because it is a case in which, in proceedings under this Act, discovery has been ordered.

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(11) [1956] 2 All E.R. 78; [1956] 2 Q.B. 78.

(12) (Jan. 11, 1956), unreported.

(13) [1956] 2 All E.R. at p. 745.

(14) [1950] 1 All E.R. at p. 724; [1950] 2 K.B. at p. 253.

(15) [1959] 3 All E.R. 298.

It is not contended by counsel for the landlords that the court has not got power to order discovery if the circumstances are special circumstances justifying such an order, but he says that on originating summons the right to discovery is a very restricted right, and that discovery will only be ordered if there are circumstances which, in the particular type of proceedings before the court, are special circumstances. I think that I correctly state the effect of his submission when I say that he means that the nature of the proceedings themselves cannot be special circumstances, but that there must be some circumstances peculiar to the particular case.

Where the issues between parties have been particularised and defined in pleadings, but no evidence has been put on affidavit, as would be the normal course in proceedings in an action commenced by writ, there is, of course, an almost invariable right for a party to have discovery against his opponent of any documents in his opponent's possession or control which relate to matters in question in the proceedings. On the other hand, one has the kind of proceedings referred to by Lord Greene, M.R., in *Re Borthwick* (16) which are brought by originating summons, and where the issues are not defined in a way in which they are defined in pleadings, but appear from evidence-in-chief given on affidavits, in which in the normal case all the evidence-in-chief is to be found.

The present case falls between the two. The issues have not been defined in pleadings, and although they may be capable of being inferred from the affidavits which have been filed, I do not think that it would be right to say that they have been defined by those affidavits. On the other hand, the evidence so far filed is not anything like the whole evidence which it will be necessary for the parties to adduce at the trial.

The onus of proving the appropriate intention under s. 30 (1) (f), will, of course, rest on the landlords. It will be for them to prove that they in fact have a settled intention to carry out their project. Their project is, in my view, a project not only for demolition but for redevelopment, and I think that their intention to demolish prima facie depends on their being able to redevelop satisfactorily from their own point of view. Consequently, one has not only to look at the demolition stage. I think that, on the facts as at present known to the court, the intention to demolish is one which is tied up with the possibility of the landlords developing the property advantageously when they obtain possession. Counsel for the landlords quite rightly says that it will be for him to prove circumstances supporting the view that his clients have a firm and settled intention to carry out the project, and that he proposes to call evidence which will prove that. But the evidence before the court ought, in my view, to be properly tested, and in order to enable it to be properly tested it is right that the applicants should have an opportunity of arming themselves to cross-examine. When on proceedings by originating summons the affidavits contain all the evidence-in-chief, the other side knows what the material is in respect of which they have got to cross-examine, and in such a case, if they think that they need discovery and can make out a special case for it, on the authorities, the court would order discovery before the trial. In the present case, however, the evidence-in-chief is not yet on affidavit, the tenants do not know what it will be, and in order to put themselves in a position properly to cross-examine it seems to me that they ought to have discovery, as they would in an action between parties commenced by writ.

It therefore seems to me right that I should order discovery of such documents as may be proper for the landlords to discover bearing on the question whether or not they have got a firm and settled intention within the meaning of the authorities to carry out their project with regard to these premises in Piccadilly. I propose, therefore, to order discovery, but I shall want the assistance of counsel to consider what the extent of that discovery should be, because at the present time I am rather impressed with the suggestion made by counsel for the landlords that the present application is too wide in its scope, and I think that it is reasonable and right that the discovery should be restricted within suitable limits.

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(16) [1948] 2 All E.R. 635; [1948] Ch. 645.

[The order made was as follows: ". . . *that the respondents by their proper officer do . . . make and file a full and sufficient affidavit stating whether they have or have had in their possession or power any and* (*if any*) *what documents relating to the following matters and accounting therefor that is to say* (*a*) *planning permissions building and bye-law consents for the proposed demolition of the properties known as numbers 82 83 and 84 Piccadilly and/or the proposed reconstruction of the said three properties and each of them now in force or in respect of which application is being made or is required by the appropriate authority to be made together with all correspondence in connexion with any such application as aforesaid* (*b*) *agreements or contracts for the said proposed demolition and/or tenders agreements or contracts for the said proposed reconstruction of the said three properties and each of them together with all correspondence in connexion with any proposed agreement or contract for any such purposes as aforesaid* (*c*) *the financial position of the respondents to meet the expenditure involved in the said proposed demolition and the said proposed reconstruction being balance sheets and profit and loss accounts for the last two accounting years of the respondents for which accounts have been completed together with any agreements entered into between the respondents and any other party for the provision of finance in connexion with the said proposed demolition or reconstruction* (*d*) (*i*) *the respective interests of the various occupiers of 84 Piccadilly and* (*ii*) *the steps taken by the respondents to determine each such interest together with all correspondence in connexion therewith* . . ."]

Solicitors: *Evans, Baker & Co.* (for the tenants); *Samuel Sebba* (for the landlords).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

R. *v.* AGRICULTURAL LAND TRIBUNAL FOR THE SOUTH EASTERN AREA, *Ex parte* BRACEY.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Byrne and Donovan, JJ.), May 26, 1960.]

Certiorari—Error of law not appearing on face of record—Tribunal acting within its jurisdiction—Evidence wrongly admitted—Whether evidence to show error admissible.

Where an inferior tribunal acting within its jurisdiction makes an error of law (e.g., in acting on no evidence or in acting on evidence which ought to have been rejected or in failing to take into consideration evidence which ought to have been considered), certiorari cannot be granted to quash the decision of the tribunal for that error of law unless the error appears on the face of the record, and the court, on application for certiorari, is not entitled to look behind the record or to receive evidence for that purpose.

R. v. *Nat Bell Liquors, Ltd.* ([1922] 2 A.C. 128) and *R.* v. *Paddington & St. Marylebone Furnished Houses Rent Tribunal, Ex p. Kendal Hotels, Ltd.* ([1947] 1 All E.R. 448) followed; dictum of LORD GODDARD, C.J., in *R.* v. *Fulham, Hammersmith & Kensington Rent Tribunal, Ex p. Hierowski* ([1953] 2 All E.R. at p. 6) not followed.

The reasons given by an agricultural land tribunal for their decision to consent to the operation of a notice to quit referred to an admission in evidence by the tenant that he had had abortive negotiations with the landlord for the surrender of the land to which the notice applied. On application by the tenant for certiorari to quash this decision, the tenant contended that, as the negotiations had been without prejudice, the evidence as to them had been wrongly admitted and they should not have been taken into consideration. The fact that the negotiations had been without prejudice did not appear in the reasons given by the tribunal, or in any other part of the record, but the tenant filed affidavit evidence to this effect.

Held: as the tribunal was acting within its jurisdiction, and as the error alleged was one of law and did not appear on the record, the court could not look at the affidavit evidence and must refuse certiorari.

[**Editorial Note.** This decision may be conveniently considered with that in *Davies* v. *Price* ([1958] 1 All E.R. 671) where the remedy in relation to an error, not apparent on the face of the decision of the tribunal, lay, so it was intimated, by appeal rather than by application for certiorari (see particularly ibid., at p. 677).

As to the nature of evidence admissible on application for certiorari to quash for error in law, see 11 HALSBURY'S LAWS (3rd Edn.) 75, para. 138; and for cases on the subject, see 16 DIGEST 417-420, *2763-2797*.

For the Agriculture Act, 1958, s. 3, substituting a new sub-s. (1) in s. 25 of the Agricultural Holdings Act, 1948, see 38 HALSBURY'S STATUTES (2nd Edn.) 70.]

Cases referred to:

Hoghton v. *Hoghton*, (1852), 15 Beav. 278; 51 E.R. 545; 22 Digest (Repl.) 369, *3973*.

R. v. *Fulham, Hammersmith & Kensington Rent Tribunal, Ex p. Hierowski*, [1953] 2 All E.R. 4; [1953] 2 Q.B. 147; 117 J.P. 295; [1953] 2 W.L.R. 1028; 3rd Digest Supp.

R. v. *Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128; 91 L.J.P.C. 146; 127 L.T. 437; 16 Digest 419, *2795*.

R. v. *Paddington & St. Marylebone Furnished Houses Rent Tribunal, Ex p. Kendal Hotels, Ltd.*, [1947] 1 All E.R. 448; 176 L.T. 330; 31 Digest (Repl.) 730, *8127*.

Motion for certiorari.

This was a motion on behalf of Dacre James Bracey, the tenant of an agricultural holding, for an order of certiorari to quash an order of the Agricultural Land Tribunal for the South-Eastern Area dated Aug. 26, 1959, consenting, under s. 25 (1) (d) of the Agricultural Holdings Act, 1948* to the operation of a notice, dated Mar. 18, 1959, to quit part of the holding served on the tenant by his landlord, Noel Carrington. The facts are stated in the judgment of LORD PARKER, C.J.

D. A. Grant for the tenant.

Alan Fletcher for the landlord.

LORD PARKER, C.J.: I find it unnecessary to go into the details of the matter as disclosed in the reasons given by the tribunal. The application was on one of two grounds, either the ground set out in s. 25 (1) (a) of the Agricultural Holdings Act, 1948, as amended by the Agriculture Act, 1958, or under para. (d) of that subsection. As is well known, the landlord has to elect one or more grounds on which he seeks to get consent to the operation of a notice to quit, and (a) deals with husbandry and (d) deals with greater hardship.

The tribunal in their reasons came to the conclusion that the tenant was an exceedingly good farmer, that the landlord was also a good farmer, and that if the land in dispute was transferred to the landlord it would not be farmed any more efficiently. Therefore, there was no question of consent being granted under (a). So far as para. (d) is concerned, however, they came to the conclusion that while the land would be a great asset to the landlord in conjunction with his land, the tenant would not be seriously prejudiced by the loss of the disputed land and, exercising their discretion, they accordingly, by a majority, consented to the operation of the notice to quit on the ground of greater hardship. In arriving at that conclusion, however, they stated this:

> "He [that is the tenant] says that to lose the disputed land would upset the whole of his economy and that the possession of it is almost vital to his farming economy and that he would go to any lengths to retain it, but he had to admit in cross-examination that three years ago he negotiated with his then landlord to surrender the 328 acres [the 328 acres included the 115 acres, the land in dispute] if he was paid £3,000 and that in February of this year, [that is, just before the notice to quit was served] through his agents, he again negotiated with the [landlord's] agents to surrender the disputed land."

The ground on which the order of certiorari is sought is really this, that those negotiations in February between the landlord and tenant in this case were, if we were entitled to look at them, negotiations conducted without prejudice; that, accordingly, the tribunal had no right to allow evidence to be given in regard to them and that they took into consideration matters which they were not entitled to take into consideration. I think that if one got as far as that, it would be impossible to say that those negotiations in February, of which evidence was given, did not affect the tribunal's mind.

However, the first question is whether we are entitled to look behind the reasons. As has been said many times, certiorari is a special remedy. It goes when there has been a want of jurisdiction, and in that expression, " want of jurisdiction ", matters akin thereto are covered, such as a decision obtained by fraud or bias on the part of members of the tribunal or, indeed, a case where there has been a breach of some principle of natural justice, like receiving evidence from one party in the absence of the other. The other main ground on which certiorari may be moved is that, when there is a speaking order, as there is here, there is an error of law on the face of the record. There is, however, this vital distinction between the two main grounds, that where it is said the tribunal have gone wrong in law while acting within their jurisdiction, this court can only interfere if they can see that error on the face of the record, whereas if certiorari is moved for for want of jurisdiction the court is entitled to look at affidavit evidence to see whether or not there was jurisdiction. Here, I am quite satisfied that on the face of this order which I have read it is impossible to say that there was any error of law. There is nothing here to disclose whether these negotiations were without prejudice negotiations or not. Accordingly, looking at the face of this record, it discloses no error of law, and accordingly on well-known principles it would be impossible for this court to go behind it and look at affidavit evidence.

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* The Agricultural Holdings Act, 1948, s. 25 (1), substituted by the Agriculture Act, 1958, s. 3, provides that "The Agricultural Land Tribunal shall consent . . . to the operation of a notice to quit . . . part of an agricultural holding if, but only if, they are satisfied as to one or more of the following matters . . . that is to say—(a) that the carrying out of the purpose for which the landlord proposes to terminate the tenancy is desirable in the interests of good husbandry as respects the land to which the notice relates, treated as a separate unit; or . . . (d) that greater hardship would be caused by withholding than by giving consent to the operation of the notice; . . ."

Section 3 of the Act of 1958 was brought into operation on Jan 26, 1959, by the Agriculture Act, 1958 (Appointed Day) (England and Wales) Order, 1959 (S.I. 1959 No. 80).

Mr. Grant—and the court is indebted to him for his argument—maintains on behalf of the tenant that on the assumption for this purpose that the negotiations were without prejudice, it is a matter which goes beyond, as he puts it, a mere rule of evidence, and means that the tribunal are taking into account matters which have been referred to in the cases as " sacred ". He refers to *Hoghton* v. *Hoghton* (1). He says that certiorari will then lie on the basis that there has been a want of jurisdiction. He relied very strongly on a dictum—I think it was only a dictum—of Lord Goddard, C.J., in giving judgment in this court in *R.* v. *Fulham, Hammersmith & Kensington Rent Tribunal, Ex p. Hierowski* (2). It is unnecessary to refer to the facts, but in that case there is a passage (3) which reads as follows:

> " But there is another ground on which, in my opinion, the court is bound to grant certiorari. If it can be shown that an inferior tribunal has come to its decision by taking into account matters which it ought never to have taken into account and are virtually extraneous to what they have to decide, that is a ground for granting certiorari. The chairman, in his affidavit, has frankly stated that the tribunal acted as they did on grounds which appear to this court to be entirely irrelevant . . ."

I confess that when I was referred to that passage with which I, as a member of the court, agreed (4), I was worried, but I notice that in the Law Reports when the matter was revised (5) that particular passage is omitted. There is a clear distinction between a tribunal that acts without jurisdiction and one which goes wrong in law while acting within its jurisdiction, e.g., in acting on no evidence or in acting on evidence which ought to have been rejected or in failing to take into consideration evidence which ought to have been considered. Those are all matters of law, and unless the error appears on the record, no order for certiorari can be obtained. It is unnecessary to read the well-known passages again in Lord Sumner's speech in the House of Lords in *R.* v. *Nat Bell Liquors, Ltd.* (6). Nor do I think it necessary to refer to another decision of this court, *R.* v. *Paddington & St. Marylebone Furnished Houses Rent Tribunal, Ex p. Kendal Hotels, Ltd.* (7), where the position is again fully set out and where the difference between certiorari and mandamus in regard to a matter of this sort is clearly drawn. I am quite satisfied that we are not entitled to look at any affidavit

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(1) (1852), 15 Beav. 278 at p. 321.

(2) [1953] 2 All E.R. 4; [1953] 2 Q.B. 147.

(3) [1953] 2 All E.R. at p. 6. This passage is in accordance with the transcript taken by the official shorthand writer.

(4) [1953] 2 All E.R. at p. 8; [1953] 2 Q.B. at p. 152.

(5) [1953] 2 Q.B. 147 at p. 151.

(6) [1922] 2 A.C. at pp. 151, 152.

(7) [1947] 1 All E.R. 448.

A evidence, in other words to go behind the record in this case, and on the record I can see no error of law. Accordingly, I would refuse this application.

BYRNE, J.: I agree, for the reasons already stated by my Lord.

DONOVAN, J.: I agree.

Application refused.

B Solicitors: *Robbins, Olivey & Lake*, agents for *Burges, Salmon & Co.*, Bristol (for the tenant); *Pennington & Son*, agents for *Lemon, Humphreys, Parker & Mather*, Swindon (for the landlord).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

C

SPEIDEL *v.* PLATO FILMS, LTD. AND OTHERS.
SAME *v.* UNITY THEATRE SOCIETY, LTD.

D [COURT OF APPEAL (Ormerod and Devlin, L.JJ.), April 28, 29, May 19, 1960.]

Libel—Pleading—Evidence in mitigation of damages—Plea of justification—Intention of defendant to adduce evidence as to character of plaintiff—Issues of fact not arising out of preceding pleadings—R.S.C., Ord. 19, *r.* 15.

The plaintiff claimed damages for libel and in his statement of claim E alleged that in a film alleged to have been published and exhibited by the defendants he was depicted as having been a party to the murders of King Alexander of Yugoslavia and M. Barthou in 1934 and of having betrayed Field-Marshal Rommel to the Nazis in 1944. By their defence the defendants pleaded justification and, in para. 5, alleged in the alternative that in mitigation of damages they would give evidence in chief (a) as to the F circumstances under which the libel was published and (b) as to the character of the plaintiff. As particulars under (A) it was alleged that the pictures and words of which the plaintiff complained " were published and exhibited as part of the film wherein the plaintiff was further depicted as having been guilty of the conduct hereinafter set out the truth of which the plaintiff in his amended statement of claim does not deny; namely, that he: (a) . . . was G party to and/or responsible for acts which were war crimes and/or against humanity and/or atrocities, namely ", and then there were set out various specific war crimes. In particulars under (B) it was alleged that " the plaintiff is widely reputed to have been and in fact was " (i) guilty of the murders and betrayal in respect of which the plea of justification had been raised, (ii) concerned in developing, directing and enforcing Nazi anti-H Jewish policy and (iii) an advocate of and believer in the suppression of German democratic political life. The plaintiff applied to strike out the whole of para. 5 of the defence.

Held: (i) the defendants were entitled, with a view to mitigation of damages to adduce evidence in chief that the reputation which the plaintiff in fact had was a bad reputation; but (a) such evidence must be confined to his I general reputation and must not be evidence of specific instances of misconduct (see p. 525, letters B to E, post), and (b) such evidence must be confined to bad reputation of a nature so related to the alleged libel that it was matter which a reasonable jury could properly take into account as diminishing the damages which, but for it, they would award (see p. 526, letter I, post).

Scott v. *Sampson* ((1882), 8 Q.B.D. 491) and *Hobbs* v. *Tinling* ([1929] All E.R. Rep. 33) applied on (a) above.

(ii) accordingly, para. 5 of the defence should be amended so as to exclude evidence of specific acts and to be confined to relevant bad reputation;

as amended it would read "in mitigation of damages the defendants will at the trial give evidence in chief that the plaintiff had . . . a bad reputation as a man who was party to and/or responsible for acts which were war crimes and/or against humanity and/or atrocities", but it would be for the trial judge to decide whether evidence of bad reputation of this sort was admissible in this particular case, the present decision being merely that such evidence was not wholly inadmissible (see p. 527, letters C to E, post).

(iii) the evidence of bad reputation which thus might be given by the defendants raised, for the purposes of pleading, issues of fact not arising out of the preceding pleadings (within the words of R.S.C., Ord. 19, r. 15), and thus introduced matter which was material fact proper to be pleaded.

Wood v. *Durham* (*Earl*) ((1888), 21 Q.B.D. 501) overruled.

[**Editorial Note.** The decision in this case would appear to resolve a doubt created by the wording of R.S.C., Ord. 36, r. 37. By that rule, where there is no plea of justification, the defendant may not give, with a view to mitigation of damages, evidence in chief as to either "the circumstances under which the libel or slander was published" or "the character of the plaintiff", without the leave of the judge, unless at least seven days before the trial he has given particulars to the plaintiff of the matters as to which he intends to give evidence. It was possibly open to argument, therefore, that where justification was pleaded, R.S.C., Ord. 36, r. 37, would not apply and that accordingly the defendant would not be required to give particulars before the trial of any matters which he intended to give in evidence in mitigation of damages. The Court of Appeal in the present case, however, decided that such evidence (e.g., general evidence of bad character) raised a material issue of fact which should be pleaded.

As to evidence in mitigation of damages at common law, see 24 HALSBURY'S LAWS (3rd Edn.) 116, para. 217, note (f); and for cases on the subject, see 32 DIGEST 166, 167, *2021-2047*.]

Cases referred to:

Hobbs v. *Tinling*, *Hobbs* v. *Nottingham Journal*, [1929] All E.R. Rep. 33; [1929] 2 K.B. 1; 98 L.J.K.B. 421; 141 L.T. 121; 30 Digest (Repl.) 267, *318*.

Scott v. *Sampson*, (1882), 8 Q.B.D. 491; 51 L.J.Q.B. 380; 46 L.T. 412; 46 J.P. 408; 32 Digest 167, *2045*.

Wood v. *Durham* (*Earl*), (1888), 21 Q.B.D. 501; 57 L.J.Q.B. 547; 59 L.T. 142; 32 Digest 167, *2039*.

Interlocutory Appeal.

These were appeals by the defendants in two actions against orders of SACHS, J., in chambers dated Mar. 31, 1960, whereby he dismissed the defendants' appeals against orders of Master CLAYTON dated Nov. 16, 1959.

In the first action the plaintiff claimed damages for libel against Plato Films, Ltd., the distributors, and against one Stanley Forman and one Kenneth John Edward Smith, directors of the company, in respect of the exhibiting of a sound film entitled "Operation Teutonic Sword", and alleged that the photographic pictures and words depicted him (a) as a party to the murders of King Alexander of Yugoslavia and Monsieur Barthou in October, 1934, and (b) as having betrayed Field-Marshal Rommel to the Nazis in or about June, 1944. By their defence, para. 3 and para. 4, the defendants admitted that the plaintiff was so depicted by the photographic pictures and words and pleaded that "The said photographic pictures and words are true in substance and in fact". Paragraph 5 read as follows:

> "Alternatively in mitigation of damages the defendants will at the trial of this action give evidence in chief as to the circumstances under which the alleged libel was published and as to the character of the plaintiff.
>
> "(A) Particulars of circumstances under which the alleged libel was published.

> " The photographic pictures and words of which the plaintiff complains were published and exhibited as part of the film wherein the plaintiff was further depicted as having been guilty of the conduct hereinafter set out the truth of which the plaintiff in his amended statement of claim does not deny; namely that he:
>
> " (a) while Chief of Staff to the Military Commander in Occupied France between about September, 1940, until about May, 1942, was party to and/or responsible for acts which were war crimes and/or against humanity and/or atrocities namely: (i) the taking and/or shooting of civilians or others as hostages; (ii) the deportation and/or removal to concentration camps and/or to the East of Jewish and other persons; (iii) the execution in Occupied France of the decrees whereunder the aforesaid and similar acts were carried out. The defendants rely on those parts of the said film which correspond with paras. 140 and 169 (inclusive) and 287 thereof.
>
> " (b) while Chief of General Staff to German Army Groups during the retreat of the German Armies in the U.S.S.R. was party to and/or responsible for acts generally accepted among civilised peoples as being contrary to the rules of warfare and/or wanton destruction of property and/or of terrorisation. The defendants will rely on the parts of the said film corresponding with paras. 170 to 200 (inclusive) and 204 thereof.
>
> " (c) while being a military attaché on the staff of or attached to the German Embassy in Paris between in/or about the period between 1934 and 1938 (inclusive) engaged in espionage on behalf of Nazi Germany in preparation for the invasion of France. The defendants rely on those parts of the said film which correspond with paras. 99 to 112 (inclusive) 140 and 202 thereof.
>
> " (d) while being a military attaché on the staff of or attached to the German Embassy in Madrid in and about 1939, engaged in espionage on behalf of Nazi Germany against France, Great Britain and North Africa. The defendants will rely on those parts of the said film which correspond with paras. 112, 113 and 202 thereof.
>
> " (B) Particulars of the matters relating to the character of the plaintiff.
>
> " The plaintiff is widely reputed to have been and in fact was: (i) guilty of the conduct alleged against him in the said film as set out in paras. 3, 4 and 5 (a) hereof; (ii) while Chief of Staff to the Military Commander in Occupied France between the aforesaid dates: (a) concerned in enforcing and carrying out the General Staff and other orders relating to the taking, selection, arrest, detention, execution and deportation of hostages; (b) concerned in developing directing and enforcing Nazi anti-Jewish policy in Occupied France; (iii) since 1926, an advocate of and believer in the suppression of German democratic political life."

In the second action, between the plaintiff and Unity Theatre Society, Ltd., the plaintiff claimed damages for the same libels against the defendants in respect of the exhibiting of the same film. By their defence the defendants raised in para. 4 and para. 5, identical pleas of justification to those in para. 3 and para. 4 of the defence in the first action. Paragraph 6 of the defence in the second action so far as is material read as follows:

> ". . . the character credit and reputation of the plaintiff as having been concerned in inhuman barbarities and mass murder as set out in para. 7 hereof are such that they could not be harmed by any publication therein complained of."

Paragraph 7 was substantially in the same terms as para. 5 of the defence in the first action.

The plaintiff applied to strike out para. 5 of the defence in the first action and para. 6 and para. 7 in the second action. On Nov. 16, 1959, Master Clayton made an order striking out these paragraphs. The defendants appealed and on Mar. 31, 1960, Sachs, J., dismissed the appeals. The defendants now appealed to the Court of Appeal. In their judgment the Court of Appeal dealt only with the pleadings in the first action.

Roy Wilson, Q.C., and *D. J. Turner-Samuels* for the defendants in the first action.

Roy Wilson, Q.C., and *J. F. F. Platts-Mills* for the defendants in the second action.

J. G. Foster, Q.C., and *Colin Duncan* for the plaintiff.

Cur. adv. vult.

May 19. **DEVLIN, L.J.**, reading the judgment of the court at the request of Ormerod, L.J., said: The plaintiff is the Supreme Commander of Allied Land Forces in Central Europe and he has brought an action against the defendants alleging that he has been libelled in a film exhibited by them called "Operation Teutonic Sword". He alleges that in this film he is depicted as being a party to the murders of King Alexander of Yugoslavia and Monsieur Barthou in October, 1934, and of having betrayed Field-Marshal Rommel to the Nazis in or about June, 1944. The defendants admit that the film showed the plaintiff as privy to the murders in 1934 and as having betrayed Field-Marshal Rommel; and they allege that these things are true. They say also that there is a great deal of other material in the film which is just as defamatory of the plaintiff, showing him as being responsible for war crimes of various sorts, and that the plaintiff makes no complaint about that. So they want to say in effect: "Even if we did falsely accuse the plaintiff of being a murderer, can his reputation be worth much if he is prepared to sit down under a charge of being a war criminal and makes no complaint about it?"

There are two things to be said at the outset. The first is that the plaintiff does not accept that the film shows him as implicated in any war crimes. So a very curious position is created. The defendants are saying that their statements about the plaintiff are even more defamatory than he thinks they are. Since we are dealing with a summons to strike out a part of the defence, we have to assume that the allegations in that part are true. We have, therefore, to assume that there are parts of the film that do show the plaintiff as guilty of war crimes. But it is only fair that we should make it quite clear in our judgment, as counsel for the plaintiff has done in argument, that the plaintiff himself does not accept that. It would be quite wrong for anyone to say that these proceedings prove General Speidel to be the sort of man who does not resent the charge of having committed war crimes. We have no reason to believe that if he considered that he had been defamed in this respect, he would not have taken the same action in regard to that libel as he has taken in regard to those that have been admitted. The second thing is that the question whether the defendants should be allowed at the trial to make the sort of comment which I have summarised above and which they would clearly like to make, will be a matter for the trial judge. It will also be for him to determine whether the jury should see the whole film, including those parts which are supposed to represent the plaintiff as a war criminal, or whether they should see only the parts that are relevant to the libel. We express no opinion on these matters because we are concerned with questions of the admissibility of evidence only in so far as they enter into the point of pleading.

The question that we have to decide is whether para. 5 of the defence, which sets out the matters which I have indicated in support of the plea in mitigation of damages, should be struck out. In a decision which we gave recently in this court (1), we said that we would not on an application of this sort ordinarily decide arguable questions on the admissibility of evidence; they are for the judge at the trial. Following the principle that is well established when an

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(1) *Curtis* v. *Fay*, (Apr. 26, 1960) (unreported).

A application is made to strike out a statement of claim as showing no cause of action, we should strike out matter as inadmissible only if it is plainly inadmissible. If it can reasonably be argued at the trial that the matter is relevant, it cannot as a general rule be scandalous or embarrassing or otherwise harmful to the opposite party by pleading it.

There is no doubt that a defendant in a libel action may in mitigation of B damages give evidence that the plaintiff bears a bad character. The word "character" is not here used in the sense of a man's quality or disposition, but in the sense of the reputation which he bears. The action for libel is an action for loss of reputation. On the issue of damage what has to be investigated is not whether the plaintiff is in truth a good or a bad man, but whether he is reputed to be a good or a bad man. If a man's reputation is already so bad C that it cannot be made worse, the man who defames him will in fact have done him no further damage; and it is nothing to the point to say that his previous reputation was unjustly bestowed on him. What is relevant is what sort of reputation the plaintiff has in fact, not whether he ought to have it or not. Further, the inquiry must be limited to general reputation. If under the guise of investigating what sort of reputation a man bears, one were to investigate D whether he was thought or said to have committed specific acts, the inquiry would soon degenerate into an inquiry about what a man had actually done in his past life as ascertained by rumour and not by fact. All this is laid down in *Scott* v. *Sampson* (2) and *Hobbs* v. *Tinling* (3), particularly per SCRUTTON, L.J. (4). SCRUTTON, L.J., says clearly (5) that one cannot prove in chief specific instances of misconduct, as distinguished from general reputation, whether E involved in the libel or not, in order to mitigate damages.

Paragraph 5 of the defence, which we have to consider in this case, is divided into two main sub-paragraphs (A) and (B). In our opinion sub-para. (A), which bears the dubious headnote, "Particulars of circumstances under which the alleged libel was published", is simply an attempt to circumvent the rule which I have just stated. The sub-paragraph alleges that the libel complained F of is

> "part of the film wherein the plaintiff was further depicted as having been guilty of the conduct hereinafter set out the truth of which the plaintiff in his amended statement of claim does not deny."

G The guilty conduct is then particularised under the description of various war crimes.

We say that this is an attempt to circumvent the rule because it is an attempt to get in specific allegations of misconduct on matters which are not in issue. It does not matter whether the allegations are to be found in the same film as the libel or in some other distinct film or document; unless they are pleaded H as defamatory and justified, they cannot be gone into. The defendants do not therefore allege that the allegations are true. Counsel for the defendants agrees that it is not open to him to do so. They do not allege that they are untrue; if they did, it would aggravate the damages and not mitigate them. They want to put them before the jury as matters that are neither true nor untrue. If these matters are left in that state, how can they help the jury in the assessment I of damages? They will help only if the defendants can manage to convey with them the innuendo that because they have not been denied by the plaintiff, they are to be taken as true. This is the point of the words: "the truth of which the plaintiff in his amended statement of claim does not deny". These words are embarrassing in the pleader's sense of the term. They imply that there is some obligation on a plaintiff, which there is not, to go through the whole film or book in which a libel is contained and admit or deny the truth of everything in it that is said against him. The sum of the matter is that it is not open to the defendants to assert or to insinuate that these allegations are true. It is not open to them to tender evidence from which it might be inferred that the plaintiff is the sort of man who does not resent defamatory charges because that would be to give evidence of character in the sense of quality or disposition and not of reputation. Sub-paragraph (A) therefore introduces matters that are plainly inadmissible, that are scandalous in their content and embarrassing in their effect and that ought to be struck out.

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(2) (1882), 8 Q.B.D. 491. (3) [1929] All E.R. Rep. 33; [1929] 2 K.B. 1.
(4) [1929] All E.R. Rep. at p. 40; [1929] 2 K.B. at p. 17.
(5) [1929] All E.R. Rep. at p. 40; [1929] 2 K.B. at p. 18.

Sub-paragraph (B) is more closely designed to raise what is permissible. It bears the headnote " Particulars of the matters relating to the character of the plaintiff ". It begins with the general allegation that " the plaintiff is widely reputed to have been and in fact was " guilty of the various matters which I have described broadly as war crimes. We think that, quite apart from two obvious defects which counsel for the defendants concedes, this paragraph as it stands is embarrassing because what is being alleged is that the plaintiff is reputed to have done certain bad acts, and that he is reputed to be a bad person. The latter is admissible and the former is not. We agree that it is not always easy for the pleader to use appropriate language which draws this distinction, but we think that it could be made clearer than it is. In considering whether or not the pleading should be struck out because of this, we have had regard to the fact that there are two admitted defects, which will have to be remedied anyway; and also a third one which in our judgment necessitates a substantial part of the sub-paragraph being struck out.

The first admitted defect is in the sentence which I have already quoted,— " the plaintiff is widely reputed to have been and in fact was ". Counsel for the defendants agrees that it is inadmissible to go into the facts and that the words " and in fact was " must come out. The second admitted defect is that the sub-paragraph alleges the plaintiff to have been reputedly guilty not only of war crimes but also of the conduct alleged against him in para. 3 and para. 4 of the defence; that conduct is the murder and betrayal which those paragraphs seek to justify. This is clearly an attempt to prove, not the bad reputation itself, but specific acts of misconduct as justifying it and is, therefore, inadmissible. It would, of course, be most embarrassing if the defendants were permitted to call evidence that the plaintiff was reputed to be guilty of the very acts which, under their plea of justification, they must prove that he actually did.

In addition to these admitted defects there are two allegations in the sub-paragraph which in our judgment cannot remain. One alleges that the plaintiff was concerned in developing, directing and enforcing Nazi anti-Jewish policy in Occupied France; and the other alleges that since 1926 he was an advocate of and believer in the suppression of German democratic political life. The bad reputation which is pleaded in mitigation of damages must bear some relation to the libel that is complained of. You cannot, for example, mitigate the fact that you have falsely called a man a traitor by proving that he had a reputation for loose morals. There does not appear to be any authority on this point. In GATLEY ON LIBEL AND SLANDER (4th Edn.), at p. 629, it is submitted as being the rule that

> " Evidence of general bad reputation must . . . be confined to the *particular trait* in the plaintiff's character which is attacked by the libel."

This may be too narrow. We would prefer to state the principle as being that the evidence must be confined to matter which a reasonable jury could properly take into account as diminishing the damages which they would otherwise have awarded. The enforcement of anti-Jewish policy in Occupied France may, of course, have involved the commission of atrocities; but if so, that is covered under the general term of war crimes which we shall next consider. Apart from that, no jury ought to diminish the damages that they would award

A to a man falsely accused of murder and betrayal because they hear that he has a reputation for anti-Jewish and anti-democratic activities, however repugnant such activities may be to them.

All that is now left in sub-para. (B) is the allegation about war crimes which incorporates and also largely repeats the material in sub-para. (A). As I have already said, we accept counsel for the plaintiff's submission that the language B used by the pleader does not show clearly enough that his case will be confined to reputation and will not extend to specific facts. Counsel for the plaintiff agrees that the pleader is not confined to alleging simply that the plaintiff has a bad reputation; he must be permitted—and, we think, can be compelled—to specify what sort of bad reputation is being alleged. The form of words used in sub-para. (A) (a) is, we think, permissible and counsel for the defendants agrees C that it would be sufficient for his purpose. We shall, therefore, order that para. 5 be struck out except for the introductory words which are as follows:

> " Alternatively in mitigation of damages the defendants will at the trial of this action give evidence in chief ",

and we shall give leave to the defendants to amend by adding thereafter:

D

> " that the plaintiff had on or before Nov. 19, 1958, a bad reputation as a man who was party to and/or responsible for acts which were war crimes and/or against humanity and/or atrocities."

This is based on our view that evidence of a reputation of this sort is not plainly inadmissible. We are not holding that it is admissible. That will be for the E judge at the trial to decide in the light of all the circumstances as he sees them when the question is put.

In arriving at these conclusions, we have approached the matter in a different way from that taken by the learned judge and have reached a slightly different result. We have considered the admissibility of the matters pleaded in para. 5; the learned judge decided that, whether admissible or not, they ought not to F be pleaded. He reached this conclusion on the authority of *Wood* v. *Earl of Durham* (6), a decision of the Divisional Court which—with some reluctance, so we are told—he felt bound to apply. On the same authority counsel for the plaintiff has submitted in the alternative that the whole of para. 5, whether or not it contains matter admissible at the trial, should be struck out as improperly pleaded.

G In *Wood* v. *Durham* (6), the plaintiff, a professional jockey, sued to recover damages for a libel charging him unfairly and dishonestly riding the horses in a particular stable. The defendants delivered a defence pleading justification and later sought leave to amend it by adding a paragraph in which they alleged that the plaintiff was commonly reputed to have been in the habit of unfairly and dishonestly riding racehorses. The application was refused on the ground H that whether the allegation would be admissible at the trial or not, it ought not to be pleaded. We are dealing with an application to strike out a paragraph that is already in the pleading and it is not the practice to do that merely because the matter alleged is unnecessary. It may be that different considerations arise when an application is being made for leave to amend. But the order which we propose grants leave to the defendants to amend their defence in the form of I an allegation very similar to that in *Wood* v. *Durham* (6); and it is, therefore, an authority with which we must deal.

The correctness of the decision in *Wood* v. *Durham* (6) has been doubted in the text-books. It is difficult to read the judgments of MANISTY, J., and HAWKINS, J., without feeling that they thought of *Scott* v. *Sampson* (7) as having been wrongly decided and did not believe that the matter complained of would be admitted at the trial. In this they were wrong, for *Scott* v. *Sampson* (7)

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(6) (1888), 21 Q.B.D. 501.

(7) (1882), 8 Q.B.D. 491.

A has been approved by this court in *Hobbs* v. *Tinling* (8). Counsel for the defendants has invited us to say that *Wood* v. *Durham* (9) was wrongly decided. We think that we should so hold and should not follow it. The decision was based on R.S.C., Ord. 21, r. 4, which provides that no denial or defence shall be necessary as to damages claimed or their amount. The Divisional Court held that matter which went only to mitigation of damage was not, therefore, a material fact within R.S.C., Ord. 19, r. 4. B

R.S.C., Ord. 19, contains the rules which apply to pleadings generally and R.S.C., Ord. 20 and R.S.C., Ord. 21 contain the rules relating to the statement of claim and defence and counterclaim respectively. R.S.C., Ord. 19, r. 15, specifies certain matters which the defendant or plaintiff "must raise by his pleading", and which should, therefore, be regarded as material within the meaning of R.S.C., Ord. 19, r. 4. The matters which must be raised under C r. 15 include

> "all such grounds of defence . . . as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings."

It may be that, as was said in *Wood* v. *Durham* (9), evidence of bad reputation D is not a ground of defence because it goes only to damages. We do not pause to deal with that, because it is sufficient if the matter introduced raises a new issue of fact. A plaintiff who has come to meet two specific charges, one of murder in 1934 and another of treachery in 1944, and who finds that it is also being said against him that he has an evil reputation as a war criminal, could rightly complain that this is a new issue of fact. It raises the sort of issue E on which, as CAVE, J., anticipated in *Scott* v. *Sampson* (10), a plaintiff would wish to come "prepared with friends who have known him to prove that his reputation has been good". In our judgment the conclusion of CAVE, J., in the same part of his judgment that general evidence of bad character is a material fact was correct. The rule on which the court in *Wood* v. *Durham* (9) relied in R.S.C., Ord. 21, is a rule which relates only to defence and must be read F subject to the general rules of pleading in R.S.C., Ord. 19. It makes unnecessary a general plea that no damage has been suffered; but it would not excuse the failure to raise in the pleading any matter that comes within R.S.C., Ord. 19, r. 15.

Appeal allowed in part.

Solicitors: *Garber, Vowles & Co.* (for the defendants); *Holland & Co.* (for the plaintiff).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(8) [1929] All E.R. Rep. 33; [1929] 2 K.B. 1.
(9) (1888), 21 Q.B.D. 501.
(10) (1882), 8 Q.B.D. at p. 503.

SOCIÉTÉ FRANCO TUNISIENNE D'ARMEMENT *v.* SIDERMAR S.P.A.

[QUEEN'S BENCH DIVISION (Pearson, J.), May 12, 13, 16, 17, 18, 1960.]

Contract—Frustration—Charterparty—Blocking of Suez Canal—Alternative longer route—Construction of charterparty—Whether charterparty frustrated by closing of canal—Basis of doctrine of frustration—Whether frustrating event must have been unforeseen at the time of the contract.

Estoppel—Estoppel in pais—Estoppel by conduct—Charterparty—Voyage via Suez Canal—Canal blocked to shipping—On arrival of vessel at loading port shipowners aware that canal blocked—Notice of readiness to load nevertheless given by vessel and cargo permitted by shipowners to be loaded by charterers' agents—No representation of fact—Promissory estoppel inapplicable.

Contract—Quantum meruit—Charterparty—Frustration of charterparty through blocking of Suez Canal—Goods carried in shipowners' vessel via Cape of Good Hope with consent of charterers—Shipowners entitled to a reasonable remuneration for carrying goods via Cape.

In considering whether a written contract has been frustrated by fundamental alteration of the situation in which the thing contracted for was to be done the essential comparison is between that which the party contracted to do (which is a question of construing the contract in the light of the surrounding circumstances) and that which, in the event, had to be done to fulfil the job undertaken; in construing the contract the fact that at the time when the contract was made the parties appreciated that a certain event might occur is one of the surrounding circumstances to be taken into account, and does not prevent the contract being frustrated by the happening of the event (compare p. 536, letter A, p. 538, letters F and G, p. 539, letters A and B, and p. 541, letters H and I, post).

Speeches in *Davis Contractors, Ltd.* v. *Fareham U.D.C.* ([1956] 2 All E.R. 145) and dictum of VISCOUNT SIMON in *British Movietonews, Ltd.* v. *London & District Cinemas, Ltd.* ([1951] 2 All E.R. at p. 625) considered.

Bank Line, Ltd. v. *A. Capel & Co.* ([1919] A.C. 435), *Tatem, Ltd.* v. *Gamboa* ([1938] 3 All E.R. 135), *Jennings & Chapman, Ltd.* v. *Woodman, Matthews & Co.* ([1952] 2 T.L.R. 409) and *Blane Steamships, Ltd.* v. *Minister of Transport* ([1951] 2 K.B. 965) followed.

By charterparty dated Oct. 18, 1956, the Massalia was chartered to proceed to Masulipatan, on the east coast of India, and having loaded a cargo of iron ore there, to proceed " with all convenient speed . . . to Genoa." Clause 19 of the charterparty required the vessel, on leaving the last port of discharge before reaching Masulipatan, to wire the shippers at Madras failing which the shippers were allowed one extra day for loading. By cl. 37 the captain was to telegraph the charterers at Genoa " on passing Suez Canal ". The charterparty fixed the rate of freight at 134s. per long ton. At the date of the charterparty both the shipowners and the charterers appreciated that the crisis consequent on the nationalisation of the Suez Canal by Egypt in July, 1956, might culminate in resort to force resulting in the canal being closed to shipping, and that if the Suez Canal, which was the shortest and the customary route from Masulipatan to Genoa were closed, the shortest practicable route would be via the Cape of Good Hope. From Oct. 29, 1956, to Nov. 7, 1956, when a general cease fire took effect, there was fighting between Egyptian and Israeli forces and on Nov. 5 and Nov. 6 landings of British and French troops took place in the Port Said and Port Fuad areas. By Nov. 4, 1956, at least eight ships had been sunk in the Suez Canal, blocking it to shipping. By Nov. 9, when the vessel arrived at Masulipatan for loading, the shipowners and charterers each appreciated that the Suez Canal was blocked and was likely to remain blocked for a period which would end the commercial purpose of the parties' venture, if the vessel were to wait for the canal's re-opening. Nevertheless, on arrival of the vessel at Masulipatan, notice of readiness to load was given; the charterers then tendered a cargo of 4,951 long tons of iron ore, which was loaded on the vessel between Nov. 13, and Nov. 18, 1956, with the master's permission, and a bill of lading, dated Nov. 18, 1956, was issued in respect of the cargo. On Nov. 19 the vessel sailed from Masulipatan for Genoa. On Nov. 20 the shipowners informed the charterers that the blocking of the Suez Canal had frustrated the charterparty; the charterers denied frustration and the parties later agreed to submit this dispute to arbitration, pending which the charterers would pay freight at the charterparty rate. Meanwhile, the vessel was proceeding to Genoa via the Cape of Good Hope; she arrived at Ceuta in the Mediterranean on Feb. 8, 1957, where she off-loaded some of her cargo on to another vessel to comply with the international convention regarding winter load lines. The two vessels arrived at Genoa on Feb. 16, 1957, and delivered their total cargoes of 4,904.635 long tons of iron ore on which the charterers paid freight at the charterparty rate of 134s. per long ton.

The distance from Masulipatan to Genoa via the Cape was about twice the distance via the Suez Canal. The extra distance round the Cape rendered the voyage more expensive and exposed the Massalia to maritime hazards for a longer period, but she was capable of withstanding the hazards of a voyage via the Cape. There was no appreciable risk of damage to or deterioration of the cargo by going via the Cape. There was no evidence that another voyage was fixed to follow that from Masulipatan to Genoa or that any trading schedule was dislocated by the voyage via the Cape. If the voyage had been performed via the Suez Canal, the vessel would have arrived at Genoa on about Dec. 16, 1956, so that the cargo loaded at Masulipatan would have exceeded the quantity she could have carried if she was to arrive at Genoa in December laden no deeper than her winter marks; further, on a voyage via the canal the vessel could not have carried more cargo than she was capable of carrying, under international convention, via the Cape. A reasonable remuneration for the carriage of cargo from Masulipatan to Genoa via the Cape of Good Hope was 195s. per long ton.

Held: (i) the charterparty was frustrated by the closing of the Suez Canal since—

(a) on its true construction, in particular in view of cl. 37 of the charterparty and the circumstances surrounding the making of the contract, it was an implied term of the charterparty that the vessel was to go by the Suez Canal route and that was the voyage which the shipowners undertook to perform (see p. 543, letter H, post); and

(b) the route via the Cape of Good Hope was so circuitous, geographically unnatural and different in several respects from the route via the Suez Canal that the voyage via the Cape was a fundamentally different voyage from that via the canal (see p. 544, letter E, post).

Cases on sale of goods by c.i.f. contract distinguished (see p. 544, letter H, post), viz., *Carapanayoti & Co., Ltd.* v. *E. T. Green, Ltd.* ([1958] 3 All E.R. 115); *Tsakiroglou & Co., Ltd.* v. *Noblee & Thorl G.m.b.H.* (ante, p. 160); *Albert D. Gaon & Co.* v. *Société Interprofessionelle des Oleagineux Fluides Alimentaires* (ante, p. 160).

(ii) the shipowners were not estopped from alleging frustration since there was no representation of fact such as could found estoppel at common law and the recent doctrine, known as that of promissory estoppel, was not wide enough to cover the facts of the present case (see p. 545, letter I, to p. 546, letter B, post).

(iii) on the facts a new agreement for the carriage of the cargo via the Cape at the freight rate fixed by the charterparty, viz., 134s. per ton, could not be implied from the conduct of the parties as no facts were established showing mutual intention to make a new agreement (see p. 546, letters G and H, and p. 547, letter E, post).

(iv) accordingly, the shipowners' true claim to freight was on a quantum meruit since there was no breach of contract or other wrongful act by the shipowners and they had carried the goods to Genoa via the Cape for the charterers' benefit and with their consent; the shipowners were therefore entitled to be paid a reasonable freight, namely, 195s. per ton (see p. 548, letter D, post).

Craven-Ellis v. *Canons, Ltd.* ([1936] 2 All E.R. 1066) followed. Obiter dicta of LORD WRIGHT, M.R., and LORD MAUGHAM in *Hain S.S. Co., Ltd.* v. *Tate & Lyle, Ltd.* ([1936] 2 All E.R. at pp. 612, 613, 616) considered.

[As to the doctrine of frustration, see 8 HALSBURY'S LAWS (3rd Edn.) 185-191, paras. 320-323.

As to estoppel by representation generally, see 15 HALSBURY'S LAWS (3rd Edn.) 223-232, paras. 422-434; as to what conduct will create estoppel, see ibid., 235, para. 440. As to promissory estoppel, see 15 HALSBURY'S LAWS (3rd Edn.) 175, para. 344.

As to quantum meruit generally, see 8 HALSBURY'S LAWS (3rd Edn.) 110, 111, paras. 191-194; and as to remuneration for services rendered under an unenforceable agreement, see ibid., 226, para. 390.]

Cases referred to:

Bank Line, Ltd. v. *A. Capel & Co.*, [1919] A.C. 435; 88 L.J.K.B. 211; 120 L.T. 129; 14 Asp. M.L.C. 370; 12 Digest (Repl.) 443, *3365*.

Birmingham & District Land Co. v. *London & North Western Ry. Co.*, (1888), 40 Ch.D. 268; 60 L.T. 527; 31 Digest (Repl.) 565, *6856*.

Blane Steamships, Ltd. v. *Minister of Transport*, [1951] 2 K.B. 965; 3rd Digest Supp.

British Movietonews, Ltd. v. *London & District Cinemas, Ltd.*, [1951] 2 All E.R. 617; [1952] A.C. 166; 3rd Digest Supp.

Carapanayoti & Co., Ltd. v. *E. T. Green, Ltd.*, [1958] 3 All E.R. 115; [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390; 3rd Digest Supp.

Chandler Bros., Ltd. v. *Boswell*, [1936] 3 All E.R. 179; Digest Supp.

Craven-Ellis v. *Canons, Ltd.*, [1936] 2 All E.R. 1066; [1936] 2 K.B. 403; 105 L.J.K.B. 767; 155 L.T. 376; Digest Supp.

Dahl v. *Nelson, Donkin & Co.*, (1881), 6 App. Cas. 38; 50 L.J.Ch. 411; 44 L.T. 381; 4 Asp. M.L.C. 392; 41 Digest 517, *3471*.

Davis Contractors, Ltd. v. *Fareham U.D.C.*, [1956] 2 All E.R. 145; [1956] A.C. 696; [1956] 3 W.L.R. 37; 3rd Digest Supp.

Denny, Mott & Dickson, Ltd. v. *Fraser (James B.) & Co., Ltd.*, [1944] 1 All E.R. 678; [1944] A.C. 265; 113 L.J.P.C. 37; 171 L.T. 345; 12 Digest (Repl.) 450, *3394*.

Fibrosa Spolka Akcyjna v. *Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122; [1943] A.C. 32; 111 L.J.K.B. 433; 167 L.T. 101; 12 Digest (Repl.) 448, *3383*.

Gaon (Albert D.) & Co. v. *Société Interprofessionelle des Oleagineux Fluides Alimentaires*, [1960] 2 All E.R. 160; *affmg.* [1959] 2 All E.R. 693.

Glidden Company, The v. *Hellenic Lines, Ltd.*, unreported.

Hain S.S. Co., Ltd. v. *Tate & Lyle, Ltd.*, [1936] 2 All E.R. 597; 155 L.T. 177; 19 Asp. M.L.C. 62; Digest Supp.

Harnam Singh v. *Jamal Pirbhai*, [1951] A.C. 688; 3rd Digest Supp.

Hirji Mulji v. *Cheong Yue S.S. Co.*, [1926] All E.R. Rep. 51; [1926] A.C. 497; 95 L.J.P.C. 121; 134 L.T. 737; 17 Asp. M.L.C. 8; 12 Digest (Repl.) 436, *3332*.

Hughes v. *Metropolitan Ry. Co.*, (1877), 2 App. Cas. 439; 46 L.J.Q.B. 583; 36 L.T. 932; 42 J.P. 421; 21 Digest 310, *1137*.

Jennings & Chapman, Ltd. v. *Woodman, Matthews & Co.*, [1952] 2 T.L.R. 409; 3rd Digest Supp.

Parkinson (Sir Lindsay) & Co., Ltd. v. *Works & Public Buildings Comrs.*, [1950] 1 All E.R. 208; [1949] 2 K.B. 632; 2nd Digest Supp.

Tamplin (F. A.) S.S. Co., Ltd. v. *Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; 85 L.J.K.B. 1389; 115 L.T. 315; 13 Asp. M.L.C. 467; 12 Digest (Repl.) 687, *5284*.

Tatem, Ltd. v. *Gamboa*, [1938] 3 All E.R. 135; [1939] 1 K.B. 132; 108 L.J.K.B. 34; 160 L.T. 159; 19 Asp. M.L.C. 216; 12 Digest (Repl.) 417, *3235*.

Thorn v. *London Corpn.*, (1876), 1 App. Cas. 120; 45 L.J.Q.B. 487; 34 L.T. 545; 40 J.P. 468; 12 Digest (Repl.) 416, *3231*.

Tool Metal Manufacturing Co., Ltd. v. *Tungsten Electric Co., Ltd.*, [1955] 2 All E.R. 657; [1955] 1 W.L.R. 761; 3rd Digest Supp.

Tsakiroglou & Co., Ltd. v. *Noblee & Thorl G.m.b.H.*, [1960] 2 All E.R. 160; *affmg. on different grounds*, [1959] 1 All E.R. 45.

Special Case.

This was an award, dated Oct. 16, 1959, stated in the form of a Special Case pursuant to s. 21 (1) (b) of the Arbitration Act, 1950, by an arbitrator, ASHTON ROSKILL, Q.C., appointed by the parties to a charterparty, disputes having arisen under the charterparty as a result of the blocking of the Suez Canal in November, 1956. By a charterparty dated Oct. 18, 1956, made between Compagnie de Navigation Européene on behalf of the owners of the vessel Massalia, Société Franco Tunisienne d'Armement (hereafter referred to as " the shipowners "), and Sidermar S.p.a. of Genoa (hereafter referred to as " the charterers ") it was provided as follows so far as is material:—

> " 2. . . . the said ship . . . shall . . . proceed with all convenient speed to Masulipatan* and there load always afloat in the customary manner subject 24 hours turn as per cl. 28 when, where and as soon as ordered by shipper's agent a full and complete cargo of iron ore, say about 5,000 tons, not exceeding what she can reasonably stow and carry . . . and being so loaded, shall with all convenient speed proceed to Genoa (including Molo Nino Ronco) and there deliver the same . . .
>
> " 3. Freight to be paid at and after the rate of 134s. (one hundred and thirty-four shillings) f.i.o. and free stowed and or trimmed, per ton of 20 cwt. or 1,016 kilos delivered . . .
>
> " 6. Time for loading to count from 6 a.m. after the ship is reported and ready, and in free pratique (whether in berth or not), and for discharging from 6 a.m. after ship is reported and in every respect ready, and in free pratique, whether in berth or not. Steamer to be reported during official hours only . . .
>
> " 19. Ship to apply to shippers Messrs. Murlidhar Jhunjhunwala, Madras, telegraphic ' Jhunjhun Madras ' for cargo, and wire them on leaving last port of discharge if there are telegraphic facilities, failing which shippers to be allowed one day extra for loading.
>
> " 28. At loading port time counting 24 hours after notice of readiness has been tendered and accepted whether in berth or not.
>
> " 29. 75% of freight to be paid within 7 days from telegraphic advice of signing bills of ladings and balance on outturn quantity on right and true delivery of cargo . . .
>
> " 34. . . . Chamber of Shipping War Risk Clauses 1 & 2 . . . are to be deemed incorporated in this charterparty.
>
> " 37. Captain to wireless to shippers Messrs. Murlidhar Jhunjhunwala, Madras, telegraphic ' Jhunjhun Madras ' giving 4 days preliminary notice and also 48 hours definite notice of his expected time of arrival at loading port.

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* A port on the east coast of India.

> "Captain also to telegraph to 'Maritsider Genoa' on passing Suez Canal."

The Chamber of Shipping War Risks Clause 2 which was incorporated in the charterparty provided:

> "(2) The ship shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destination, delivery or otherwise howsoever given by the government of the nation under whose flag the vessel sails or any department thereof, or by any other government or any department thereof, or any person acting or purporting to act with the authority of such government or of any department thereof . . ."

In fact no such order or direction was given; at least, none was mentioned in the Special Case.

The following facts were found by the arbitrator. On July 26, 1956, President Nasser announced the nationalisation by Egypt of the Suez Canal and the canal then became the subject of an international crisis. This crisis developed with increasing gravity and by Oct. 18, 1956, when the charterparty was concluded, the possibility existed that it could culminate in resort to force in which event the Suez Canal might become closed to shipping. At the time of the conclusion of the charterparty, Oct. 18, 1956, the route via the canal was the shortest and the customary route from Masulipatan to Genoa. In the event of the canal being closed to shipping the shortest practicable route from Masulipatan to Genoa would be via the Cape of Good Hope. When the charterparty was concluded both the shipowners and the charterers appreciated the foregoing facts. From Oct. 29, 1956, until the general cease fire heavy fighting took place in the Sinai Peninsula between Egyptian and Israeli forces, and from Oct. 31, 1956, until the general cease fire, pursuant to ultimata delivered on Oct. 30, 1956, to the Egyptian and Israeli governments by the British and French governments, the air forces of Great Britain and France attacked various targets in Egypt. On Nov. 5 and 6, 1956, airborne and seaborne landings of British and French troops took place in the Port Said and Port Fuad areas. A general cease fire took effect on Nov. 7, 1956. By Nov. 2, 1956, at least five ships had been sunk in the Suez Canal, blocking it. On Nov. 4, 1956, at least three more ships were sunk at Suez, blocking the canal, and by that date the canal was closed to all traffic. By Nov. 7, 1956, it was likely that the canal would remain blocked for a period of time which would, if the vessel were to await the re-opening of the canal, be so long as to put an end to the commercial purpose of the venture into which the shipowners and charterers had entered. By Nov. 9, 1956, the shipowners and charterers each appreciated the foregoing facts.

The Massalia arrived at Masulipatan on Nov. 9, 1956, and on the same day gave notice of readiness to load. The charterers then tendered a quantity of 4,951 long tons of iron ore for loading and this cargo was loaded on the vessel by their agents between Nov. 13 and Nov. 18, 1956 (both dates inclusive). The master of the vessel permitted the 4,951 long tons to be loaded on the vessel and the shipowners issued a bill of lading in respect of this cargo dated Nov. 18, 1956. On Nov. 19, 1956, the vessel sailed from Masulipatan for Genoa. On Nov. 20, 1956, the shipowners' representative informed the charterers' representative at Genoa that in the shipowners' view the charterparty was at an end because of the blocking of the Suez Canal and the likelihood of the canal remaining blocked for a substantial period and intimated that the shipowners claimed payment of a total freight at the rate of 209s. per long ton. The charterers replied that in their view the shipowners were still obliged to perform the charterparty and were not entitled to a higher freight rate than that fixed by the charterparty, i.e., 134s. per long ton. At no time prior to Nov. 20, 1956, was it contended by or on behalf of the shipowners that the charterparty had been brought to an end. No explanation was offered in evidence for the shipowners' delay between Nov. 9 and Nov. 20, in raising this contention. Subsequent to Nov. 20, 1956, further discussions took place between representatives of the shipowners and the charterers, and on Dec. 5, 1956, the parties agreed to submit the dispute to arbitration pending which the charterers would pay freight at the rate fixed by the charterparty. The vessel, after calling at Colombo from Nov. 23 to Nov. 29, 1956, proceeded to Genoa via the Cape of Good Hope which was then the shortest practicable route from Masulipatan to Genoa. On Feb. 8, 1957, when the vessel arrived at Ceuta, in the Mediterranean, for bunkering, her winter load line according to the International Load Line Convention, which becomes operative in the Mediterranean on Dec. 16 and ends on Mar. 15, was submerged; consequently 238.563 long tons of the vessel's cargo was off-loaded and shipped to Genoa in another vessel, the Condessa. The Massalia and the Condessa arrived at Genoa on or about Feb. 16, 1957, and there delivered a total cargo of 4,904.635 long tons. The charterers paid the shipowners freight at the rate of 134s. per long ton on the above quantity of cargo in three instalments: on Nov. 26, 1956, on Dec. 8, 1956, and on Apr. 23, 1957. The instalment paid on Nov. 26, 1956, represented approximately 75 per cent. of freight at the rate of 134s. per long ton. The following further facts were found by the arbitrator. The distance from Masulipatan to Genoa via the Cape of Good Hope is approximately twice the distance via the Suez Canal. The additional distance via the Cape rendered the voyage financially more onerous to the shipowners than a voyage via the Suez Canal but there was no evidence of the exact extra cost to the shipowners of a voyage via the Cape. While the additional distance via the Cape exposed the vessel to maritime hazards for a longer period the vessel, loaded as she was, at all material times was capable of withstanding the maritime hazards of a voyage from Masulipatan to Genoa via the Cape. The additional distance via the Cape did not expose the cargo of iron ore to any appreciable risk of damage or deterioration. There was no evidence that the vessel had been fixed for another voyage to follow that from Masulipatan to Genoa or that any trading schedule was dislocated by the voyage via the Cape. If the voyage could have been performed via the Suez Canal the vessel would not have arrived at Genoa before Dec. 16, 1956, and in that event, the quantity of cargo in fact loaded at Masulipatan would have exceeded the quantity which the vessel was capable of carrying if she was to arrive at Genoa laden no deeper than her winter marks. Further, if the voyage had been performed via the Suez Canal little, if any, cargo could have been loaded in excess of the quantity which, under the International Load Line Convention the vessel was capable of carrying via the Cape of Good Hope. "Maritsider Genoa" was the telegraphic address of the charterers. The charterers were not parties to the bill of lading or to any contract evidenced thereby and they did not know of the reservation in the bill regarding possible "readjustment of freight in case vessel compelled deviate from normal route owing obstruction Suez Canal*." A reasonable remuneration for the carriage of the cargo from Masulipatan to Genoa via the Cape of Good Hope was 195s. per long ton delivered. Accordingly the total remuneration over and above that fixed by the charterparty for the carriage of the cargo from Masulipatan to Genoa amounted to £14,959 2s. 9d.

The shipowners contended that there was frustration of the charterparty by Nov. 9, or at latest Nov. 13, 1956, by reason of the closing of the Suez Canal, and that an agreement was to be inferred from the events that happened and the conduct of the parties that the charterers would pay a reasonable remuneration for the carriage of the cargo from Masulipatan to Genoa. The charterers contended that the charterparty was not frustrated. In the alternative, they contended that if it was frustrated then the shipowners were estopped from so

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* In the Special Case the arbitrator said that he regarded the bill of lading as irrelevant.

A contending on the facts (see para. 7 (4) of the Case stated, set out at p. 545, letters E to H, post). The charterers also contended that an agreement was to be inferred from the conduct of the parties that the cargo would be carried via the Cape of Good Hope at the rate of freight provided in the charterparty or on the charterparty terms. The shipowners denied that by words or conduct they represented, as alleged by the charterers, that the charterparty was not B frustrated or that they were ready and willing to perform the charterparty notwithstanding the blocking of the canal or that they were not going to insist on their strict legal right by desisting from further performance of the charterparty.

The arbitrator found in so far as it was a question of fact, and held in so far as it was a question of law that the shipowners did not at any time represent by C words or conduct (i) that the charterparty was not frustrated; or (ii) that they were ready and willing to perform it notwithstanding the blocking of the Suez Canal; or (iii) that, if the cargo was loaded, it would be carried to Genoa at the charterparty rate of freight or on the charterparty terms; or (iv) that they would not insist on any of their legal rights relating to the carriage of the cargo from Masulipatan to Genoa; or (v) that they would not require to be paid a D reasonable remuneration for carrying the cargo to Genoa. On a true construction of the charterparty and on the facts found the arbitrator held (a) that the continued availability of the Suez Canal was not a basic assumption of the charterparty; (b) that the performance of the voyage via the Cape of Good Hope was not commercially or fundamentally different from its performance via the Suez Canal; and (c) that the charterparty was not frustrated. If, contrary E to this view, the charterparty was frustrated, the shipowners were not estopped from so alleging, and there was no implied agreement between the parties that the cargo would be carried from Masulipatan to Genoa via the Cape at the charterparty freight rate or on the charterparty terms. If the charterparty was frustrated and the shipowners were not estopped from so alleging, an agreement was to be inferred that the charterers would pay a reasonable remuneration for F the carriage of the cargo via the Cape. Such reasonable remuneration was at the rate of 195s. per long ton delivered.

The questions of law stated for the decision of the court were (i) whether on the facts found the shipowners were estopped from contending that the charterparty was frustrated; (ii) if the answer to (i) was " no ", whether on a true construction of the charterparty and on the facts found the charterparty was G frustrated; (iii) if the answer to (i) was " no " and the answer to (ii) was " yes ", whether on the facts found the shipowners were entitled to remuneration beyond the amount to which they were originally entitled under the terms of the charterparty. The arbitrator answered the last mentioned questions as follows: (i) No, (ii) No, and (iii) Did not arise.

A. A. Mocatta, Q.C., and *R. A. MacCrindle* for the shipowners, the claimants.

H *Roy Wilson, Q.C.*, and *Basil Eckersley* for the charterers, the respondents.

PEARSON, J., having read the material parts of the charterparty and referred to the Special Case, continued: In order to decide the main question in this case, which is the question whether the contract was frustrated or not, it is necessary to consider how the doctrine of frustration of contracts has been I affected by the speeches in the House of Lords in *Davis Contractors, Ltd.* v. *Fareham U.D.C.* (1); and how, in the light of those speeches, the question should be formulated in relation to the facts of the present case. All the speeches have to be taken into account. It is clearly still not incorrect to base frustration on an implied term of the contract (2). Also I think that the court's decision to include in the contract, or exclude from it, an alleged implied term is part of the court's construction of the contract, and that that is the proper reconciliation of what otherwise might have appeared to be slightly divergent views. The crucial importance of the construction of the contract was emphasised in the speech of Lord Reid (with which Lord Somervell of Harrow agreed), and it was shown that an inquiry into what the parties would have agreed on the question at issue, if they had been asked about it at the time of the contract, is an artificial approach and in some cases unhelpful (3). Being in search of the most appropriate formulation to apply in the present case, I will read certain passages. Lord Reid said (4):

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(1) [1956] 2 All E.R. 145; [1956] A.C. 696.

(2) See the speech of VISCOUNT SIMONDS, [1956] 2 All E.R. at p. 150; [1956] A.C. at p. 715. LORD MORTON OF HENRYTON'S speech, [1956] 2 All E.R. at p. 151; [1956] A.C. at p. 717. LORD RADCLIFFE'S speech, [1956] 2 All E.R. at p. 159; [1956] A.C. at p. 727.

> " In order to determine how far the arbitrator's findings are findings of law and, therefore, subject to review, I think it is necessary to consider what is the true basis of the law of frustration. Generally, this has not been necessary; for example, Lord Porter said in *Denny, Mott & Dickson, Ltd.* v. *James B. Fraser & Co., Ltd.* (5): ' Whether this result follows from a true construction of the contract or whether it is necessary to imply a term or whether again it is more accurate to say that the result follows because the basis of the contract is overthrown, it is not necessary to decide . . .' These are the three grounds of frustration which have been suggested from time to time, and I think that it may make a difference in two respects which is chosen. Construction of a contract and the implication of a term are questions of law, whereas the question whether the basis of a contract is overthrown, if not dependent on the construction of the contract, might seem to be largely a matter for the judgment of a skilled man comparing what was contemplated with what has happened. And, if the question is truly one of construction, I find it difficult to see why we should not apply the ordinary rules regarding the admissibility of extrinsic evidence whereas, if it is only a matter of comparing the contemplated with the actual position, evidence might be admissible on a wider basis. Further, I am not satisfied that the result is necessarily the same whether frustration is regarded as depending on the addition to the contract of an implied term or as depending on the construction of the contract as it stands."

Then Lord Reid said (6):

> " I think that there is much force in Lord Wright's criticism in *Denny, Mott & Dickson, Ltd.* v. *James B. Fraser & Co., Ltd.* (7): ' The parties did not anticipate fully and completely, if at all, or provide for what actually happened. It is not possible to my mind to say that, if they had thought of it, they would have said: " Well, if that happens, all is over between us ". On the contrary, they would almost certainly on the one side or the other have sought to introduce reservations or qualifications or compensations.' It appears to me that frustration depends, at least in most cases, not on adding any implied term but on the true construction of the terms which are, in the contract, read in light of the nature of the contract and of the relevant surrounding circumstances when the contract was made. There is much authority for this view."

Then Lord Reid cites what Viscount Simon said in *British Movietonews, Ltd.* v. *London & District Cinemas, Ltd.* (8):

> " . . . Viscount Simon said: ' If, on the other hand, a consideration of the

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(3) Per Lord Reid, [1956] 2 All E.R. at pp. 153, 154; [1956] A.C. at pp. 719 to 721. Per Lord Radcliffe, [1956] 2 All E.R. at pp. 159, 160; [1956] A.C. at pp. 726 to 729. Per Lord Somervell of Harrow, [1956] 2 All E.R. at p. 163; [1956] A.C. at p. 733.

(4) [1956] 2 All E.R. at p. 152; [1956] A.C. at p. 719.

(5) [1944] 1 All E.R. at p. 687; [1944] A.C. at p. 281.

(6) [1956] 2 All E.R. at p. 153; [1956] A.C. at p. 720.

(7) [1944] 1 All E.R. at p. 683; [1944] A.C. at p. 275.

(8) [1951] 2 All E.R. at p. 625; [1952] A.C. at p. 185.

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> terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point—not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation.' "

B Pausing there, that is important, because VISCOUNT SIMON had consistently in a number of cases (9) taken the view that the doctrine of frustration could be ascribed to an implied term and VISCOUNT SIMON is there emphasising the importance of construction of the contract. Therefore, in my view, there is no real divergence between the two views. Then LORD REID went on (10) to quote what ASQUITH, L.J., said in *Sir Lindsay Parkinson & Co., Ltd.* v. *Works &* C *Public Buildings Comrs.* (11):

> " 'In each case a delay or interruption was fundamental enough to transmute the job the contractor had undertaken into a job of a different kind, which the contract did not contemplate and to which it could not apply, although there was nothing in the express language of either contract to limit its operation in this way.' "

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LORD REID then referred to *Thorn* v. *London Corpn.* (12) and went on to say (10):

> " On this view, there is no need to consider what the parties thought, or how they or reasonable men in their shoes would have dealt with the new situation if they had foreseen it. The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new E situation: if it is not, then it is at an end. In my view, the proper approach to this case is to take from the arbitrator's award all facts which throw light on the nature of the contract or which can properly be held to be extrinsic evidence relevant to assist in its construction and then, as a matter of law, to construe the contract and to determine whether the ultimate situation as disclosed by the award is, or is not, within the scope of the contract so F construed."

LORD RADCLIFFE, having referred to the large number of different phrases which had been used in describing the operation of frustration, said (13):

> " A full current anthology would need to be longer yet. But the variety of description is not of any importance, so long as it is recognised that each is G only a description and that all are intended to express the same general idea."

Pausing there, in my view that is an important passage, because it means that the old familiar phrases, such as " the footing of the contract ", and the " basis ", or " basic assumption " of the contract, and so on, are still admissible and useful phrases which can be properly used in relation to these contracts. LORD RAD- H CLIFFE went on to say (13): " I do not think that there has been a better expression of that idea that the one offered by EARL LOREBURN in *F. A. Tamplin S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* (14) "—and then that extract is set out. LORD RADCLIFFE then refers to the difficulties of the implied term theory in a quotation from *Hirji Mulji* v. *Cheong Yue S.S. Co.* (15) (to which I will refer later) (16):

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(9) See, e.g., *Joseph Constantine S.S. Line, Ltd.* v. *Imperial Smelting Corpn. Ltd.*, [1941] 2 All E.R. at p. 171; *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. at p. 125.

(10) [1956] 2 All E.R. at p. 154; [1956] A.C. at p. 721.

(11) [1950] 1 All E.R. at p. 229; [1949] 2 K.B. at p. 667.

(12) (1876), 1 App. Cas. at p. 127.

(13) [1956] 2 All E.R. at p. 159; [1956] A.C. at p. 727.

(14) [1916] 2 A.C. at pp. 403, 404; 13 Asp. M.L.C. at p. 468.

(15) [1926] All E.R. Rep. at p. 58; 17 Asp. M.L.C. at p. 12.

(16) [1956] 2 All E.R. at p. 160; [1956] A.C. at p. 728.

> "The legal effect of frustration 'does not depend on their intention or their opinions, or even knowledge, as to the event'. On the contrary, it seems that, when the event occurs, the 'meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence': (*Dahl* v. *Nelson* (17), per Lord Watson). By this time, it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is, and must be, the court itself. So, perhaps, it would be simpler to say at the outset that frustration occurs whenever the law recognises that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do. There is, however, no uncertainty as to the materials on which the court must proceed. 'The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the surrounding circumstances, and, on the other hand, the events which have occurred' (*Denny, Mott & Dickson, Ltd.* v. *James B. Fraser & Co., Ltd.* (18) per Lord Wright). In the nature of things there is often no room for any elaborate inquiry. The court must act on a general impression of what its rule requires. It is for that reason that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."

The point emerging which is most material for the present case is that the essential comparison is not between the situation existing at the date of the contract and the situation existing at the time of the performance, but between that which the shipowners by their charterparty contracted to do and that which, in the event, had to be done in order to carry the goods to Genoa. In construing the contract, both its express provisions and the relevant circumstances known to both parties at the time of contracting have to be taken into account, and all its terms, express and implied, have to be ascertained.

Now para. 5 of the award contains in particular two sentences which need special consideration. The third sentence of sub-para. (1) says:

> "This crisis [i.e., regarding the Suez Canal] developed with progressively increasing gravity and by Oct. 18, 1956, when the charterparty was concluded, the possibility existed that it could culminate in resort to force in which event the Suez Canal might become closed to shipping."

Then sub-para. (3) says:

> "At the time when the charterparty was concluded (Oct. 18, 1956) the [shipowners] and [charterers] respectively appreciated the facts stated in sub-paras. (1) and (2) of this paragraph (19)."

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(17) (1881), 6 App. Cas. at p. 59; 4 Asp. M.L.C. at p. 398.

(18) [1944] 1 All E.R. at p. 683; [1944] A.C. at pp. 274, 275.

(19) Sub-paragraph (2) of para. 5 stated that at the time when the charterparty was concluded (Oct. 18, 1956) the route via the Suez Canal was the shortest and the customary route from the loading port, Masulipatan, to the port of discharge, Genoa, and that in the event of the Suez Canal being closed to shipping the shortest practicable route from Masulipatan to Genoa would be via the Cape of Good Hope.

A Learned counsel have agreed that, notwithstanding the word " respectively ", that must mean that the shipowners and charterers both appreciated the possibility.

This question therefore arises. Does the existence of a possibility, appreciated by both parties at the time of making the contract, that a certain event may occur, necessarily prevent the frustration of the contract by that event when it B does occur? In other words, does the frustrating event have to be unforeseen in the sense that the possibility of it has not been appreciated by the parties? In my view, on principle, the answer should be " No ", because we are concerned with the construction of the contract, and it must often happen that contracting parties appreciate a possibility but do not provide for it in their contract—they cannot provide for every possible event—and the particular event concerned C may appear to them to be unlikely, or they may be unable to work out the consequences of it, or unable to agree on the provisions to be made with regard to it, or they may simply take the chance that it may occur and frustrate their contract. For example, persons making contracts in the summer of the year 1939 must have appreciated the possibility of an outbreak of war with Germany, but such contracts could nevertheless be frustrated by the outbreak of war when it D occurred.

There is also ample authority in favour of the view that the parties' appreciation at the time of making their contract that a certain event may happen does not prevent the frustration of the contract by that event when it does occur. There is *Bank Line, Ltd.* v. *A. Capel & Co.* (20). The contract was frustrated by continuing requisition. The parties clearly had in mind the possibility of a requisi-E tion occurring, because they had inserted an express provision relating to it.

Next there is *Tatem, Ltd.* v. *Gamboa* (21). The headnote (22) which is accurate reads:

> " If the foundation of a contract goes, either by the destruction of the subject-matter or by reason of such long interruption or delay that the performance is really in effect that of a different contract, and the parties F have not provided what in that event is to happen, the performance of the contract is to be regarded as frustrated, even though the event which causes the destruction of the subject-matter or the interruption or delay was within the contemplation of the parties when they made the contract."

This case was concerned with a charterparty for the use of a ship in what may be called " Spanish waters ". It was during the Spanish civil war and in fact the G ship was seized. It was held that that must have been foreseen as a possibility. The case was tried by GODDARD, J., who said this (23):

> " Sir Robert Aske meets this point by saying that one cannot have frustration where the circumstances must have been contemplated by the parties. By ' circumstances ', I mean circumstances which are afterwards H relied on as frustrating the contract . . . It is perfectly true that in many of the cases . . . one finds the expression ' unforeseen circumstances ', and it is argued that ' unforeseen circumstances ' must mean circumstances which one could not have foreseen. It seems to me, with respect, that, if the true doctrine be that laid down by LORD HALDANE (24)—the absolute disappearance of the contract—or if it be as VISCOUNT FINLAY (25) put it—' the I continued existence of a certain state of facts '—then whether circumstances are foreseen or not makes very little difference. If the foundation of the contract goes . . . it goes, whether or not the parties have made a provision for it. Whether or not the parties contemplated, or must be taken to have contem-

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(20) [1919] A.C. 435; 14 Asp. M.L.C. 370.

(21) [1938] 3 All E.R. 135; [1939] 1 K.B. 132.

(22) [1939] 1 K.B. 132.

(23) [1938] 3 All E.R. at p. 143; [1939] 1 K.B. at p. 137.

(24) [1916] 2 A.C. at p. 406; 13 Asp. M.L.C. at p. 469.

(25) *Larrinaga & Co., Ltd.* v. *Société Franco-Americaine des Phosphates de Médulla, Paris* (1923), 39 T.L.R. at p. 318.

> plated, that the foundation of the contract would be destroyed cannot alter the position at all. If it comes about, it comes about, although the parties may or may not have agreed as to what is to happen if there is this destruction. Therefore, it seems to me that, when one is using the expression ' unforeseen circumstances ' in relation to the frustration of the performance of a contract, one is really dealing with circumstances which are unprovided for, circumstances for which (and in the case of a written contract one has only to look at the document) the contract makes no provision."

I would only like to say with regard to that, that possibly it is a little narrow to say that in the case of a written contract one only has to look at the document; it may be always that, if there are surrounding circumstances, they should be looked at also. Goddard, J., after a long quotation from what Lord Haldane said in *F. A. Tamplin S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* (26), then said (27):

> " . . . I regard Viscount Haldane as saying there that, unless one makes the contrary intention plain, the law imposes this doctrine of frustration in the events which have been described. One makes the intention plain by saying that, if the foundation of the contract goes, either by the destruction of the subject-matter or by reason of such long interruption or delay that the performance is really in effect that of a different contract, parties can if they wish . . . provide for what in that event is to happen, but, if they do not, then the performance of the contract is regarded as frustrated."

That passage is of interest as an anticipation of what was afterwards said in the House of Lords in *Davis Contractors, Ltd.* v. *Fareham U.D.C.* (28).

Then there is *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.* (29) in which *Tatem, Ltd.* v. *Gamboa* (30) was cited with approval by Viscount Simon.

In *Jennings & Chapman, Ltd.* v. *Woodman, Matthews & Co.* (31), Somervell, L.J., said (32):

> " With regard to the sentence in the judge's judgment in the middle of the paragraph I have just read, Mr. McIntyre said that the word ' unexpectedly ', in the phrase ' cannot . . . be regarded as having unexpectedly emerged ', was taken from a sentence in Viscount Simon's speech in *British Movietonews, Ltd.* v. *London & District Cinemas, Ltd.* (33) in the House of Lords, and that may be so. The judge may have taken that adverb out of its context and given it a wider meaning than, I am sure, Lord Simon intended to give it in its context, because, of course, the principle of frustration may apply although the event which frustrated it is an event which both parties may have realised might happen."

Denning, L.J., said (34):

> " It was suggested that this was a case of frustration. I do not regard it as a case of frustration, but it is, I think, analogous to it. It is a case where, to use Lord Simon's words in the *British Movietonews* case (35), ' a fundamentally different situation has now unexpectedly emerged '. The judge agreed that a fundamentally different situation had emerged, but said that it had not ' unexpectedly ' emerged. He thought that the parties could and should have contemplated that it might have emerged. Even so, I think it was unexpected. The plain fact is that the parties did not contemplate it.

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(26) [1916] 2 A.C. at p. 406; 13 Asp. M.L.C. at p. 469.
(27) [1938] 3 All E.R. at p. 144; [1939] 1 K.B. at p. 139.
(28) [1956] 2 All E.R. 145; [1956] A.C. 696.
(29) [1942] 2 All E.R. at p. 125; [1943] A.C. at p. 40.
(30) [1938] 3 All E.R. 135; [1939] 1 K.B. 132.
(31) [1952] 2 T.L.R. 409.
(32) [1952] 2 T.L.R. at p. 412.
(33) [1951] 2 All E.R. 617; [1952] A.C. 166.
(34) [1952] 2 T.L.R. at p. 414.
(35) [1951] 2 All E.R. at p. 625; [1952] A.C. at p. 185.

A They did not expect it. They proceeded on a fundamental assumption which has turned out to be wrong."

That passage is of some interest as possibly drawing a distinction between that which is expected, that is to say, regarded by the parties as something which probably will happen, as contrasted with a mere possibility, regarded by the parties as something which perhaps might happen.

B Then there is *Blane Steamships, Ltd.* v. *Minister of Transport* (36). It is sufficient for present purposes to say that that was a case of frustration by constructive total loss, and the possibility of constructive total loss must have been in the minds of the parties because they inserted in the contract an express provision relating to it.

Certain authorities were cited on the other side. There was *Chandler Bros., Ltd.* v. *Boswell* (37). C That, if I may summarise it shortly, was a case in which the defendant was the main contractor, and he contracted to divert a road for a county council, and, as incidental to that purpose, to make a tunnel. The work of excavating for the tunnel was sub-contracted to a firm called Chandler Bros. The head contract contained a provision that the engineers of the county council, if they were dissatisfied with the sub-contractor, might require the head contractors to remove him. D When the sub-contract was drawn up by the parties it was drawn up with close regard to the provisions of the head contract. It was obvious that those who drew up the sub-contract had the head contract before them at the time. The sub-contract did not contain any provision to the effect that the engineers might require the removal of the sub-contractor. It was suggested that some such provision should be implied, but the court held that it E could not be implied because the parties must have had fully in mind that possibility, and indeed they had drawn up the sub-contract with express relation to the head contract. It is in the light of those facts that one has to read what is said in that case by GREENE, L.J. (38), and in my view what he said there was directed to the particular facts of that particular case and does not throw any light on the present question.

F Secondly, there was the passage from *British Movietonews, Ltd.* v. *London & District Cinemas, Ltd.* (39) which has already appeared in an extract which I have read.

Then LORD RADCLIFFE said in *Davis Contractors, Ltd.* v. *Fareham U.D.C.* (40) (which I have already cited):

> G "Two things seem to me to prevent the application of the principle of frustration to this case. One is that the cause of the delay was not any new state of things which the parties could not reasonably be thought to have foreseen. On the contrary, the possibility of enough labour and materials not being available was before their eyes and could have been the subject of special contractual stipulation. It was not made so."

H There is that passage, and then there are a number of passages in a number of speeches in which the frustrating event is described as something " unexpected " or " not contemplated " or " not anticipated ", and so on.

In my view, the explanation of those descriptions being applied to the frustrating events is partly that it happened to be an actual description in a particular case, and partly also this. The possibility, appreciated by both parties at the time of making their contract, that a certain event may occur, is one of the I surrounding circumstances to be taken into account in construing the contract, and will, of course, have greater or less weight according to the degree of probability or improbability and all the facts of the case.

Now I come to the construction of the charterparty. First it has to be noticed that cl. 2 of the charterparty contains on the face of it an unqualified obligation that the vessel, having loaded at Masulipatan, is to proceed with all convenient speed to Genoa. There is no definition of the route. The parties could have said " shall proceed by way of the Suez Canal ", but they did not do so. So that wording of cl. 2 is manifestly a point in favour of the charterers in this case. There is, however, the last sentence of cl. 37: " Captain also to telegraph to ' Maritsider Genoa ' on passing Suez Canal ". I fully accept the argument of counsel for the charterers that, for ordinary purposes, that is an unimportant provision. He compared it—I think rightly—with the provisions of cl. 19, which show that there was a similar provision for the early stage of the contract under which the vessel, on leaving the last port of discharge but before reaching Masulipatan was to wire the shippers, and, if that obligation was not performed, the penalty was that the shippers were to be allowed one extra day for loading. In my view, similarly if the captain failed to telegraph to " Maritsider Genoa " on passing the Suez Canal that would not be a fundamental breach of the contract, but would probably be an unimportant breach. The only resulting penalty on the shipowner for failure to comply with that obligation would be a liability to compensate the charterers for such damage, if any, as the breach might cause them. So it is clear enough that, for ordinary purposes, it is an unimportant provision. But, for the present purposes, it may be extremely important, because it says that the captain is " to telegraph . . . on passing the Suez Canal ". It does not say " if the vessel passes the Suez Canal ". It assumes, at any rate, that the vessel will pass the Suez Canal. That is an assumption in the contract, and, in my view, it probably goes further. There is an obligation to pass the Suez Canal. If the captain has to telegraph to " Maritsider Genoa " " on passing the Suez Canal ", he must go to the Suez Canal in order to be able to do so. So, in my view, there is actually an obligation to pass the Suez Canal.

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(36) [1951] 2 K.B. 965. (37) [1936] 3 All E.R. 179. (38) [1936] 3 All E.R. at p. 187.
(39) [1951] 2 All E.R. at p. 625; [1952] A.C. at p. 185.
(40) [1956] 2 All E.R. at p. 161; [1956] A.C. at p. 731.

That is the main point, but there are also certain subordinate matters bearing on construction. There is the appreciated possibility, as I may now call it (because I have fully dealt with it already), and that is a point in favour of the charterers' contentions. But it is not so strong as an expectation. Then secondly —in my view, not unimportant—there is the simple geography of the matter. The route by way of the Suez Canal is a fairly direct route. It goes almost due West after passing round the southern tip of India, and then through the Red Sea and the Suez Canal, and through the Eastern and Central Mediterranean, and, I suppose, through the Straits of Messina, then up in a more or less northerly direction to Genoa. But the route via the Cape is a highly circuitous route, and, although that is obvious on a first glance at the map, it is to my mind in every sense worth emphasising. The vessel, having rounded the southern tip of India, has to pass the Equator and go far down to the South to go round the Cape of Good Hope, then into the Southern Atlantic and northwards past the Equator again into the Northern Atlantic. Then it has to take what may be called a sharp right turn through the Straits of Gibraltar into the Western Mediterranean and approach its destination from the West, having started from a point far to the East. It is a highly circuitous route. It is a route which no sensible person would take for the purpose unless either the Suez Canal were closed or the Suez Canal dues were utterly and commercially exorbitant. But otherwise it is an unnatural route if it is possible to go through the Suez Canal.

Also there are the matters with which the learned arbitrator dealt in the Special Case. There was the extra expense of going via the Cape. There was the extra journey in distance; the extra time; and the different climatic conditions, which would not affect a cargo of iron ore, but might have some effect on the vessel's cargo. There is the point about chartering arrangements (41), though I am not quite sure whether that has any material bearing on the matter. Perhaps it does have a bearing to this extent, that the shipowners would naturally fix a charter to begin after the conclusion of this journey as soon as possible. That they would be able to do if the journey was to go through the Suez Canal but not otherwise. If the journey was to go through the Suez Canal, or, alternatively, via the Cape of Good Hope, they would not be able to do so. On the other hand, it is pointed out, quite rightly, that what would make any such charter impossible of performance was simply the happening of the frustrating event. But, on the whole, I am not clear that this point about fixing the subsequent charter has really very much bearing. Similarly, on the facts of this case, the point about the International Load Line Convention (42) does not have much bearing, because, by whichever route the vessel went, she would be overloaded in relation to the winter load line by the time she reached Genoa.

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(41) See p. 534, letter F, ante.

Then there is a further point which I think is worth mentioning, but which again should not be unduly stressed. There is the figure of the freight. The freight fixed by the charterparty was 134s. per long ton. A reasonable freight for the trip via the Cape of Good Hope was 195s. per long ton. There is no express finding in the Special Case that 134s. was an appropriate rate for the trip via the Suez Canal. Also there is no finding that the rate of 134s. per long ton included any additional element to compensate the shipowners for the possibility of having to go round the Cape of Good Hope. I am rather inclined to infer that the rate of 134s. per long ton was the appropriate rate for the Suez Canal voyage, but I cannot say that it is clear from the facts as stated.

Then finally there is the point about the conduct of the parties after the frustrating event occurred. On that counsel for the charterers, quite rightly, placed some reliance as an aid to the construction of the contract if there should be ambiguity. I think that really the principle appears in *Hirji Mulji* v. *Cheong Yue S.S. Co., Ltd.* (43), in the passage which begins by stating that

> " . . . whatever the consequences of the frustration may be upon the conduct of the parties, its legal effect does not depend on their intention, or their opinions or even knowledge, as to the event, which has brought this about, but on its occurrence in such circumstances as show it to be inconsistent with further prosecution of the adventure."

But the last sentence of the paragraph is (43):

> " What the parties say and do is only evidence, and not necessarily weighty evidence, of the view to be taken of the event by informed and experienced minds."

What happened in the event here was that the parties for some days went on acting as if the charterparty was still in force. Then, on Nov. 20, 1956, the shipowners informed the charterers that they considered that the contract had been frustrated, and the reply of the charterers was that they did not agree with that view. In my view, the conduct of the parties is not a consideration of any great weight, but, of course, it should be taken into account.

It is, of course, by no means an easy question whether this contract was frustrated or not, but, in my view, having regard to the express provisions of the contract and the surrounding circumstances, the proper view is that it was a term of the contract (whether express or impled) that the vessel was to go by the Suez Canal route. That was the voyage which the shipowners undertook to perform. It is true to say that the voyage is not the whole of the performance which the shipowners had to give. They had to bring the vessel by what is called the preliminary voyage to Masulipatan, and there they would have to assist in the loading of the cargo on board. Again, at the vessel's destination at Genoa they would have to assist and play their due part in unloading. But, of course, the main part, or the principal part—one might say the essential part —of their performance was the voyage itself, and that was that they were required to go via the Suez Canal. That is my view as to the meaning of the contract, and one does not have to say whether it is an express or implied term. I think it is an implied term, but a term implied directly from an express term, although also one brings in all the surrounding circumstances.

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(42) See p. 534, letter G, ante.
(43) [1926] All E.R. Rep. at p. 58; 17 Asp. M.L.C. at pp. 12, 13.

Having decided that that is the true construction of the contract, and that, on the true construction of the contract, that is the voyage which the shipowners have undertaken to make—in the language of a building contract, that is the job which the shipowners have contracted to perform—one then has to compare that with the voyage which had to be made, or the job which had to be done, after the closing of the canal. For reasons which have already been given, in effect, I think that that voyage was a fundamentally different voyage. It may help to make a simple comparison with what might happen in the case of a land journey. Supposing a lorry owner had contracted to carry goods from London to York. The natural way, I suppose, of going from London to York would be via the Great North Road, the A1. If that were temporarily closed, it might be necessary to make a journey a little further to the West, through Leicester and Nottingham, or a little further to the East, through Cambridge and Lincoln. But it may well be said that that is the same journey with a minor variation of route; there would be no frustration. But supposing some disruptive or catastrophic event had happened which caused the whole of the roads of eastern and central England to be closed, and the motor lorry's journey had to be undertaken via Oxford, Gloucester, Chester, Liverpool, Manchester and Leeds. That would be a highly circuitous route, and it may well be that it was a fundamentally different journey. The owner of the lorry might well say (44) " Non haec in foedera veni "! That is a simple comparison, and, in my opinion, it is of some assistance. At any rate, my view is this, that, manifestly, the route via the Cape of Good Hope is so circuitous, and so unnatural, and so different in a number of respects, from the route via the Suez Canal that it should be regarded as fundamentally different for the present purposes. There was, therefore, in my view, frustration of the contract, that is to say, the charterparty.

Reference was made to certain cases decided with regard to c.i.f. contracts. There was *Carapanayoti & Co., Ltd.* v. *E. T. Green Ltd.* (45); and the cases of *Tsakiroglou & Co., Ltd.* v. *Noblee & Thorl G.m.b.H.* (46) and *Albert D. Gaon & Co.* v. *Société Interprofessionelle des Oleagineux Fluides Alimentaires* (47). With regard to those cases, I think that I need only read what was said by SELLERS, L.J., in the two last mentioned cases. He said (48):

> " The effect of the blockage of the Suez Canal on shipowners was obvious, for the relatively short route through the canal was denied them and for destinations such as we are considering in these cases a different and much more prolonged journey had to be substituted. But the question is what effect that had on the contract of sale between the parties here."

Then he went on to examine the facts of the particular case and to consider what difference it made to the sale of goods contract. One may say shortly that it is obvious that the position is very different in a sale of goods contract. Although it was a c.i.f. contract, the seller would sell the goods provided for and the buyer would buy the goods provided for. The seller would put the goods on board the ship at the port as contemplated by the contract and the buyer would receive the goods at the port as contemplated by the contract. The only difference would be that the seller would pay more than he expected for the freight and the buyer would have to wait longer than he expected to receive the goods. It was considered by the Court of Appeal that these were not fundamental differences and there was no frustration in the case of a c.i.f. contract.

There was also cited an American case *The Glidden Company* v. *Hellenic Lines, Ltd.* (49). That was decided by the United States Court of Appeals, second circuit. In that case there were charterparties for the transportation of ilmenite from India to " a United States Atlantic port north of Cape Hatteras ". The voyage was to be " via Suez Canal or Cape of Good Hope, or Panama Canal, at owners' option declarable not later than on signing of bills of lading, to one safe U.S. Atlantic port north of Cape Hatteras, port at charterer's option ". There was a typewritten insertion that the charterer's option was " to be declared not later than on vessel's passing Gibraltar ". It was argued that that provision which had been inserted in typescript necessarily implied that the vessel must pass Gibraltar, and therefore must go through the Suez Canal and could not go by any other route. But, on the construction of that particular contract, if that implication had been accepted no meaning whatever would have been given to the alternatives expressly provided for, namely, a voyage via the Cape of Good Hope or Panama Canal, and it was held that it could not be accepted that, on the true construction of that contract, the voyage must necessarily be performed through the Suez Canal. It was held therefore that, when the Suez Canal was closed, that did not cause a frustration. In my view, that is merely an example of a particular charterparty being construed according to its terms, and the terms were different from those in the present case.

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(44) See p. 538, letter D, ante. See also *Tsakiroglou & Co., Ltd.* v. *Noblee & Thorl G.m.b.H.* p. 171, ante, footnote (25). (45) [1958] 3 All E.R. 115; [1959] 1 Q.B. 131.

(46) [1959] 1 All E.R. 45; *affd.* C.A., ante, p. 160.

(47) [1959] 2 All E.R. 693; *affd.* C.A., ante, p. 160. (48) Ante at p. 162.

(49) Unreported.

The next question is whether the shipowners are estopped from alleging the frustration. The charterers' contentions on this point are set out in the Special Case (para. 7 (4)) as follows:

> " If the charterparty was frustrated the [shipowners] were estopped and precluded from so contending. In this regard it was urged as follows: (i) When the vessel's notice of readiness to load was given on Nov. 9, 1956, the [shipowners] knew that the Suez Canal was blocked and was likely to remain blocked for a substantial period of time and that the shortest practicable route was then via the Cape of Good Hope. (ii) The [shipowners] permitted the vessel to be loaded by the agents of the [charterers] and upon completion of loading the bill of lading was issued by the [shipowners]. The bill of lading incorporated the terms conditions liberties and exception of the charterparty and contained a specific stipulation that it was subject to the lien clause (cl. 21) thereof. (iii) The [shipowners] permitted the vessel, loaded as aforesaid, to sail from Masulipatan on Nov. 19, 1956. (iv) On Nov. 20, 1956 the [shipowners] by their representative intimated for the first time to the representatives of the [charterers] at Genoa the [shipowners'] contention that the charterparty had come to an end because of the blocking of the Suez Canal. (v) At all material times from Nov. 9, 1956 the [shipowners] had known that the Suez Canal was blocked and was likely to remain blocked for a substantial period of time and delay until Nov. 20, 1956 in intimating their aforesaid contention was unexplained. (vi) In these circumstances (it was contended) the [shipowners] represented: (a) that the charterparty was not frustrated and that they were ready and willing to perform it notwithstanding the blocking of the Suex Canal, (b) that they were not going to insist on their strict legal rights by desisting from further performance."

[HIS LORDSHIP then stated the arbitrator's findings, viz., findings (i)-(v) at p. 535, letter C, ante, and the finding at p. 535, letter E, ante that, if contrary to the arbitrator's view, the charterparty was frustrated, the shipowners were not estopped from so alleging. HIS LORDSHIP continued:] It is clear to my mind that there was no representation of fact such as could found any estoppel at common law. The subject of equitable estoppel (50) is obscure and insufficiently developed. Reference was made to 15 HALSBURY'S LAWS OF ENGLAND (3rd Edn.), p. 175, and to ANSON'S LAW OF CONTRACT (21st Edn.), pp. 103, 104 and 105.

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(50) I.e., promissory estoppel.

Reference was made also to *Birmingham & District Land Co.* v. *London & North Western Ry. Co.* (51), *Hughes* v. *Metropolitan Ry. Co.* (52), *Tool Metal Manufacturing Co., Ltd.* v. *Tungsten Electric Co. Ltd.* (53) and *Harnam Singh* v. *Jamal Pirbhai* (54). In the last-mentioned case there may have been an estoppel at common law rather than an equitable estoppel, but it is not very clear which it was. However, I have looked at those cases. They are far removed from the present case. In my view, there has been no development of this comparatively new doctrine of equitable estoppel which is wide enough to cover the present case. Moreover, it may well be that the findings of the arbitrator are in themselves sufficient to exclude the application of any equitable estoppel in the present case.

Next it is said that there is to be implied from the conduct of the parties an agreement—not a fictitious agreement, but an actual agreement—that the cargo would be carried from Masulipatan to Genoa by way of the Cape of Good Hope at the same rate of freight as that provided in the charterparty or on the charterparty terms. The main contentions of the charterers on this point are set out in the Special Case as follows:

> " If the charterparty was frustrated, an agreement was in all the circumstances (including those stated in sub-para. (13) of para. 5 hereof (55) and in sub-paras. (i) to (v) of sub-para. (4) of this paragraph [para. 7]) (56) to be inferred between the [shipowners] and the [charterers] that the cargo would be carried from Masulipatan to Genoa via the Cape of Good Hope at the same rate of freight as that provided in the charterparty or on the charterparty terms."

The arbitrator found that there were no representations as alleged, and he held that no agreement between the shipowners and the charterers was to be inferred that the cargo would be carried from Masulipatan to Genoa via the Cape of Good Hope at the same rate of freight as that provided by the charterparty or on the charterparty terms.

It is right to consider this question broadly. There might be a different formulation of the purport of the alleged agreement, for instance, to treat the charterparty as valid whether it was or not, or to proceed according to the terms of the charterparty notwithstanding that it might be invalid. Other formulations may be suggested. One must, however, look for an actual new agreement, with each party intending to make a new agreement, or, at any rate, so conducting himself that the other party could reasonably believe that he was intending to make a new agreement. Can it be said that the shipowners, by their captain giving the notice of readiness to receive cargo, offered a new agreement to the charterers' agents, and that the charterers' agents, by tendering the cargo, accepted the offer? Or can it be said that a new agreement was made by the charterers loading the cargo and by the captain receiving the cargo and starting the voyage with the cargo on board? The necessary acts and conduct are there if the intention to make a new agreement could be inferred. There are, however, no findings of fact to establish the supposed intention or apparent intention, and the findings in para. 12 are adverse to it (56), and the probabilities are against it. It is probable either that the parties thought that the original charterparty was still in force and were intending to perform it, or that they did not know what the legal position was and they were trying to preserve the status quo. Moreover, the captain would not, unless expressly authorised by the shipowners, have any authority to enter into a new agreement on their behalf: Scrutton on Charterparties (16th Edn.), p. 49; Carver's Carriage of Goods by Sea (10th Edn.), p. 30. Want of authority was not pleaded as such, but, in view of the normal lack of such authority, it is improbable that the captain would intend, or be supposed by the other party to intend, to enter into such an agreement, that is to say, the want of authority does come in as a factor of improbability, but only in that way.

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(51) (1888), 40 Ch.D. at p. 286.

(52) (1877), 2 App. Cas. 439.

(53) [1955] 2 All E.R. 657.

(54) [1951] A.C. 688.

(55) I.e., that the charterers paid to the shipowners freight at the charterparty rate of 134s. per long ton on the total cargo delivered at Genoa, the payment being made in three instalments on Nov. 26, 1956, Dec. 8, 1956 and Apr. 23, 1957; and that the instalment of Nov. 26, 1956, represented approximately 75 per cent. of freight at the rate of 134s. per long ton (see cl. 29 of the charterparty at p. 532, letter I, ante).

(56) See p. 545, letters E to H, ante.

There is the further point also that, if such an agreement were made, it would be an agreement to perform the long voyage round the Cape of Good Hope at a freight rate of 134s. per long ton; whereas, as found in the Special Case, the reasonable freight rate for such a voyage would be 195s. per long ton, and it is improbable that the shipowners would make that unreasonable agreement.

With some reluctance, I feel compelled to reject the contention that there was such a new agreement to be inferred from the conduct of the parties. I say "with some reluctance" because the shipowners did, by giving the notice of readiness and receiving the cargo and starting the voyage, restrict the field of choice which might have been open to the charterers. When the shipowners on Nov. 20, 1956, asserted frustration, the charterers could have accepted that view and had the cargo unloaded at Colombo. But they did not have the chance of finding a different ship or a different outlet for the goods at Masulipatan. However, if there was hardship on the charterers, it arose really from the frustrating event and not from any fault of the shipowners, who might well have to consider the position and take legal advice—in this case in particular on English law—before asserting frustration. It is not possible to find here any estoppel or any new agreement that the ship should make the voyage round the Cape of Good Hope at the original charterparty freight rate.

Finally, there is the agreement alleged by the shipowners for the payment of hire at a reasonable rate. The shipowners' contentions on this point are set out in the Special Case as follows:

> "By Nov. 9, 1956 or, at the latest, by Nov. 13, 1956 the charterparty was frustrated and in all the circumstances (including the fact that between Nov. 13 and Nov. 18, 1956 the [charterers] by their agents tendered the cargo to the vessel for loading and loaded the same) an agreement was to be inferred between the [shipowners] and the [charterers] that the [charterers] would pay a reasonable remuneration for the carriage of the cargo from Masulipatan to Genoa and that such reasonable remuneration was not less than 200s. per long ton delivered."

The charterers contended that a reasonable remuneration for the carriage of the cargo was about 178s. per long ton delivered. The arbitrator found the reasonable remuneration to be 195s., and held that if the charterparty was frustrated and the shipowners were not estopped and precluded from so alleging, an agreement was to be inferred between the shipowners and the charterers that the charterers would pay a reasonable remuneration for the carriage of the cargo from Masulipatan to Genoa and that such reasonable remuneration was at the rate of 195s. per long ton delivered. In my view, there was no actual agreement to that effect. At the material time, which was from about Nov. 9, 1956 to about Nov. 20, 1956, neither party had any actual intention, or had evinced any apparent intention, to make a new agreement. The shipowners' true claim is on a quantum meruit, which can be referred to, though perhaps not very aptly, as a fictitious agreement.

On that there is *Craven-Ellis* v. *Canons, Ltd.* (57). That was in the Court of Appeal. The plaintiff was appointed managing director of a company by an agreement under the company's seal which also provided for his remuneration. By the articles of association of the company each director was required to obtain his qualification shares within two months after his appointment. Neither the plaintiff nor the other directors obtained their qualification shares within two months or at all. The plaintiff having done work for the company claimed to A recover the remuneration provided for in the agreement, or, alternatively, on the basis of a quantum meruit. It was held that the fact that the plaintiff did the work under an agreement which was in fact void did not disentitle him from recovering on a quantum meruit. GREER, L.J., said (58):

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(57) [1936] 2 All E.R. 1066; [1936] 2 K.B. 403.

> " . . . the obligation to pay reasonable remuneration for the work done when there is no binding contract between the parties is imposed by a rule B of law, and not by an inference of fact arising from the acceptance of services . . ."

There are further relevant passages in GREER, L.J.'s judgment (59), and in GREENE, L.J.'s judgment (60), which was in agreement with that of GREER, L.J.

Then in *Hain S.S. Co., Ltd.* v. *Tate & Lyle, Ltd.* (61) there are some obiter dicta C on what the position would be after a deviation had deprived the shipowner of the right to rely on, at any rate, certain provisions of the charterparty. Three of their lordships, LORD ATKIN, LORD WRIGHT and LORD MAUGHAM, were not prepared to accept the view taken in the Court of Appeal that, in such an event, the shipowner could not recover any freight for his services. A view was indicated, certainly by LORD WRIGHT, M.R. (62), and I think also by LORD MAUGHAM (63), D to the effect that in such a case the shipowner would have a right to recover reasonable remuneration on a quantum meruit.

The present case is, to some extent, a fortiori. There was no breach of contract or other wrongful act by the shipowners. They carried the goods from Masulipatan to Genoa for the charterers' benefit and with the consent of the charterers. In my view, the law implies or imposes an obligation for the charterers to pay E reasonable freight, and the amount of the reasonable freight is found in the Special Case.

I, therefore, decide the questions of law (64) in favour of the shipowners. Accordingly the alternative award of the arbitrator applies, which is that: (i) The charterers do pay the shipowners the sum of £14,959 2s. 9d. together with interest thereon at £4 per cent. per annum from Feb. 16, 1957; (ii) the charterers F do bear and pay the whole of the arbitrator's costs of the reference to him and the whole of the costs of the award; (iii) if the shipowners in the first instance paid the whole or any part of the arbitrator's costs of the reference and of the award, the charterers shall forthwith refund to the shipowners the sum so paid; (iv) the charterers do pay to the shipowners the whole of the shipowners' own costs of the reference to arbitration.

Judgment for the shipowners, the claimants.

Solicitors: *Holman, Fenwick & Willan* (for the shipowners, the claimants); *Crawley & de Reya* (for the charterers, the respondents).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

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(58) [1936] 2 All E.R. at p. 1073; [1936] 2 K.B. at p. 412.
(59) [1936] 2 All E.R. at pp. 1071, 1072; [1936] 2 K.B. at pp. 409, 410.
(60) [1936] 2 All E.R. at pp. 1075, 1076; [1936] 2 K.B. at pp. 414, 415.
(61) [1936] 2 All E.R. 597; 19 Asp. M.L.C. 62.
(62) [1936] 2 All E.R. at pp. 612, 613; 19 Asp. M.L.C. at p. 69.
(63) [1936] 2 All E.R. at p. 616; 19 Asp. M.L.C. at p. 70.
(64) See p. 535, letters F and G, ante.

R. *v.* REGISTRAR OF BUILDING SOCIETIES, *Ex parte* A BUILDING SOCIETY.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Gorman and Ashworth, JJ.), April 27, 28, 1960.]

[COURT OF APPEAL (Hodson, Pearce and Upjohn, L.JJ.), May 9, 10, 11, 12, 1960.]

Certiorari—Registrar of Building Societies—Order prohibiting building society making invitations to subscribe for shares—Investigation—Hearing of representations by society—Whether registrar acting in administrative or quasi-judicial capacity—Prevention of Fraud (Investments) Act, 1958 (6 *&* 7 *Eliz.* 2 *c.* 45), *s.* 11 (1), (3).

In May, 1959, the Registrar of Building Societies served notice on a building society, under s. 11 (3)* of the Prevention of Fraud (Investments) Act, 1958, requiring the society to produce books, information, etc. The affairs of the society were under investigation from May, 1959, until February, 1960. On Feb. 19, 1960, pursuant to the proviso to s. 11 (1)† of the Act of 1958, the registrar served on the society notice of his intention to make an order under s. 11 (1) directing that no invitation to subscribe should be issued by the society. The covering letter enclosing the notice stated four principal grounds on which the registrar proposed to make the order, although there was no provision in s. 11 requiring any grounds to be stated. On Mar. 18 the registrar considered representations by counsel on behalf of the society. In the course of the representations there was a reference to the society's accounts for the year ending Dec. 31, 1959, which were not due to be filed until Mar. 31, 1960, and the hearing was adjourned so that those accounts might be available for the registrar's inspection. At a further, and final, hearing before the registrar on Mar. 25, 1960, the accounts for the year ending Dec. 31, 1959, prepared on the statutory form " A.R. 11 ", were produced. The society's auditor had appended his certificate, dated Mar. 21, 1960, to the form and annexed thereto a special report, dated Mar. 25, 1960. After considering the accounts and the auditor's special report, the registrar remained of the opinion that an order under s. 11 (1) should be made, and on Mar. 28 he decided to make the order. On Mar. 30 a request was made for Treasury's approval which was necessary under s. 11 (1). On Mar. 31 the society's auditor wrote to the registrar asking for an interview with the executive registrar to discuss the way in which accounts should be certified under the Building Societies Act, as there was a new Bill before Parliament. The letter asking for the interview was headed in the name of the building society, and, at the interview, which took place on Apr. 1, the point in issue in regard to a proposed amendment to the Bill was illustrated by reference to the accounts of the society. The substance of the conversation between the executive registrar and the auditor was reported to the registrar, but nothing was said at the interview which could affect the registrar's mind in relation to the question, which he had already decided, whether an order under s. 11 (1) should be made. The society was informed that the interview had taken place. On Mar. 30 a formal request for Treasury approval of the order was made. On Apr. 6 Treasury approval was received and the order was made. On an application by the building society for an order of certiorari to quash the order of Apr. 6,

Held: (i) although the registrar was not conducting an inquiry in the full sense when affording the society an opportunity of being heard in accordance with the proviso to s. 11 (1) of the Prevention of Fraud (Investments) Act, 1958, yet, after he had formed the intention that he signified by the notice of Feb. 19, 1960, he was acting in a quasi-judicial capacity which continued until the order was made on Apr. 6, 1960 (see p. 560, letters E to I, post). A

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* The relevant terms of the subsection are printed at p. 551, letter E, post.

† The relevant terms of the subsection are printed at p. 551, letter B, post.

(ii) it was, therefore, necessary to consider what took place at the interview of Apr. 1, 1960, the substance of which was communicated to the registrar before the order was made, but nothing had in fact taken place then which could be regarded as likely to prejudice the conclusion which the registrar B had to reach, and accordingly there was no ground for quashing the order of Apr. 6, 1960 (see p. 563, letter G, post).

QUAERE whether, when requiring information pursuant to s. 11 (3) of the Act of 1958, the registrar was acting in an administrative or in a quasi-judicial capacity (see p. 560, letters G and H, post).

Appeal dismissed. C

[**Editorial Note.** Section 11 of the Prevention of Fraud (Investments) Act, 1958, will be superseded by cl. 7 of the Building Societies Bill, 1960 (Bill 115), at present before Parliament, if the Bill is passed; there is a saving in the Bill for orders in force at its commencement.

As to the prohibition of invitations to subscribe for shares of building society, see 3 HALSBURY'S LAWS (3rd Edn.) 583, para. 1180, and Supplement. D

For the Prevention of Fraud (Investments) Act, 1958, s. 11, see 38 HALSBURY'S STATUTES (2nd Edn.) 896.]

Cases referred to:

Board of Education v. *Rice*, [1911] A.C. 179; 80 L.J.K.B. 796; 104 L.T. 689; 75 J.P. 393; 19 Digest 602, *290*. E

Errington v. *Minister of Health*, [1934] All E.R. Rep. 154; [1935] 1 K.B. 249; 104 L.J.K.B. 49; 152 L.T. 154; 99 J.P. 15; Digest Supp.

Franklin v. *Minister of Town & Country Planning*, [1947] 2 All E.R. 289; [1948] A.C. 87; [1947] L.J.R. 1440; 111 J.P. 497; 2nd Digest Supp.

Horn v. *Minister of Health*, [1936] 2 All E.R. 1299; [1937] 1 K.B. 164; 105 L.J.K.B. 649; 155 L.T. 335; 100 J.P. 463; Digest Supp. F

Local Government Board v. *Arlidge*, [1915] A.C. 120; 84 L.J.K.B. 72; 111 L.T. 905; 79 J.P. 97; 38 Digest 97, *708*.

R. v. *Camborne JJ., Ex p. Pearce*, [1954] 2 All E.R. 850; [1955] 1 Q.B. 41; 118 J.P. 488; [1954] 3 W.L.R. 415; 3rd Digest Supp.

R. v. *Rand*, (1866), L.R. 1 Q.B. 230; 35 L.J.M.C. 157; sub nom. *R.* v. *Rand*, *R.* v. *Bradford, JJ.*, 30 J.P. 293; 38 Digest 99, *719*. G

R. v. *Sunderland JJ.*, [1901] 2 K.B. 357; 70 L.J.K.B. 946; 85 L.T. 183; 65 J.P. 598; 38 Digest 99, *721*.

R. v. *Sussex JJ., Ex p. McCarthy*, [1924] 1 K.B. 256; 93 L.J.K.B. 129; 88 J.P. 3; sub nom. *R.* v. *Hurst, Ex p. McCarthy*, 130 L.T. 510; 33 Digest 294, *97*.

R. v. *Westminster Assessment Committee, Ex p. Grosvenor House (Park Lane), Ltd.*, [1940] 4 All E.R. 132; [1941] 1 K.B. 53; 110 L.J.K.B. 6; 165 L.T. 43; 104 J.P. 428; Digest Supp. H

Scott v. *Scott*, [1913] A.C. 417; 82 L.J.P. 74; 109 L.T. 1; 16 Digest 130, *276*.

Motion for certiorari.

This was a motion on behalf of a building society for an order of certiorari to remove into the High Court and quash an order made by the Registrar of Building Societies on Apr. 6, 1960, under s. 11 of the Prevention of Fraud (Investments) Act, 1958. The facts are set out in the judgment of LORD PARKER, C.J. I

N. N. McKinnon, Q.C., and *J. R. Peppitt* for the building society.

J. R. Cumming-Bruce for the Registrar of Building Societies.

LORD PARKER, C.J.: In these proceedings counsel moves for an order of certiorari on behalf of a building society to bring up and quash an order dated Apr. 6, 1960, made by the Registrar of Building Societies pursuant to his powers under s. 11 of the Prevention of Fraud (Investments) Act, 1958. By that section the registrar is given somewhat drastic powers in order to safeguard the interests of persons who have invested or deposited money in building societies. I will read the relevant parts of the section at once. By sub-s. (1) it is provided:

> "If, with respect to any building society, the registrar considers it expedient so to do in the interests of persons who have invested or deposited or may invest or deposit money with the society, he may by an order made with the approval of the Treasury direct that, unless and until the order is revoked, no invitation to subscribe for, or to acquire or offer to acquire, securities or to lend or deposit money shall be made by or on behalf of the society; and if any invitation is made in contravention of such an order, the person by whom the invitation is so made shall be guilty of an offence . . ."

There follows a proviso in these terms:

> "Provided that, before deciding to make an order under this subsection with respect to any society, the registrar shall serve on the society a written notice stating his intention to make the order, and shall consider any representations with respect to the proposed order made to him by the society within the period of one month from the date of the service of the notice, and, if the society so requests, afford it an opportunity of being heard by him within that period."

By sub-s. (2) it is provided:

> "Any order under the preceding subsection may be revoked by a subsequent order of the registrar made with the approval of the Treasury."

By sub-s. (3) machinery is provided whereby the registrar may require in advance all the information that he thinks necessary from the society and call on the society "to produce to the registrar such books, accounts, deeds and other documents relating to the business of the society . . ."

As I have said, the powers of s. 11 (1) are drastic. Once an order is made, whether published or not, knowledge of it will, no doubt, get around, and not only will further invitations for money be stopped but there is a real likelihood that withdrawals will result, causing considerable damage to the society. Such safeguards as there are must be found in the proviso to s. 11 (1), and clearly it is of the utmost importance that the procedure envisaged in the proviso is meticulously followed.

The short facts of the present case are as follows. A notice was given under s. 11 (3) to the society in May, 1959, to produce information, books, etc., and the registrar carried on thereafter an investigation until February, 1960. On Feb. 19, 1960, he served a notice on the society of his intention to make an order. The notice is in these terms:

> "Notice is hereby given pursuant to the provisions of s. 11 (1) of the Prevention of Fraud (Investments) Act, 1958, that it is the intention of the registrar to make an order directing that no invitation to subscribe for, or to acquire or offer to acquire, securities or to lend or deposit money shall be made by or on behalf of the above-named society. Any representations that the society desires to make to the registrar with respect to the proposed order must be submitted to him within the period of one month from the date of the service of this notice."

That notice was accompanied by a letter of the same date in which it was stated: "The principal grounds upon which the registrar proposes to make an order are as follows . . ." There are then set out four grounds to which I find it unnecessary to refer, except to mention that the first ground was the unsatisfactory reserve position in relation to the total assets of the society. The letter ended by saying:

> " Representations in respect of the proposed order may be made both orally and in writing. If representatives of the society wish to attend before the registrar for this purpose I will arrange an appointment upon hearing from you."

As a result, a hearing took place before the registrar on Mar. 18, 1960, when the society was represented by leading and junior counsel. In the course of that hearing leading counsel for the society traced the reserve position from 1955, covering the years 1955, 1956, 1957, and 1958. His object, no doubt, was to show, if he could, that year by year the reserve position was improving despite enormous increases in capital. He was about to move on to 1959, the accounts for which year were not due until Mar. 31, 1960, which was, of course, after the date of the hearing, and the registrar naturally said: " Yes, we have no accounts whatever for 1959 ". The registrar went on to say—and I have some sympathy with him:

> " I cannot really listen to representations on current accounts until I have had them laid before me and until I have had a chance to peruse them. If you want to make further representations on that, Mr. McKinnon, you can come again, but until I have had an opportunity to consider the state of affairs as disclosed by these accounts, it is premature to hear representations on them . . . I do not think it would be right to offer you a general adjournment on all matters, but on this particular matter of the accounts if, when you yourself have seen them, you want to make observations on them, I shall be prepared to listen to you on a further date on that particular point."

A further hearing took place on Mar. 22, when the accounts still were not available. Finally, there was an adjourned hearing on Mar. 25, when the accounts were produced, together with a special report from the auditor. Those accounts had only come forward that morning shortly before the hearing. Leading counsel for the society had not had an opportunity to go through them in detail, but they were put in. The registrar said to him:

> " But it was because you referred to the accounts in your submission and representations that we thought we would like to see them. A.—Yes, sir; I make no complaint. I dare say I have brought this on my own head by referring to them, and I am not making any complaint. But when those accounts are examined you may think that, if there is any further point, having regard to the importance of this matter, on which you want any representation from the society, that can be done, because although we have now gone over the statutory period [that was referring to the fact that more than a month had elapsed since the notice of intention had been served] I cannot complain, and the society would not dream of complaining if there was any further information you wanted; but, as far as I can say with my limited knowledge of accounts, I am prepared to rely on the certificate of a man like Mr. Thornton-Smith, who knows about these things, and he has made a special report."

Later, at that hearing, the matter was carried a little further because counsel said:

> " Inasmuch as it has only been delivered today, if there is anything that requires explanation I do not know whether there are any representations you would like to hear from the society in respect of it; and, of course, there are the representations which I made to you on the first occasion, dealing with the specific matters dealt with in the notice—my argument, you will recollect, was that, supposing for the sake of argument, at the time when those transactions arose and in view of what has happened since, if an order had then been made, what has happened since would justify an application for the revocation of the order; that was my contention."

Finally, it was left in this way by counsel saying:

> "Subject to anything arising on the accounts or on the correspondence, you may think that the matter is now closed and for you to deal with."

The matter ended there so far as the hearings were concerned.

The registrar thereafter considered the matter and clearly, as he says in his affidavit, he did consider the 1959 accounts and the special report. On Mar. 28 he made up his mind to make the order. The position then was that, having on information obtained between May, 1959, and February, 1960, evinced an intention to make an order, he was satisfied that there was nothing that he had since heard, nothing which he had heard up to Mar. 28, which caused him to change his mind. On Mar. 30 Treasury consent was asked for: on Apr. 6 Treasury consent was obtained and the order in question was made. Meanwhile, on Mar. 31 Mr. Thornton-Smith, the auditor, wrote to the registrar. It is right to say that he was concerned about a point, with which it is unnecessary to deal, in regard to the way that accounts should be certified under the Building Societies Act. There was a new Bill before Parliament, and he wanted to take up the matter with the registrar. The letter, however, which he wrote was headed in the name of this particular building society, and it said:

> "You will be aware that we have submitted a special report on our audit of the accounts of the above-named society for the year ended Dec. 31, 1959. The preparation of that report and the signature of the form A.R. 11 caused considerable difficulty because of the wording of the printed certificate on the form A.R. 11. It became necessary for us to consult leading counsel and the opinion which he gave to us was such that we would like to have the opportunity to report to you thereon. In our opinion the matter is of concern to all auditors of building societies, despite the advent of the new Act."

That letter was received on Mar. 31, not by the registrar, but by the executive registrar. The executive registrar, Mr. Leigh, apparently thought that a point of general importance was likely to arise on which it might be necessary to take urgent steps, the matter being before Parliament. He spoke to Mr. Thornton-Smith on the telephone. I find it unnecessary to go into the details of what took place, but it is clear that over the telephone it was arranged that the point in issue should be illustrated by reference to the accounts of this building society. An appointment was made, and Mr. Thornton-Smith went round on Apr. 1, and spent some hour and a half with Mr. Leigh. There is no doubt that, in the course of that hour and a half, reference was made to the affairs of this building society. It is also clear from the affidavit of the registrar that Mr. Leigh, after that interview, reported to him because in the last paragraph of his affidavit the registrar says:

> "After I had taken my decision to make an order against the society under s. 11 and had instituted an application for Treasury approval thereto, Dennis Leigh, the executive registrar, reported to me the interview that he had with the society's auditor on Apr. 1. I considered whether I should advise that any action should be taken in relation to the Bill [the Bill before Parliament] in view of the problem raised by the auditor. I took note of the comments of the auditor about the society's accounts. Those comments had no effect upon my mind in relation to the question, already decided, whether an order under s. 11 should be sought from the Treasury."

In those circumstances, three points are taken on behalf of the society. Perhaps points 1 and 2 rather go together, but I propose to deal with them in three stages. The first point is that the registrar refused to hear representations in regard to the 1959 accounts as he had promised to do. For my part, I am quite satisfied that, looked at baldly in that way, there was no refusal by the registrar whatsoever to hear representations. On Mar. 18 he had promised counsel that, when the accounts were prepared, counsel should have an opportunity of making representations. On Mar. 25, when the accounts were forthcoming and were produced, counsel, so far from then desiring to make representations, was stating that the matter, so far as he was concerned, was closed unless the registrar required any further information after studying the accounts. There, the matter was left. The bald ground that representations in regard to the accounts were refused, in my judgment, wholly fails. The only way in which it can be put, and this is really, I think, the second ground, is that, in operating the procedure in the proviso to s. 11 (1), natural justice demands that the registrar should state either in writing or orally to the society every ground and every matter which is operating on his mind in order to give the society a lead as to the sort of representations which might be useful. It can be put in this way, that it is quite impossible for a society to make proper and adequate representations unless the society knows the case which it has to meet. It is said that natural justice demands such a course, bearing in mind particularly the drastic powers that there are under this section and the serious results to the society if an order is made.

In this connexion, reference has been made to most of the leading cases in this field of law, beginning with *Board of Education* v. *Rice* (1) and going through *Local Government Board* v. *Arlidge* (2) and the other cases up to and including *Franklin* v. *Minister of Town & Country Planning* (3) dealing with the new town at Stevenage. For my part, I would like to say at once that I always find the expression " natural justice " very difficult. There is no one code of natural justice which is automatically imported into any procedure of a judicial nature. What is imported by way of natural justice depends entirely on the tribunal or official in question, the nature of his functions, and, perhaps most important of all, the exact words of the statute, because Parliament may by suitable words provide for a procedure which conflicts in many respects with the concepts of natural justice which one would find adopted by the courts. Each case must depend on the nature of the function and the exact words of the statute.

Counsel for the registrar has suggested that this is one of those extreme cases of which *Franklin's* case (3) is one, where the official concerned is acting in an administrative capacity from first to last and where there is never a stage when he is acting in a quasi-judicial capacity. For my part, as at present advised, I cannot accept the full length of that contention. It seems to me here that the natural approach where an official is given the power of life and death—because it almost amounts to that—over a building society, is that one would naturally expect to find that at some stage of the proceedings he should act in a quasi-judicial capacity, and for my part, although I find it unnecessary to come to a final conclusion in the matter, I think that at the moment when he enters on a hearing and up to the time when the order is made, he is acting in a quasi-judicial capacity. As I have said, I find it unnecessary to decide the point, because, even assuming that that is so, I go on to the next stage and ask myself in what, if any, manner the registrar has in this matter of representations on accounts conflicted with any principle of natural justice. He started by giving the notice accompanied by the principal grounds which moved him to think that he ought to make an order. There has been some argument whether that was a necessary step. In particular, reference is made to s. 6 of the Building Societies Act, 1894, which provides particularly for grounds being specified for cancelling or suspending the registry of a society (4); and it is noteworthy that in the section with which we are now concerned there is a complete absence of any such provision. Nevertheless, for the purposes of this argument I am willing to assume that natural justice demands that the registrar should inform a society in these circumstances of the sort of matters which are passing through his mind and on which he wishes to inform himself by representations from the society. That was done. I am also prepared to assume that, if in the course of the hearing or the inquiry some new point, some new ground, should come to light, then clearly, and I think that this is conceded, fairness would demand that the society should be informed of that matter and given an opportunity to make representations in regard to that new ground. But that is not this case. What happened here was that the registrar made up his mind in advance that, as at present advised, it was his intention to make an order, and he gave his grounds. In the course of the proceedings reference was made to the later position, namely, in 1959, which he had not had an opportunity theretofore of considering. He had only dealt with the years 1955 to 1958. Reference was made to 1959. He quite rightly, in my view, said that he must see the accounts. He saw the accounts, and nothing which he saw in the accounts altered his mind as to the provisional intention which he had formed, having looked at the years 1955 to 1958. For my part, I can see no ground for saying that natural justice should demand that, having looked at the accounts himself, accounts which did not affect his mind at all, he should nevertheless call on the society to make representations with regard to what he saw in the accounts, and the same, of course, applies to the special report of the auditor. It seems to me that the whole of the argument on this point on the facts of this case is quite artificial. As I have said, the matter was left entirely with the registrar to say whether there were any points on which he wanted any further information. Counsel had ample opportunity either of making representations at once on the accounts or, if he felt that he was not in a position to do so, to ask for an adjournment; and no adjournment was requested.

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(1) [1911] A.C. 179. (2) [1915] A.C. 120.

(3) [1947] 2 All E.R. 289; [1948] A.C. 87.

(4) See s. 6 (2) of the Building Societies Act, 1894; 2 HALSBURY'S STATUTES (2nd Edn.) 657.

The third ground relates to the interview which took place between Mr. Leigh and Mr. Thornton-Smith. Quite shortly, it is said that this is a case akin to *Errington* v. *Minister of Health* (5); in other words, it is said here that an investigation or a hearing was being continued in the absence of and behind the back of one of the parties, and yet no opportunity was given to the party to deal with the matters elucidated in that private investigation. The principle laid down in *Errington's* case (5) is still good law, and quite clearly, when there is a lis or a quasi-lis, matters being dealt with inter partes, it is beyond doubt that it is wrong for the Minister or the tribunal to hear evidence from one party in the absence of the other, or to get outside information which may tell against one of the parties without giving that party an opportunity of dealing with it. But this, as it seems to me, is quite a different case. Granted that the registrar was acting in a quasi-judicial capacity, the position had arrived when he had, in the light of the years 1955 to 1958, said that he intended to make an order. The accounts for 1959 were introduced. Those accounts for 1959 did not cause him to change his mind, witness the fact that on Mar. 28, before Mr. Thornton-Smith ever had his interview, the registrar had decided that nothing in the 1959 accounts caused him to change his mind. In those circumstances, supposing that Mr. Thornton-Smith, contrary to what the registrar says, had produced a lot of damaging evidence, if I may put it that way, in connexion with the 1959 accounts, supposing that that had happened, one asks oneself how can that affect the matter if the 1959 accounts, without the prejudicial evidence at the interview, had not affected the registrar? I cannot see how, in those circumstances, natural justice demanded that the society should have been informed of what Mr. Thornton-Smith had said and been given an opportunity of dealing with it. Incidentally, it was not done, it is only right to say, in any hole-and-corner way because the society were in fact informed that this interview had taken place. In my judgment, the last ground in relation to that interview also fails.

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(5) [1934] All E.R. Rep. 154; [1935] 1 K.B. 249.

A I would only add this. In the course of these proceedings the court has given the society considerable latitude to raise a number of matters which go outside the grounds of the statement for relief, and many allegations of unfairness have been made against the registrar. No doubt the society thinks that it is suffering under some grievance, but I think that it is only right to say that, having heard the multitude of accusations made against the registrar, I, for my part, am satisfied that he acted fairly and that none of the imputations which have been B made has been validly made. I would dismiss the application.

Perhaps I should have said that the scope of s. 11 has been argued before this court, the question being whether there is any condition precedent before the registrar can consider it expedient to make an order. The court finds it quite unnecessary to come to any conclusion on that matter.

C **GORMAN, J.:** I agree so completely with what my Lord has said that I do not think that any useful purpose would be served by my saying anything further.

ASHWORTH, J.: I also agree.

D [At the request of counsel for the society, and with the consent of the registrar, a stay on the publication of the society's name was granted for one day, on condition that thereafter any moneys sent to the society as subscriptions for shares or deposits should be paid into court and should not be taken out by the society until further order, to enable counsel for the society to apply to the Court of Appeal for a further stay. On an application to the Court of Appeal (HODSON, PEARCE and UPJOHN, L.JJ.) on Apr. 29, the registrar again consented, and their E Lordships continued the order banning the publication of the society's name, subject to the same condition, until the appeal was decided.]

May 9, 10, 11. **Appeal.**

The building society appealed to the Court of Appeal from the order of the Divisional Court, dated Apr. 28, 1960, dismissing the society's application for an order of certiorari to remove into the High Court and quash an order made by F the Registrar of Building Societies on Apr. 6, 1960, under s. 11 of the Prevention of Fraud (Investments) Act, 1958. The Registrar of Building Societies also appealed by cross-notice, against part of the order of the Divisional Court (see p. 559, letter I, post).

N. N. McKinnon, Q.C., and *J. R. Peppitt* for the building society.

J. R. Cumming-Bruce for the Registrar of Building Societies. G

May 12. **HODSON, L.J.:** This is an appeal from an order of the Divisional Court dated Apr. 28, 1960, dismissing a motion by a building society to remove an order of the Registrar of Building Societies to this court for the purpose of being quashed. The order of the registrar was made on Apr. 6, 1960, directing that no invitation to subscribe should be issued by the society. H

> "Pursuant to the provisions of s. 11 (1) of the Prevention of Fraud (Investments) Act, 1958, the Registrar of Building Societies hereby directs that unless and until this order is revoked no invitation to subscribe for, or to acquire or offer to acquire, securities or to lend or deposit money shall be made by or on behalf of the above-named society."

Subsection (1), sub-s. (2) and sub-s. (3) of s. 11 are material. I

> "(1) If, with respect to any building society, the registrar considers it expedient so to do in the interests of persons who have invested or deposited or may invest or deposit money with the society, he may by an order made with the approval of the Treasury direct that, unless and until the order is revoked, no invitation to subscribe for, or to acquire or offer to acquire, securities or to lend or deposit money shall be made by or on behalf of the society . . ."

The next part of sub-s. (1) deals with penalties in the event of a contravention of that order. The proviso to the subsection reads:

> "Provided that, before deciding to make an order under this subsection with respect to any society, the registrar shall serve on the society a written notice stating his intention to make the order, and shall consider any representations with respect to the proposed order made to him by the society within the period of one month from the date of the service of the notice, and, if the society so requests, afford it an opportunity of being heard by him within that period."

Subsection (2) reads:

> "Any order under the preceding subsection may be revoked by a subsequent order of the registrar made with the approval of the Treasury."

Subsection (3), which deals with a matter anterior in time to the hearing to which sub-s. (1) refers, is as follows:

> "The registrar may, at any time, by notice in writing served on a building society or on any person who is or has been an officer of such a society, require that society or person to produce to the registrar such books, accounts, deeds and other documents relating to the business of the society, and to furnish to him such other information relating to that business, as he considers necessary for the exercise of the powers which he has by virtue of sub-s. (1) and sub-s. (2) of this section; and any such notice may contain a requirement that any information to be furnished in accordance with the notice shall be verified by a statutory declaration."

The remainder of sub-s. (3) deals with sanctions to enforce the provisions of sub-s. (3) itself.

In May, 1959, notice was given to the society under s. 11 (3); and the investigation of the registrar continued until Feb. 19, 1960. On Feb. 19, 1960, notice was given:

> "Notice is hereby given pursuant to the provisions of s. 11 (1) of the Prevention of Fraud (Investments) Act, 1958, that it is the intention of the registrar to make an order directing that no invitation to subscribe . . . shall be made by or on behalf of the above-named society. Any representations that the society desires to make to the registrar with respect to the proposed order must be submitted to him within the period of one month from the date of the service of this notice."

The covering letter enclosing the notice stated this:

> "The principal grounds upon which the registrar proposes to make an order are as follows: (i) The unsatisfactory reserve position in relation to the total assets of the society. (ii) Inadequacy of security for the advances in respect of the 'Oak Farm' properties, resulting in a position of potential loss which would jeopardise the society's solvency. (iii) Division of mortgages artificially thus avoiding disclosure of details in the schedule of the annual accounts. (iv) The unauthorised deposit of large amounts of the society's 'liquid' funds on terms which require up to six months' notice of withdrawal. With regard to (ii) [that is, the Oak Farm property] the registrar has received from the district valuer a provisional valuation of the Oak Farm Estate at a total figure of £149,000 compared with the society's valuation of £370,000."

The final paragraph reads:

> "Representations in respect of the proposed order may be made both orally and in writing. If representatives of the society wish to attend before the registrar for this purpose I will arrange an appointment upon hearing from you."

On Mar. 18 the first hearing took place, when counsel on behalf of the society made representations. In the course of those representations he desired to refer, or was considered by the registrar to be anxious to refer, to the accounts for 1959, which had not then been produced and which the registrar had not seen. The accounts for the year ending Dec. 31, 1959, were not due to be filed with the registrar until Mar. 31, 1960, and, therefore, there was nothing unusual in the fact that those accounts were not then produced. Nevertheless it is clear from what I have already said that the investigations of the registrar had been pursued into 1959, which was the period for which no accounts were then ready. An adjournment was granted in order that those accounts might be available for the inspection of the registrar, and also for certain correspondence to be produced to which I need not further refer.

On Mar. 22 a further abortive hearing took place, because the accounts were not then ready; and on Mar. 25, 1960, there was the final hearing before the registrar: then the accounts for the year ending Dec. 31, 1959, prepared on the statutory form called " A.R. 11 ", were produced. To that form the auditor has appended his certificate, dated Mar. 21, 1960, and annexed thereto a special report, dated Mar. 25, 1960. The special report of the auditor is in the form of a letter and is as follows:

> " 1. Interest on Share Capital. Interest amounting to £130,094 9s. 6d. was due to be paid to the society's shareholders on Dec. 31, 1959. The cheques or warrants in settlement of the interest were dated Jan. 1, 1960, and appear in the books of the society on that date instead of the last day of the accounting period, that is Dec. 31, as has been the practice in previous years.
>
> " 2. Withdrawals of Capital. During the last few months of the year ended Dec. 31, 1959, the society received from a number of investors withdrawal forms requesting the society to repay their investment together with the accrued interest thereon on Dec. 31, 1959. In accordance with the terms of issue of the shares the society calculated interest to the requested date of repayment, that is Dec. 31, 1959, but the cheques in payment of the interest and repayment of the investment were dated Jan. 1, 1960. The interest so paid is included in the figure of £130,094 9s. 6d. referred to in para. 1 above. The total of share capital so repaid on Jan. 1, 1960, was £172,357 6s. 1d.
>
> " 3. Balance due or outstanding on Mortgages. (a) On Dec. 31, 1959, the total sum of £354,314 10s. 5d. was credited to the society's bank account by way of the redemption of three mortgages issued to Oak Farm Property Investment, Ltd., Oak Farm Property Co. and Oak Farm Investment Co. On Jan. 1 and 2, 1960, the respective sums of £270,000 and £92,000 were advanced by the society on the same security. (b) For the purpose of the society's accounts the receipt of the sum of £354,314 10s. 5d. referred to in (a) above has been ignored. The sum of £354,314 10s. 5d. is included in the balance sheet under the heading of ' Balance due or outstanding on Mortgages ' and the cash at bank has been reduced by a similar sum.
>
> " 4. Cash at bank. The balance of cash at bank at Dec. 31, 1959, as shown by the books of the society was £642,450 12s. 10d. The society's balance sheet at Dec. 31, 1959, shows cash at bank in the sum of £288,136 2s. 5d. computed as follows: Cash at bank as shown by the books of the society, £642,450 12s. 10d.: Less cash received on Dec. 31, 1959, referred to in para. 3 (b) above, £354,314 10s. 5d. [leaving a balance of £288,136 2s. 5d.].
>
> " If the payment of interest referred to in para. 1 above and the repayment of capital referred to in para. 2 had taken place on Dec. 31, 1959, the balance of cash would have been fully absorbed and there would have been an overdraft of £14,315 7s. 1d."

On Mar. 28, having considered the accounts and the special report which was

A put in with the accounts by the representatives of the society on the hearing of Mar. 25, and having heard the representations, the registrar made up his mind to make an order. On Mar. 30 consent was asked for Treasury approval; a further request for Treasury approval was made on Apr. 5, described in the second instance as a formal request; and Treasury approval was received on Apr. 6, on which date the order was made.

B In the view which I have formed as to the nature of the proceedings when representations made on behalf of the society were heard by the registrar, I think it unnecessary to examine in detail the extent to which the Crown has proved the steps taken to obtain Treasury approval. It is sufficient to say that Treasury approval was obtained and the order was made, pursuant to Treasury approval, on Apr. 6. Meanwhile, on Mar. 31, the auditor, a Mr. Thornton-Smith, C wrote to the registrar and sought and obtained an interview with the executive registrar, Mr. Leigh, on a question which was agitating his mind as to the certification of accounts under the Building Societies Act. The Act (6) provides for certificates or special reports, in the alternative; whereas Form A.R. 11, on the face of it, provides for the signature of the auditor and in addition, where circumstances require, a special report. It was known to the auditor, and of course to D the registrar, that there was a Bill pending before Parliament, and the matter which was in question was whether it was desirable to propose an amendment to that Bill so as to make the Building Societies Act requirement for a certificate or special report fall into line with the form A.R. 11, or, in the alternative, whether Form A.R.11 should be amended so as to make it square with the provisions of the Act. The auditor had received advice from learned counsel practising in the E Chancery Division to the effect that the provisions of the Building Societies Act should be strictly followed; and it was natural and proper, on a matter of that kind, that the registrar in his administrative capacity should consider this question.

It was at this interview (7) that the conversation took place between Mr. Leigh, the executive registrar, and Mr. Thornton-Smith, the auditor, which gives F rise to the main question on which this appeal turns. The point then raised comes under the heading of administration, but for the purpose of the illustration of the point which the auditor desired to make and to have elucidated, with an eye on the proposed legislation, the balance sheet of the society was discussed, and the executive registrar, as in duty bound, reported the matter to the registrar himself—the registrar being the officer who had heard the representations on G behalf of the society. It is contended on behalf of the building society here (and this is the main contention) that there should have been no discussion between the auditor and the registrar through his executive registrar on the affairs of the society, and that this vitiates the order of Apr. 6, since the registrar was acting in a quasi-judicial capacity and was not at liberty to receive information on the subject-matter of the representations behind the back of the society.

H LORD PARKER, C.J., in giving judgment in the Divisional Court (a judgment with which the other members of the court concurred), did not accept the submission of counsel for the registrar that the registrar was acting throughout in an administrative capacity in the full sense of the word (8) so that certiorari would not lie; but he dealt with the case on the assumption at any rate that, from the moment when the registrar entered on a hearing such as I have spoken of until I the order was made, he was acting in a quasi-judicial capacity. In order that the point may be determined, the registrar, by cross-notice in this court, contended that throughout he was acting administratively: alternatively, even if he was not acting administratively throughout, it is submitted that from Mar. 28, when he finally made up his mind to seek Treasury approval to the order which he intended to make, he had shed his judicial habit and put on again his administrative clothing which he (it is submitted) was wearing at the time of the interview between Mr. Thornton-Smith and Mr. Leigh.

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(6) See s. 2 (2) of the Building Societies Act, 1894; 2 HALSBURY'S STATUTES (2nd Edn.) 653.

(7) The interview took place on Apr. 1, 1960.

(8) See p. 554, letter G, ante.

The hybrid capacity of a Minister or official who, when holding an inquiry, may be acting in a judicial capacity but may at the time of the making of an order be acting in an administrative capacity is not an uncommon symptom which arises when statutory provisions of the kind with which we are now concerned fall to be considered. In each case the relevant statutory provisions have to be considered, and the duty of the official who conducts the inquiry has to be considered having regard to the language of the statute which imposes the duty on him. The position is, to my mind, well put (if I may say so respectfully) by Scott, L.J., in *Horn* v. *Minister of Health* (9):

> " . . . where public departments are given quasi-judicial duties as well as administrative duties, the need of their carrying out their quasi-judicial duties in strict accordance with natural justice must always be considered in the light of their administrative duties also. The administrative duties have to be carried out as part of the policy of Parliament imposed upon the Minister by the statute which he is administering, and Parliament must be taken quite deliberately to have decided that the exercise of the quasi-judicial functions of the Minister is compatible with the performance of his administrative duties under the Act. In my view, this particular case illustrates very clearly that principle, that the two types of duties go together and are compatible one with the other."

Counsel for the registrar submitted from the fact that the registrar was under no obligation to do what he in fact did here—give notice of the grounds on which his intention had been formed—that he was conducting an inquiry not in the full sense, at any rate, judicial, or even quasi-judicial. It was submitted that it was repugnant to the idea of judicial inquiry that no precise notice should be given of charges made which required an answer. It is, of course, further to be noticed that the registrar was not conducting an inquiry in the full sense (as Lord Parker, C.J., pointed out) inter partes, because he was having representations made to him only by the party against whom he had himself signified his intention—his provisional intention—to make an order. The quasi-judicial capacity may, I think, subsist even though the full form of a judicial inquiry is not there. (Compare *R.* v. *Westminster Assessment Committee, Ex p. Grosvenor House* (*Park Lane*), *Ltd.* (10), which concerned proceedings before a rating assessment committee.) The purpose of the inquiry is shown by the language of the section, and the object of representation by the society must surely be to give it an opportunity of persuading the registrar to alter the intention which he has previously indicated. It is, I think, unnecessary to consider further whether, in the preliminary investigation under s. 11 (3) of the Act of 1958, when he was calling for documents and examining documents, he was acting administratively or judicially. He was, it may be said, obtaining as it were discovery as a preliminary to forming his intention. But having regard to the range of the inquiry, it is, I think, open to the view that at that stage at any rate he was acting in an administrative capacity. As I say, no question in this appeal arises under that subsection. But after he had formed his intention to make an order under s. 11 (1), of which he gave notice on Feb. 19, it seems to me that his quasi-judicial capacity arose and persisted until the order was made on Apr. 6.

The principles of law applicable are to be found in the speech of Lord Loreburn, L.C., in *Board of Education* v. *Rice* (11):

> "Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the

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(9) [1936] 2 All E.R. at p. 1312; [1937] 1 K.B. at p. 186.

(10) [1940] 4 All E.R. 132; [1941] 1 K.B. 53.

(11) [1911] A.C. at p. 182.

A present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must B act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant state- C ment prejudicial to their view."

I emphasise the last phrase:

> " . . . always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

D A case of a more recent date which is relied on, and rightly relied on, by the building society is a decision of the Court of Appeal in *Errington* v. *Minister of Health* (12). I need not go through the facts of that case, but the point which emerges is that it is immaterial for the purposes of considering this question to say that anyway, whatever happened, it made no difference: the matter must, I think, be looked at from a wider and more detached and objective point of view E than that. GREER, L.J., in dealing with this matter (13), quoted from Sch. 1, para. 4, to the Housing Act, 1930, the Act there in question, which reads:

> " . . . in any other case he shall, before confirming the order, cause a public local inquiry to be held and shall consider any objection not withdrawn and the report of the person who held the inquiry, and may then confirm the order, either with or without modification."

F GREER, L.J., continued:

> " It seems to me that that involves the proposition that the matters there mentioned are the only matters which he is entitled to consider. If, instead of directing his mind solely to those matters, he also considers evidence which might have been, but had not been, given at the public inquiry, but G was given ex parte afterwards without the applicants having any opportunity whatever to deal with it, it seems to me that the confirming order was not one made within the powers of the Act. It is admitted that, though the draftsmanship of the section is not perfect, the order there referred to is the confirming order and not the original order. In my judgment, it is true to say that an order made by a quasi-judicial officer based on materials H which are not those referred to in Sch. 1, para. 4, is an order which is not within the powers given by the Act, having regard to the proposition which has been established in common law that a quasi-judicial officer in exercising his powers must do it in accordance with the rules of natural justice—that is to say, he must hear both sides and must not hear one side in the absence of the other."

I MAUGHAM, L.J., said (14):

> " The question whether the Minister, after such an inquiry has been held and after a report has been made, can then proceed—I am not dealing with the facts for the moment—to hear ex parte statements from one side or the other in the absence of those whose obvious desire it would be to controvert

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(12) [1934] All E.R. Rep. 154; [1935] 1 K.B. 249.
(13) [1934] All E.R. Rep. at p. 161; [1935] 1 K.B. at p. 268.
(14) [1934] All E.R. Rep. at p. 163; [1935] 1 K.B. at p. 272.

> them is precisely similar to the question whether, after holding, or having caused the holding of, a public local inquiry of a quasi-judicial character the Minister can then hold a private inquiry of his own to which one party only is admitted. That position is one which I should be very slow to adopt . . ."

A little later, MAUGHAM, L.J., said (15):

> "My conclusion is that, although the act of affirming a clearance order is an administrative act, the consideration which must precede it is of the nature of a quasi-judicial consideration, and the Minister is bound to the extent mentioned by the House of Lords in *Board of Education* v. *Rice* (16)."

He was there referring to the speech of LORD LOREBURN, L.C., to which I have referred. The final paragraph of his judgment reads (17):

> "The only remaining question is whether the court should come to the conclusion that the interests of the applicants have been substantially prejudiced by what has been done, because the quashing of the order is a matter of discretion for the court. I am not satisfied that the statements which were made to the Ministry in fact affected the decision of the Minister, or of his officials, and I certainly have no reason to doubt that the officials were acting in what they thought to be the public interest. On the other hand, it seems to me a matter of the highest possible importance that, where a quasi-judicial function is being exercised in such circumstances as it had to be exercised here, with the result of depriving people of their property, especially if it is done without compensation, the persons concerned should be satisfied that nothing unfair has been done in the matter, and that ex parte statements have not been heard before the decision has been given without any chance for the persons concerned to refute those statements. That seems to me a matter of the greatest possible public importance, and, if I am right in the view which I have expressed about the functions of the Minister being of a quasi-judicial character, I think it follows that in the special circumstances of this case, as I understand them to be, the court has no option but to quash the order."

That shows that the question cannot be solved by merely deciding whether or no the Minister made up his mind without reference to the particular matter in question; and I think, accordingly, that the submission made on behalf of the building society in that respect is sound—that is to say, that the matter must be dealt with objectively. Indeed, I think that that follows from the principles which have been laid down in another class of case, dealing with bias of the court, the most recent enunciations of which have stemmed from the observations of LORD HEWART, C.J., in *R.* v. *Sussex JJ., Ex p. McCarthy* (18), where the clerk to the justices retired with the justices, although it made no difference to the case. LORD HEWART, C.J., then used those famous words that justice " should . . . be seen to be done ". The same problem has been considered more recently in *R.* v. *Camborne JJ., Ex p. Pearce* (19), where SLADE, J., gave the judgment of the court and referred to a number of authorities on this topic, including *R.* v. *Rand* (20), where BLACKBURN, J., in dealing with " bias " cases, referred to the matter as depending on whether there was or was not " a real likelihood " of bias. In the judgment of the court in *R.* v. *Camborne JJ.* (21) it was stated:

> " . . . the right test is that prescribed by BLACKBURN, J., in *R.* v. *Rand* (20), namely, that to disqualify a person from acting in a judicial or quasi-judicial capacity on the ground of interest (other than pecuniary or proprietary) in the subject-matter of the proceeding, a real likelihood of bias

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(15) [1934] All E.R. Rep. at p. 163; [1935] 1 K.B. at p. 273.

(16) [1911] A.C. 179.

(17) [1934] All E.R. Rep. at p. 166; [1935] 1 K.B. at p. 279.

(18) [1924] 1 K.B. at p. 259.

(19) [1954] 2 All E.R. 850; [1955] 1 Q.B. 41.

(20) (1866), L.R. 1 Q.B. at p. 233.

(21) [1954] 2 All E.R. at p. 855; [1955] 1 Q.B. at p. 51.

A must be shown. This court is, further, of opinion that a real likelihood of bias must be made to appear not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries."

Earlier (22), the court had cited from a judgment of VAUGHAN WILLIAMS, L.J., B in *R.* v. *Sunderland JJ.* (23):

> " 'Can it be said here that there was nothing more than a mere possibility or suspicion that these justices would be biased? We must judge of this matter as a reasonable man would judge of any matter in the conduct of his own business. Can one doubt that a reasonable man as a matter of business would, under the circumstances of this case, infallibly draw the C inference that the justices who had negotiated and brought about this agreement would have a real bias in favour of granting the licence . . .?' "

It is true that these cases to which I have just referred are cases about judicial bias, and nobody has raised the question of bias in this case. But they do show that, so long as the judicial or quasi-judicial capacity persists, it is no answer to say that justice was in fact done, and I think, therefore, that one is bound to D examine what took place at the interview, which was in the form of a conversation which was ultimately communicated to the registrar, and see whether, when one looks at this matter objectively, there is any likelihood that the fountain of justice would be sullied.

[HIS LORDSHIP reviewed the evidence contained in the affidavits of the auditor and the executive registrar regarding the conversation, and continued:] E Nothing material was added and no fresh information was given during that conversation beyond that contained in the special report which had already been put in on behalf of the society on Mar. 25 by counsel for the society. [HIS LORDSHIP referred to the submission attacking this conversation and stated that on examination it was found to be without substance. HIS LORDSHIP continued:]

No doubt it was indiscreet for the registrar, in considering the point which he F had to consider in relation to the Parliamentary Bill, the administrative matter, to allow the report which had been put in evidence in the judicial hearing to be used, even as an illustration of the problem; but I am satisfied on the evidence of the parties to the interview that, in doing so, nothing was done which went beyond legitimate illustration, so that the registrar, in the exercise of his undoubted administrative function relating to the point raised by Mr. Thornton- G Smith, did not fall into the error of receiving fresh representations relating to the matter on which he was acting judicially. Nothing took place which on any reasonable view could be regarded as likely to prejudice the conclusion which the registrar had to embody in its final form by the order which he made on Apr. 6. This interview, therefore—and I accept the submission of counsel for the registrar in this respect—does not form a foundation for the edifice which the society seeks H to build on it, of a reception of material evidence behind the back of the society of a kind which would compel a fair tribunal to give the society a further hearing. Indeed, on my reading of the evidence, it is difficult to see how the registrar could have framed an invitation to the society to make any further representation or to answer any supposed further material which had been put before him, for on my reading of this evidence there was no fresh material contained therein. I The proceedings over which the registrar was presiding were not concluded until the final order was made, but up to that time he received no relevant representations on those matters and no further material was brought to his attention after the representations had been closed. The accounts were in no sense new. The accounts, and the special report, were part of the material which had been produced for consideration when the representations of the society were made.

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(22) [1954] 2 All E.R. at p. 854; [1955] 1 Q.B. at p. 50.
(23) [1901] 2 K.B. at p. 373.

Mr. Thornton-Smith and Mr. Leigh were discussing with one another the accounts A
of 1959 not with an eye on the order which the registrar was about to make but
with an eye on the administrative problem which they had to discuss, namely, the
form of the certificate and the special report, which either would be an alternative
or an addition to the signature to the account. For my part, I have come to the
conclusion that this case is a long way from those where the court has been
obliged to exercise discretion to make an order of certiorari to quash an order on B
the ground that the principles of natural justice have not been followed.

There are further grounds of appeal, to which I shall refer very shortly. The
society, it is said, was in effect debarred from making representations to the
registrar; but a reading of the transcript of what occurred before the registrar
on the occasions when the hearing took place satisfies me that there is no sub-
stance in that at all. There was never any refusal of the registrar at any time to C
hear representations; and, indeed, at the final hearing on Mar. 25 no adjournment
was asked for. I need add nothing further to what LORD PARKER, C.J., said on
that topic (24). Similarly, a complaint was made in this court, as well as in the
court below, on the form of the letter covering the notice which was sent on
Feb. 19, 1960, because that letter gave merely the principal grounds on which the
registrar had stated his intention of making an order, and it is said: "That is D
wholly insufficient as a foundation for a judicial hearing because no notice was
given in any sufficient form for us, the building society, to be able to deal with the
matters which were being said or being considered to our prejudice". The
answer to that seems to me to be this. So far as the Act of Parliament is con-
cerned, the registrar is not bound to give any particulars of the allegations which
he makes at all: he merely has to give notice of the hearing to the other side— E
notice of his intention and notice that he is ready to hear their representations.
That he did. He went further than the Act of Parliament compelled him to do in
giving, under four headings, an indication of the matters to which the society
would be asked to address themselves. It could hardly be a matter of complaint
that the registrar went further than was necessary in complying with the provi-
sions of the Act of Parliament. F

For these reasons, I would dismiss the appeal.

PEARCE, L.J.: I agree entirely with what my Lord has so clearly stated.
[HIS LORDSHIP referred to what was said at the interview between the society's
auditor and the executive registrar, and continued:] In my view nothing was
said at that interview which could reasonably be thought to affect the mind of G
the registrar; and I agree entirely that, for the reasons which my Lord has given,
this appeal should be dismissed.

UPJOHN, L.J.: I agree completely with both the judgments which have
been delivered, and do not desire to add anything of my own.

[Counsel for the building society, having been refused leave to appeal to the H
House of Lords, applied for a stay of publication of the name of the society
pending an application to the House of Lords for leave to appeal. The application
was opposed by counsel for the registrar.]

UPJOHN, L.J.: When the matter was first mentioned counsel for the
registrar took the point that the court had no jurisdiction to order a suspension of
publication, that being a duty cast, he submitted, by the statute entirely on the I
registrar. I suppose it is still open to counsel to take that point, and we should
then have to determine whether it is a good one or not.

HODSON, L.J.: We never considered it before because counsel agreed in
the end.

Cumming-Bruce: I was agreeing before.

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(24) See p. 555, letters A to E, ante.

McKinnon, Q.C.: I am content to argue before your Lordships' court that the registrar has not got power under s. 11 of the Act of 1958 to effect publication of the name of the society.

HODSON, L.J.: But when public proceedings take place in court, the newspapers name the society, and that is publication. There is great doubt about whether there is any power in the court to order the names to be suppressed in almost any case where the court is sitting in open court.

McKinnon, Q.C.: With respect, in criminal proceedings it is commonly done, and a witness is referred to as " Mr. X " or " Y " or " Z."

HODSON, L.J.: That is probably on the ground that justice cannot be done without something of that kind. But you would have to argue before us that justice could not be done unless the name was suppressed. I think that that is the basis of it. We are not at present disposed to make any order affecting publicity. There may be doubts whether we have any power to do it.

Cumming-Bruce: I do not consent, and, secondly, if necessary I take the point as to jurisdiction.

HODSON, L.J.: Have we any power to suppress names?

Cumming-Bruce: There is the practice in infant cases, but they are proceedings in chambers and everything flows from that. Then there are the solicitor cases. In regard to solicitors there is provision by which the order made by the disciplinary committee may itself not be placed on the file (25) or published until the determination of any appellate proceedings, if an application to that end is made by the solicitor. Therefore, that legislation specifically contemplates that the order shall not come into public notice until the legal proceedings are finished. It appears reasonable to hold that, as that legislation expressly contemplates protecting the anonymity of the solicitor by keeping the order off the file, that would be a warrant to the court not to publish the name of the solicitor in the appellate proceedings in relation to the order. There is nothing of that sort here; and there is a real practical objection to the continuance of the secrecy which is sought.

UPJOHN, L.J.: I should have thought that we are not really concerned with publication at all. We have merely refused to grant an order of certiorari. Whether the registrar has power to publish, or whether he does publish, or what his practice is, does not seem to me to be a matter, strictly speaking, concerning this court.

Cumming-Bruce: The first heading on the notice of appeal is outside the jurisdiction of this court, namely, the question whether the registrar has a right to publish or not. This court is concerned merely with the title of these proceedings, and whether the order of this court should continue to be an anonymous order. I would submit that it should not be and, indeed, cannot be so.

[Their Lordships conferred.]

HODSON, L.J.: We think that we have no power to alter the title of the suit.

McKinnon, Q.C.: The application to the court arises out of an order which has been made in proceedings which were private proceedings, not public proceedings. If my point on that is right, it is an order which is a private order.

HODSON, L.J.: If you come to a court of certiorari, you come to a public court where justice is " seen to be done." How are we to do justice publicly if we suppress the names of the parties?

McKinnon, Q.C.: Assuming that the House of Lords take the view that there is a case here for the society, it would only be right, if the order should never have been made in the first place, that the society should not have been irreparably damaged before that has been decided. On any view, there will be substantial damage to the society; and if in the end their Lordships' House takes the view that the order of the registrar ought never to have been made, then it would be contrary to the principles of any system of justice that, before that decision had been reached by the final tribunal, the society should have been irreparably damaged.

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(25) For the power to suspend the filing of an order, see the Solicitors (Disciplinary Proceedings) Rules, 1957 (S.I. 1957 No. 2240), r. 28.

UPJOHN, L.J.: The principle is clear. It was stated by VISCOUNT HALDANE, L.C., in *Scott* v. *Scott* (26):

> " While the broad principle is that the courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of courts of justice must be to secure that justice is done."

VISCOUNT HALDANE, L.C., then dealt with the well-known exceptions of lunatics and infants and certain criminal cases, and said (27):

> " . . . the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity."

That is the principle which we have to apply, sitting in public. I would have thought that " necessarily " the name is published.

HODSON, L.J.: I agree.

PEARCE, L.J.: I also agree.

HODSON, L.J.: We are all of opinion that we really cannot treat this as a matter of pure discretion, and in the exercise of our duty all we can do is to dismiss this appeal, with costs. We refuse leave to appeal to the House of Lords, and make no further order.

McKinnon, Q.C.: There is only this difficulty now. I ask leave for the money in court to be repaid to the society? There is something like £60,000 or more in court.

Cumming-Bruce: When Mr. McKinnon made his application to the Divisional Court that there should be no publicity, the Divisional Court granted that application on terms designed to the effect that the continued flow of money into the society's coffers, which would have been prevented by the order, would go into court, in conditions which would enable the court to return the money to the depositors. The registrar is very strongly opposed to the money being returned to the society, as that would defeat the whole nature of the exercise of cross-undertakings.

HODSON, L.J.: How is that to be disposed of?

Cumming-Bruce: I envisage that the names of the depositors will be communicated to the court and the money repaid. As the money is in court, there is a jurisdiction to give directions for its disposal.

HODSON, L.J.: If there is an order of the Divisional Court outstanding and we dismiss the appeal against the Divisional Court's order, the Divisional

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(26) [1913] A.C. at p. 437.

(27) [1913] A.C. at p. 438.

A Court's order still stands and you will have to solve this problem with the Divisional Court. Mr. McKinnon will say "We have not in fact advertised since the order was made. The money is our money."

Cumming-Bruce: The material part of the Divisional Court order is that:

> "The society do not take out of court any part of the said moneys which said moneys are to be dealt with in accordance with directions to be
> B given by the court."

The first order is that:

> "The society lodge in court any moneys hereinafter paid to the society as subscriptions for shares or any part of a share or by way of a deposit indicating the names and addresses of the payers and to produce to the
> C registrar a copy of the receipt for lodgment."

What I envisage happening now is an application to the Divisional Court to give directions for the said moneys to be returned to the payers whose names and addresses are held in court.

HODSON, L.J.: Yes. That is a matter for the Divisional Court.

D *McKinnon, Q.C.*: The stay on publication still exists till we go back to the Divisional Court. There is an order of the Divisional Court so far as that is concerned.

HODSON, L.J.: We have not concerned ourselves with whether they have exceeded their jurisdiction or not. All we have done is to dismiss the appeal.

Cumming-Bruce: There is no stay on publication in the order.

E **UPJOHN, L.J.**: There is nothing in this order.

McKinnon, Q.C.: There was a consent that there be no publication. By consent, there was to be no publication during the subsistence of this order. That was the position. It was on those terms that I agreed to enter into these undertakings which were incorporated in the order of the court.

F **PEARCE, L.J.**: It does not recite it.

HODSON, L.J.: You are thinking of two different kinds of publication all the time. All we are concerned with is the publicity which this case may receive as being a case heard in public. We are not concerned with the other matter.

McKinnon, Q.C.: My Lord, publication of the order will not matter in
G the least if this case receives the sort of publicity which might be expected.

HODSON, L.J.: Exactly. I see the practical side of it. But all we are concerned with is the publicity of this case here. I cannot say anything further about the publication of the order as such by the registrar.

Appeal dismissed.

H [May 12. Counsel for the registrar applied to the Divisional Court (LORD PARKER, C.J., BYRNE and ASHWORTH, JJ.) for directions in regard to the money lodged in court by the building society pursuant to an order of the Divisional Court. Counsel for the building society did not ask for the money to be paid back to the society. It was ordered that the appropriate officer of the court should pay back their deposits to such depositors as had not already been
I repaid by the society, and that, on the officer being satisfied that any depositors had been repaid by the society, the amount of their deposits should be repaid to the society.]

Solicitors: *W. J. Wade & Co.*, Slough (for the building society); *Treasury Solicitor.*

[*Reported in the* Divisional Court *by* F. GUTTMAN, ESQ., *Barrister-at-Law, and in the* Court of Appeal *by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

WINDSOR REFRIGERATOR CO., LTD. AND ANOTHER *v.* BRANCH NOMINEES, LTD. AND OTHERS.

[CHANCERY DIVISION (Cross, J.), March 29, April 5, 6, 7, 8, 11, May 19, 1960.]

Deed—Execution—Delivery—Delivery by agent—Agent not appointed by deed.

Deed—Escrow—Revocable instructions to be fulfilled before deed to become binding —Whether deed effectively delivered as an escrow.

Company—Debenture—Receiver—Appointment purported to be made by deed—Seal of company affixed in presence of directors who attested it—Deed not delivered effectively—Whether appointment effective as instrument under hand.

In 1946, in order to secure its overdraft with a bank a company issued under its seal a debenture giving a floating charge over the company's assets to B.N. Ltd. as nominee of the bank of which B.N. Ltd. was a wholly owned subsidiary. The debenture provided that after the principal moneys thereby secured, which were payable on demand, should have become payable " the registered holder of this debenture may at any time appoint by writing any person or persons to be a receiver or receivers of the property charged by this debenture ". By an agreement of even date to which the company, the bank and B.N. Ltd. were parties B.N. Ltd. agreed to stand possessed of the debenture and the money secured by it on trust (so far as is material) as a continuing security for the payment by the company to the bank of all moneys owing by the company to the bank, and that, in case of default by the company in payment on demand, B.N. Ltd. would, at the request of the bank, exercise all the powers vested in B.N. Ltd. by the debenture. On or about Feb. 25, 1958, B.N. Ltd., having prepared at the bank's request a formal demand for payment of the principal moneys secured by the debenture and a letter authorising the manager of a branch of the bank to receive payment on behalf of B.N. Ltd., each of which documents was signed by a director of B.N. Ltd., and having, also at the bank's request, sealed an undated deed appointing one P.C.G. as receiver under the debenture, sent these documents to the bank. The common seal of B.N. Ltd. was affixed to the deed appointing the receiver in the presence of two directors of B.N. Ltd., who signed the deed in the ordinary course of attesting the affixing of the seal. B.N. Ltd. did not intend the deed to become unconditionally binding on B.N. Ltd. at the time when the seal was affixed to it. The documents were sent by the bank to their branch manager with instructions to agree the receiver's remuneration, to attend personally at the company's office and, failing immediate repayment, to hand the instrument of appointment to P.C.G. On Feb. 28, 1958, the branch manager, having inserted the date Feb. 28, 1958, in the deed appointing the receiver, attended at the company's office with P.C.G. The branch manager handed to the managing director of the company the formal demand by B.N. Ltd. and a letter authorising him to receive payment under the debenture. Payment was not made and the branch manager then informed the managing director that P.C.G. was to be appointed a receiver and handed to P.C.G. the deed appointing him receiver. On the question whether P.C.G. had been validly appointed receiver, viz., whether the deed appointing him had been delivered as the deed of B.N. Ltd., or was effective as an instrument under hand, the foregoing facts being assumed for the purpose of deciding this question as a preliminary point of law.

Held: the appointment was invalid for the following reasons—

(i) delivery of a deed was essential to its validity and the branch manager of the bank was not an agent of B.N. Ltd. duly authorised to deliver the deed of appointment on its behalf, because no such power was conferred on him by the constitution of B.N. Ltd. and the appointment of an agent to

A deliver a deed already sealed must itself be under seal if it were to be valid (see p. 573, letter F, post).

Powell v. *London & Provincial Bank, Ltd.* ([1893] 2 Ch. 555) applied.

(ii) if a deed was delivered to an agent (not authorised by deed to deliver it) on the footing that it was not to become binding on the grantor until certain instructions had been fulfilled, and if the instructions were revocable B so that the deed could be recalled at any time before delivery, then there was not delivery of the deed by the grantor either as an escrow or at all; accordingly, as the branch manager's instructions were revocable, the deed of appointment did not become binding as the deed of B.N. Ltd. when he fulfilled them (see p. 574, letter I, and p. 576, letter G, post).

Dictum of VAUGHAN WILLIAMS, L.J., in *Foundling Hospital* (*Governors* C *& Guardians*) v. *Crane* ([1911] 2 K.B. at p. 374) applied.

Eccles v. *Bryant & Pollock* ([1947] 2 All E.R. 865) considered.

(iii) the deed of appointment could not be regarded as an appointment under hand validly made on behalf of B.N. Ltd., because there was no evidence that the directors, when they put their names to the deed, were authorised to do any other thing than witness the affixing of the seal of D B.N. Ltd. to the deed of appointment, which, being on its face a deed, could not, therefore, be treated as an instrument under hand (see p. 577, letter B, post).

Re Tahiti Cotton Co., Ex p. Sargent ((1874), L.R. 17 Eq. 273) distinguished.

[As to the execution of a deed and delivery as an escrow, see 11 HALSBURY'S E LAWS (3rd Edn.) 348-351, paras. 559-561; and for cases on the subject, see 17 DIGEST (Repl.) 221, *200-208*.

For s. 74 of the Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 580.]

Cases referred to:

Eccles v. *Bryant & Pollock*, [1947] 2 All E.R. 865; [1948] 1 Ch. 93; [1948] F L.J.R. 418; 12 Digest (Repl.) 70, *396*.

Farrar v. *Farrars, Ltd.*, (1888), 40 Ch.D. 395; 58 L.J.Ch. 185; 60 L.T. 121; 9 Digest (Repl.) 29, *9*.

Foundling Hospital (*Governors & Guardians*) v. *Crane*, [1911] 2 K.B. 367; 80 L.J.K.B. 853; 105 L.T. 187; 17 Digest (Repl.) 217, *170*.

Powell v. *London & Provincial Bank, Ltd.*, [1893] 2 Ch. 555; 62 L.J.Ch. 795; G 69 L.T. 421; 17 Digest (Repl.) 212, *106*.

Tahiti Cotton Co., Re, Ex p. Sargent, (1874), L.R. 17 Eq. 273; 43 L.J.Ch. 425; 9 Digest (Repl.) 218, *1388*.

Preliminary Point of Law.

The plaintiffs, Windsor Refrigerator Co., Ltd. (hereinafter called "the com- H pany") and Harry Fletcher Wood, managing director, in an action against the defendants, Branch Nominees, Ltd. (hereinafter called "the debenture holders"), National Provincial Bank, Ltd. (hereinafter called "the bank") and Philip Clarkson Greenwood, alleged that the third defendant, Mr. Greenwood, had been wrongfully and invalidly appointed receiver by the debenture holders and that by his wrongful acts as receiver the company and the second plaintiff, I Mr. Wood, had suffered damage and the plaintiffs sought consequential relief.

By an order made in the action dated May 27, 1959, it was ordered that a point of law raised in the pleadings be argued before the court as a preliminary point of law, viz., whether the procedure described in para. 5 and para. 8 of the defence read with the further and better particulars was invalid to effect the appointment by the debenture holders of Mr. Greenwood on Feb. 28, 1958, to be the receiver under their debentures by reason of all or any of the following facts:—(1) the fact of the debenture holders in the circumstances making and sealing on Feb. 25, 1958, an undated instrument of appointment prior to any demand being made on the company for payment of the principal moneys secured by the debentures or of the moneys owed by the company to the bank; (2) the fact of the bank sending the instrument of appointment to their branch manager with instructions (a) to demand from the company at their registered office payment of the principal moneys (b) to date the instrument and (c) failing immediate payment to deliver the instrument to Mr. Greenwood; (3) the fact of the branch manager on Feb. 28, 1958, inserting into the instrument the date " Feb. 28, 1958 " prior to making such demand for payment; (4) the fact of the branch manager on Feb. 28, 1958, making such demand for payment to the managing director of the company at the company's principal place of business and not receiving payment; (5) the fact of the branch manager thereupon handing the instrument of appointment to Mr. Greenwood.

The facts as described in paras. 5 and 8 of the defence read in conjunction with the further and better particulars are set out in the judgment.

Muir Hunter and *David Graham* for the plaintiffs.

J. L. Arnold, Q.C., and *L. J. Morris Smith* for the defendants.

Cur. adv. vult.

May 19. **CROSS, J.**, read the following judgment: The issue in this action is whether on Feb. 28, 1958, the third defendant, Philip Clarkson Greenwood, was validly appointed by the first defendants, Branch Nominees, Ltd. (whom I will call " the debenture holders ") to be the receiver of the undertaking and assets of the plaintiffs, Windsor Refrigerator Co., Ltd. (whom I will call " the company ") under the terms of three debentures granted by the company to the debenture holders. By an order made in the action on May 27, 1959, by agreement between the parties, it was directed that this issue should be determined by the court as a point of law on the footing that where the facts were in dispute on the pleadings, the version given by the defendants in the relevant paragraphs of their defence and the particulars delivered under it were correct.

The facts which are agreed, or which I must assume to be correct, are as follows: The company had an account at the Reading branch of the second defendant, the National Provincial Bank, Ltd. (whom I will call " the bank "). The debenture holders are a wholly owned subsidiary of the bank, and securities to be given to the bank to secure advances by the bank are commonly taken in the name of and issued to the debenture holders as trustees for or nominees of the bank. The functions of the debenture holders in this regard are carried out as part of the department of the bank known as " the security department ". The control and superintendence of advances made by the bank through its various branches by way of overdrafts or otherwise are exercised by the department of the bank known as " the advance department ", and the advance department had therefore control and superintendence of the company's account with the bank at its Reading branch. The first of the three debentures in question was issued under the seal of the company on Apr. 30, 1946. It was in common form, containing a promise by the company to pay to the debenture holders on demand the sum of £3,000 with interest in the meantime at five per cent. and a floating charge on all the property of the company to secure the payment of capital and interest. The debenture was issued subject to and with the benefit of the conditions indorsed on it. Condition 12 (1) was in the following terms:

> " At any time after the principal moneys hereby secured shall have become payable the registered holder of this debenture may at any time appoint by writing any person or persons to be a receiver or receivers of the property charged by this debenture and may from time to time by writing remove any receiver so appointed and appoint another in his stead."

Sub-paragraphs (2), (3) and (4) of condition 12 contained the usual provisions with regard to the powers, duties and remuneration of any receiver so appointed. On the same day as this debenture was issued, an agreement (called a " Buckley agreement ") was made between the company, the bank and the debenture holders. Clause 1 of this agreement provided that the debenture holders, who were therein described as " the trustees ", should stand possessed of the debenture and the money secured by it on trust in the first place as a continuing security for payment by the company to the bank on demand of all moneys owing by the company to the bank and, subject to such trust in favour of the bank, on trust for the company. Clause 2 provided that it should be lawful for the debenture holders, at the request of the bank at any time thereafter in case of default in payment of such sum or sums or any part thereof on demand, to exercise all and every or any of the powers vested by the debenture in the holders thereof, including (inter alia) the power to appoint a receiver, and that the debenture holders should execute all such assurances and do all such acts as the bank should require or think proper.

On Dec. 11, 1947, and Jan. 31, 1951, similar debentures for securing sums of £2,000 and £5,000 respectively were issued by the company to the debenture holders, accompanied in each case by similar agreements between the company, the bank and the debenture holders. On Feb. 24, 1958, the advance department of the bank, by a memorandum in writing, requested the debenture holders to prepare a formal demand for payment of the full amount of £10,000 owing by the company under the three debentures, and a letter authorising Mr. Inkin and Mr. Hobby, who were respectively the branch manager and senior clerk of the Reading branch, to receive payment of that sum on behalf of the debenture holders. On the same day, or early on the next day, the advance department sent to the security department an instrument of appointment of Mr. Greenwood as receiver under the debentures, with a request in writing for its sealing by the debenture holders. This document was in the following terms:

> " We, Branch Nominees, Ltd., being the registered holders of the debentures referred to in the schedule hereunder written and under and in accordance with the provisions of the conditions indorsed upon the said debentures and all other powers us enabling, hereby appoint Mr. Philip Clarkson Greenwood, A.C.A., to be receiver of the undertaking and all of the property and assets of Windsor Refrigerator Co., Ltd., comprised in and charged by the said debentures upon the terms and with and subject to the powers and provisions contained in the said debentures, and we declare that the said receiver shall be entitled to remuneration at the rate already arranged between us and the said receiver or at such higher rate not exceeding five per cent. as shall or may from time to time be agreed by us with him as witness our common seal this (blank) day of (blank) 1958."

The schedule contained details of the three debentures to which I have referred.

At about 10 o'clock in the morning of Feb. 25, 1958, the common seal of the debenture holders was affixed to this instrument of appointment in the presence of Mr. Brooks and Mr. Wheeler, two of the directors of the debenture holders, who signed their names in the space provided for the purpose on the instrument, but the date was left blank. The debenture holders thereupon returned the instrument so sealed to the advance department, together with a formal demand for payment by the company to the debenture holders of £10,000, signed by Mr. Brooks, and a letter to the secretary of the company, also signed by Mr. Brooks, authorising Mr. Inkin or Mr. Hobby to receive payment of the £10,000 on behalf of the debenture holders. On the same day, the advance department of the bank sent the instrument of appointment and the two letters to Mr. Inkin, together with a letter in the following terms:

> " In reply to your letters of the 19th and 21st instant, the directors desire you to call up the debt and guarantees and we confirm our recent telephone conversation to this effect. They have appointed Mr. Philip Clarkson Greenwood, A.C.A., to act as receiver and have transferred the account to realisation section, who will instruct you further in due course. A formal

> demand by Branch Nominees, Ltd., for payment of the amount due under the debentures is enclosed, together with a letter from Branch Nominees, Ltd., authorising Mr. Neal David Inkin or Mr. Vernon Penrose Hobby to receive payment. It is essential that these should be presented personally by Mr. Inkin or Mr. Hobby at the company's registered office and he should take with him the debentures so as to produce them in case of need. Failing immediate repayment, you may then hand the enclosed deed of appointment to Mr. Philip C. Greenwood. As you are no doubt aware, the deed of appointment requires to be stamped 10s., and realisation section should be advised of the date inserted by return of post in order that the necessary notice may be filed with the registrar of joint stock companies within the prescribed period of seven days. We should like you to discuss and settle beforehand with Mr. Greenwood the question of his remuneration as receiver and in this connexion we consider that five per cent. on realisations would be a reasonable scale, but in the event of its being necessary for the receiver to employ agents for the disposal of the assets and commissions, fees, etc., have to be paid to such agents, then the amount payable to the receiver in respect of such realisations should be 2½ per cent. only. We return the debentures totalling £10,000, Buckley agreements and certificates of registration, receipt of which kindly acknowledge."

On Feb. 26, Mr. Inkin, having received this letter and its enclosures, made an appointment by telephone with Mr. Wood, who was the managing director of the company, to meet him at 11 o'clock on Feb. 28, to discuss the company's account, which was then overdrawn to the extent of £8,032 14s. 9d. At about 10.20 a.m. on the morning of Feb. 28, Mr. Inkin inserted the date " Feb. 28 " in the instrument of appointment and went with Mr. Greenwood to the company's office at Maidenhead, where they arrived at about 11 a.m. Mr. Inkin first saw Mr. Wood alone, without Mr. Greenwood being present. He informed Mr. Wood that he had bad news for him, as the bank required repayment of the company's debt, and he handed him the two letters addressed to the company by the debenture holders and requested him to read them, which Mr. Wood did. There then followed a discussion between Mr. Wood and Mr. Inkin which lasted for about fifteen minutes, at the end of which Mr. Greenwood came in and was introduced by Mr. Inkin to Mr. Wood. During the next ten minutes or thereabouts, a further conversation took place, mainly consisting of an account by Mr. Wood of the difficulties experienced by the company. Mr. Inkin then said " The fact remains that Mr. Greenwood is to be appointed receiver " and thereupon handed to Mr. Greenwood the deed of appointment. Mr. Greenwood then handed to Mr. Wood a letter dated Feb. 28 which he had signed and brought with him, which was in the following terms:

> " Dear Mr. Wood, I wish to inform you that I have today been appointed receiver of the Windsor Refrigerator Co., Ltd., under a series of debentures in favour of the bank. You will of course appreciate that I shall have to be responsible for the running of the company during my period of office. I trust that with care and co-operation from all concerned the company will emerge from its difficulties and after my release as receiver continue trading and go from strength to strength. Yours sincerely, Philip C. Greenwood."

The meeting between the three gentlemen then continued until about 1 p.m.

The particulars given under para. 5 and para. 8 of the defence include the following sub-paragraph which I must assume for present purposes to be true and ought, I think, to be set out in full:

> " (e) The requests for the preparation of the formal demand and the sealing of the instrument of appointment were made by the bank (through its advance department) with the intention thereafter of procuring the said

> demand to be served on the company and the said instrument of appointment to be dated and delivered to Mr. Greenwood so as to effect his appointment as receiver. The debenture holders complied with such requests (as they were bound to under cl. 2 of each of the said agreements) in the knowledge that such was the intention of the bank and in order to enable such intention to be carried into effect and the bank had the express or alternatively implied authority from the debenture holders on their behalf to serve or procure the serving on the company of the said demand and to date and deliver to Mr. Greenwood the said instrument or procure the same to be so dated and delivered. It was not the intention either of the debenture holders or the bank that the said instrument of appointment should have any effect until so dated and delivered."

It is further stated in the particulars that Mr. Inkin, in handing to Mr. Greenwood the deed of appointment, was exercising on behalf of the bank the authority which the bank had from the debenture holders as stated in para. (e) above.

I must now consider whether on these assumptions of fact Mr. Greenwood was validly appointed receiver on the morning of Feb. 28. Clause 12 (1) of the conditions indorsed on the debentures provides that a receiver can only be appointed after the principal moneys thereby secured shall have become payable, i.e., after the debenture holders have demanded payment of them, but I must assume for present purposes that Mr. Inkin had made a demand for payment on behalf of the debenture holders before he handed the deed of appointment to Mr. Greenwood. A deed, whether executed by a corporation or by an individual, does not necessarily bind the grantor as soon as it is sealed. It only becomes binding when it has been " delivered " by the grantor as his deed, i.e., when the grantor has indicated by words or conduct that he intends the deed which he has executed to be binding on him. The debenture holders, according to the facts which I must assume to be true, did not intend the deed of appointment to become unconditionally binding on them when the seal was affixed to it on the morning of Feb. 25. On the other hand, the deed cannot have been delivered on their behalf by Mr. Inkin when he handed it to Mr. Greenwood on Feb. 28. Mr. Inkin was not a person who, under the constitution of the debenture holders, had any power to execute or deliver deeds on their behalf and, although a corporation can no doubt appoint a third party as their agent to deliver a deed which they have previously sealed, such an appointment would itself have to be under seal just as would a similar appointment by an individual of an agent to deliver a deed for him (see *Powell* v. *London & Provincial Bank, Ltd.* (1)). The defendants seek to escape from this difficulty in one of two ways. They argue first that the appointment was delivered by the debenture holders on Feb. 25 as an " escrow " subject to conditions which were fulfilled when Mr. Inkin handed the document to Mr. Greenwood on Feb. 28. Alternatively, if for any reason the appointment cannot be regarded as having been delivered as an escrow, they argue that it should be regarded not as a deed at all but as equivalent to a document under hand.

The word " escrow " is sometimes, I think, loosely used to describe a deed which has not been delivered at all. In fact, however, the two things are entirely different. A deed which has not been delivered at all has no effect whatever unless and until the grantor indicates his wish that it shall become binding on him. On the other hand, an escrow, i.e., a deed which is delivered subject to a condition, becomes unconditionally binding, without any further expression of the grantor's will, as soon as the condition is fulfilled. Thus, the death of the grantor renders an undelivered deed forever incapable of having any effect, but it has no effect on an escrow which will become binding on the grantor's estate if and when the condition subject to which it was delivered is fulfilled (see generally Norton on Deeds (2nd Edn.), at p. 18). If, then, the appointment of

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(1) [1893] 2 Ch. 555.

Mr. Greenwood as receiver was delivered by the debenture holders as an escrow on Feb. 25, what were the conditions subject to which it was so delivered? The defendants argued, in reliance on the wording of the last sentence of sub-para. (e) of the particulars which I have set out above, that the only conditions were that Mr. Inkin should date the deed and hand it to Mr. Greenwood. The plaintiffs, on the other hand, argued that on the hypothesis that the deed was delivered as an escrow there must have been two other conditions which had to be fulfilled, viz., (i) that Mr. Greenwood should be prepared to act as receiver for a remuneration satisfactory to the bank and the debenture holders, and (ii) that a demand for payment should have been made by Mr. Inkin on behalf of the debenture holders and not complied with by the company before the deed was handed to Mr. Greenwood.

The fact that there was this dispute between the parties shows how unsuitable this form of procedure is for the determination of a question of this sort. If I was trying the action, I should presumably have heard the evidence of the directors of the debenture holders. As it is, I have to ascertain the facts to be assumed by construing the relevant parts of the defence and particulars. Construing them as best I can, I think that if this deed can be considered to have been delivered at all on Feb. 25, I must take it to have been delivered subject to the four conditions stated by the plaintiffs and not only to the two stated by the defendants. The argument of the defendants appears to me to attach too much importance to the wording of sub-para. (e) and to ignore the reality of the case. It is natural enough that the date and handing over of the deed should be referred to together in the last sentence of that sub-paragraph, since these were the two things which were to happen to the deed itself as a piece of paper; but, in the absence of any evidence on the point, I cannot infer from the fact that the making of a demand is not mentioned in the same sentence that it was not also a condition on which the deed was delivered. The defendants' argument would apparently involve the consequence that if Mr. Inkin had handed the deed to Mr. Greenwood to read in the car as they were on their way to the meeting (which, for all I know, he may have done), the deed would thereupon have become unconditionally binding on the debenture holders and obviously would not have effected the appointment of a receiver, since no demand had been made. I shall therefore proceed on what appears to me to be the common-sense assumption that if this deed can be regarded as having been delivered at all on Feb. 25, it was delivered subject to the four conditions to which I have referred, viz.: (i) that Mr. Greenwood agreed to act on acceptable terms; (ii) that a demand for payment was made by Mr. Inkin and not complied with; (iii) that Mr. Inkin dated the deed; and (iv) that he handed it to Mr. Greenwood after the demand was made and not complied with. It also appears to be plain on the facts which I have to assume that Mr. Inkin was acting as a mere agent for the debenture holders and that his instructions could have been countermanded at any moment. If, for example, the bank had suddenly decided not to call in the loan or that Mr. Greenwood was not a suitable person to be a receiver and had asked the debenture holders to tell Mr. Inkin to tear up the deed, he would have been bound to obey their directions.

The question which then arises is whether, if a deed is sealed and handed to an agent of the grantor to deal with in a certain way on the footing that it is not to become binding on the grantor until the instructions are fully complied with and the instructions are revocable by the grantor so long as they are not yet complied with, the deed can be regarded as having been delivered as an escrow. In other words, can the carrying out of revocable instructions be regarded as conditions of a delivery by the grantor, or should such a deed be regarded as not having been delivered at all by the grantor, with the result that the agent must be authorised by deed to deliver it for the grantor when he has carried out his instructions?

The only case cited to me which deals with this point is *Foundling Hospital* (*Governors & Guardians*) v. *Crane* (2). There, one H. signed and sealed a document with the date in blank purporting to be an assignment to Mrs. B. of a lease held by him and delivered the document to his solicitors on terms set out in a letter addressed to him by them as follows:

> " We acknowledge that you have today executed the assignment of your lease to Mrs. B. as an escrow, and that we are to retain it on your behalf until you send instructions to complete the deed. In the event of your dying before the deed is completed, we understand that we are to consider the deed as having been completed before your death, and to take what steps are necessary to vest the lease in Mrs. B., should she wish it. In the event of Mrs. B. dying before the assignment is completed, you will of course send us further instructions as to what is to be done with the premises."

The document was not attested so as to satisfy the requirements of the Wills Act, 1837. H. died without having given any further instructions in the matter but having occupied and retained the title deeds of the house until his death and paid the rent, rates and taxes in respect thereof. The issue in the case was whether the assignment was effectively delivered as an escrow conditionally on H. dying without giving any further instructions or was merely an undelivered deed having no effect whatever. The Court of Appeal held that it was merely an undelivered deed. The ratio decidendi of the case was that even if the document could otherwise have been regarded as an escrow, the imposition of a condition that it should only take effect on the grantor's death was invalid as an attempt to make a testamentary disposition in a form not authorised by the Wills Act, 1837. All three members of the court, however, also considered whether, if the condition had been valid, the fact that the solicitor was only to vest the property in Mrs. B. on H.'s death if H. had not given him contrary instructions in the meantime would have precluded the document from being an escrow. FARWELL and KENNEDY, L.JJ., merely doubted whether such a document could be an escrow. Thus, FARWELL, L.J., said (3):

> " I doubt . . . if a deed can be delivered as an escrow at all subject to an overriding power in the grantor to recall the deed altogether . . ."

VAUGHAN WILLIAMS, L.J., on the other hand, expressed (4) a clear opinion that such a deed would not be an escrow at all but only an undelivered deed. His opinion on this point is not, of course, binding on me; but, so far as I know, it has never been dissented from and I propose to follow it.

Counsel for the defendants referred me, on this part of the case, to the decision of the Court of Appeal in *Eccles* v. *Bryant & Pollock* (5), as an example of a case where a document signed and entrusted to an agent with instructions to deal with it in a certain way was to become binding when the instructions were carried out unless previously revoked. It is, however, to be observed that the document in question there was not a deed but a document under hand. Just as a deed which is not delivered at all when it is sealed can be delivered at a later date by the grantor or by his agent appointed by deed and in the meantime has no effect whatever, so no doubt a document under hand can be executed with the intention that it shall have no effect whatever until something or other is done by the man who executes it or by an agent of his who need not, of course, be appointed by deed. But, so far as I know, a unilateral document under hand cannot be executed as an escrow, i.e., as a document binding on the man who signs it and on his estate on the fulfilment of a condition not expressed in the document. It does not seem to me, therefore, that such a case as *Eccles* v. *Bryant & Pollock* (5) is in any way inconsistent with the view expressed with regard to deeds by Vaughan Williams, L.J., in the *Foundling Hospital* case (6).

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(2) [1911] 2 K.B. 367.

(3) [1911] 2 K.B. at p. 379.

(4) [1911] 2 K.B. at pp. 374, 375.

(5) [1947] 2 All E.R. 865; [1948] 1 Ch. 93.

If I had been of opinion that the revocable instructions given to Mr. Inkin could have been regarded as conditions subject to which the deed might have been delivered as an escrow, a further question would have arisen, viz., whether the fact that on Feb. 25, the debenture holders had no power to make an unconditional appointment of a receiver since no demand for payment had yet been made would itself have precluded them from delivering the appointment on that day as an escrow to take effect after a demand had been made. It is clear that a grantor cannot deliver a deed as an escrow if he has at that date no capacity to execute a deed at all; e.g., a deed executed by an infant as an escrow will not bind him even if he comes of age before the condition is fulfilled. Again, the view is expressed in Williams on Vendor and Purchaser (3rd Edn.), at pp. 1184, 1185, that if a man delivers a conveyance of land as an escrow at a date when he has not got the legal estate conveyed but subsequently obtains it before the condition is fulfilled, the deed will not carry the legal estate to the grantee on fulfilment of the condition. So it might be argued here that as the debenture holders had no power to appoint a receiver on Feb. 25, an appointment made by a deed delivered as an escrow on that date could not be effective on the subsequent fulfilment of the conditions of delivery even though the power to appoint had by then arisen. It may be, however, that the answer to this question really turns on whether or not the debenture holders could on Feb. 25 have delivered a deed appointing a receiver which was expressed to be conditional on a demand being made and not complied with. If they could have done that, then it would be somewhat unreasonable to say that they could not have delivered a deed as an escrow subject to the unexpressed condition that it was not to take effect until after the power had arisen. Apart from authority, I should have been inclined to hold that on the true construction of condition 12 (1) a mortgagee could not appoint a receiver before default conditionally on default being made, but the courts have held that where a mortgagee's power of sale only arises on the expiry of a notice to redeem given to the mortgagor, a contract of sale made conditional on the failure of the mortgagor to comply with the notice becomes binding on the expiry of the notice, subject to the price then being adequate (see *Farrar* v. *Farrars, Ltd.* (7)). By a parity of reasoning, it might be said that the debenture holders could have appointed Mr. Greenwood receiver on Feb. 25, conditionally on default being made, and I suppose on Mr. Greenwood still being a suitable appointee at the date when default was made. I prefer, therefore, to rest my decision on this part of the case on the ground that a deed cannot be delivered as an escrow at all subject to an overriding power in the grantor to recall the deed altogether, rather than on the fact that on Feb. 28 the debenture holders had no power to make an unconditional appointment.

I must now turn to the alternative submission of the defendants. It is, as I understand, based on the following propositions: (i) Condition 12 does not require an appointment of a receiver by the debenture holders to be under seal at all. (ii) By virtue of s. 74 (2) of the Law of Property Act, 1925, the directors of the debenture holders could have appointed an agent or agents to execute on their behalf a document under hand appointing Mr. Greenwood as receiver. (iii) Such an appointment under hand by an agent for the debenture holders could have been made with the intention that it should not bind the debenture holders unless and until Mr. Inkin had carried out the various instructions given to him and if made with that intention it would have become automatically binding on the debenture holders when the instructions were carried out by Mr. Inkin. (iv) If this appointment cannot take effect as an escrow, I ought to treat it as being equivalent to an appointment under hand made by the directors who signed it as agents for the debenture holders.

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(6) [1911] 2 K.B. at pp. 374, 375.

(7) (1888), 40 Ch.D. at p. 412.

A Propositions (i) and (ii) are obviously correct and for my part I am prepared to accept proposition (iii), but I am quite unable to see how the facts which I must assume to be correct justify proposition (iv). The debenture holders were asked by the bank to prepare and seal a deed. I have not seen any resolution of the board of the debenture holders, but I assume that it accorded with this request. I have, therefore, no reason to think that the two directors who put their B names on the appointment were authorised to do anything else than to witness the affixing of the seal. I cannot assume that they had any authority to bind the company by a document under hand or were purporting to do so. On this part of the case, counsel for the defendants referred me to *Re Tahiti Cotton Co., Ex p. Sargent* (8), where SIR GEORGE JESSEL, M.R., held that where the C articles of association of a company permitted a transfer of shares to be made by an instrument in writing, a document signed and sealed by the transferor which was not a valid deed could be treated as an effective instrument in writing. I cannot see that this case really assists the defendants. There, the signature of the transferor (which, incidentally, at that date was not required for a deed) made the document on its face an instrument in writing within the meaning of D the articles whether or not it was also a valid deed. Here, the document in question is on its face a deed and nothing else, and I do not see how I can treat it as though it were an instrument under hand.

In the result, therefore, I shall answer the question put to me by saying that on the assumptions of fact which the order directs me to make (but which, of course, may not correspond with the true facts), Mr. Greenwood was not validly E appointed receiver on Feb. 28, 1958.

Order accordingly.

Solicitors: *Matthew Trackman, Lifton & Cunnington* (for the plaintiffs); *Wilde, Sapte & Co.* (for the defendants).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

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(8) (1874), L.R. 17 Eq. 273.

SOCIEDAD FINANCIERA DE BIENES RAICES S.A. *v.* AGRIMPEX HUNGARIAN TRADING COMPANY FOR AGRICULTURAL PRODUCTS.

[HOUSE OF LORDS (Lord Radcliffe, Lord Cohen, Lord Keith of Avonholm, Lord Jenkins and Lord Morris of Borth-y-Gest), February 29, March 1, 2, 3, 7, 8, 9, 10, June 2, 1960.]

Shipping—Demurrage—Port charterparty—Time lost waiting for berth—Delay due to cargo not being available—No berthing permit until cargo available—Ship kept lying in roads—Whether ship an arrived ship.

Shipping—Port charterparty—Duty of charterer to provide cargo—Breach of duty—Whether matter of defence or counterclaim.

By a charterparty dated Aug. 24, 1954, the charterers agreed with the owners of a vessel that she, having loaded a part cargo of maize at an Argentine port, should proceed to load the balance of the cargo at the port of Buenos Aires. On Oct. 12, 1954, at 1.30 p.m., the vessel arrived at and anchored at the intersection, or free anchorage, in Buenos Aires roads which was a point twenty-two miles distant from the dock area of the port. No vessel could proceed from the intersection to the dock area without a "giro", or berthing permit, and a police permit; and by virtue of a resolution passed by the port authority on Sept. 1, 1954, owing to the congestion of shipping in the vicinity of the loading elevator, no vessel would be granted a berthing permit unless her cargo of grain was ready to load. Loading of grain cargoes never took place in the roads. The cargo was not ready to load until Oct. 29, when a berthing permit was obtained and the vessel reached her loading berth at 2 p.m. The police permit was received when she actually berthed. The charterers having paid under protest to the owners demurrage for the period Oct. 12 to Oct. 29, recovered in an action against them the demurrage and also despatch money on the ground that the vessel was not an arrived ship at Buenos Aires until Oct. 29. The owners recovered by counterclaim damages for delay for the same period on the ground of the charterers' failure to have a cargo ready for the vessel until Oct. 29. On appeal,

Held: (i) under a port charterparty a vessel was not an arrived ship until she was within the commercial area of the port, that was to say (LORD RADCLIFFE dissenting), a physical area where ships could be loaded when a berth was available; in the present case (LORD COHEN also dissenting on this) the limits of the geographical position which the vessel must reach to be within the commercial area of the port of Buenos Aires were not extended as result of the resolution of Sept. 1, 1954, and, on the facts, the port did not include the intersection, with the consequence that the vessel was not an arrived ship until Oct. 29, 1954 (see p. 598, letter B, p. 610, letters E to H, p. 611, letters F to H, and p. 618, letter B, post).

Leonis S.S. Co., Ltd. v. *Joseph Rank, Ltd.* ([1908] 1 K.B. 499) approved.

(ii) (LORD KEITH OF AVONHOLM dissenting) if, as in the present case, the provision of cargo was necessary to enable a vessel to become an arrived ship, the obligation of the charterers to provide the cargo, or a reasonable part of it, in time to enable the vessel to perform its obligations was absolute; accordingly the charterers, not having provided a cargo until Oct. 29, 1954, were liable in damages (see p. 595, letter D, p. 611, letter I, and p. 620, letter F, post).

Ardan S.S. Co. v. *Andrew Weir & Co.* ([1905] A.C. 501) applied.

Little v. Stevenson & Co. ([1896] A.C. 108) and *Jones, Ltd.* v. *Green & Co.* ([1904] 2 K.B. 275) considered and explained.

(iii) (per LORD COHEN, LORD JENKINS and LORD MORRIS OF BORTH-Y-GEST) the charterers' breach of duty was a matter of counterclaim, not defence (see p. 611, letter I, p. 597, letter A, and p. 620, letter H, post).

(iv) (per Lord Radcliffe, Lord Cohen and Lord Morris of Borth-y-Gest) assuming that the ship was an arrived ship on Oct. 12, 1954 (contrary to (i) at p. 578, ante) the absence of a giro, or berthing permit, and the absence of a police permit, would not have prevented lay days running (see p. 589, letter A, p. 592, letter E, p. 593, letter D, and p. 618, letters E to H, post).

Decision of the Court of Appeal (sub nom. *Agrimpex Hungarian Trading Company for Agricultural Products* v. *Sociedad Financiera de Bienes Raices S.A.*, [1958] 2 All E.R. 695) affirmed.

Decision of Ashworth, J. (sub nom. *Agrimpex Hungarian Trading Company for Agricultural Products* v. *Sociedad Financiera de Bienes Raices S.A.*, [1957] 3 All E.R. 626) overruled as regards only the effect of the absence of a berthing permit.

[As to when a ship is an arrived ship, see 30 Halsbury's Laws (2nd Edn.) 422-427, para. 592; as to readiness to load, see ibid., 427, 428, paras. 593, 594; and as to the charterer's duty to provide a cargo, see ibid., 434-442, paras. 602-605.

For cases on when a ship is an arrived ship, see 41 Digest 568-572, *3921-3957*; for cases on readiness to load, see ibid., 447-450, *2804-2819*; and for cases on the charterer's duty to provide a cargo, see ibid., 453-456, *2843-2867*.]

Cases referred to:

Armement Adolf Deppe v. *Robinson (John) & Co., Ltd.*, [1917] 2 K.B. 204; 86 L.J.K.B. 1103; 116 L.T. 664; 14 Asp. M.L.C. 84; 41 Digest 529, *3568*.

Ardan S.S. Co. v. *Weir (Andrew) & Co.*, [1905] A.C. 501; 74 L.J.P.C. 143; 93 L.T. 559; 10 Asp. M.L.C. 135; 41 Digest 453, *2848*; *revsg.*, (1904), 6 F. (Ct. of Sess.) 294.

Austin Friars, The, (1894), 71 L.T. 27; 7 Asp. M.L.C. 503; 41 Digest 450, *2819*.

Barque Quilpué, Ltd. v. *Brown*, [1904] 2 K.B. 264; 73 L.J.K.B. 596; 90 L.T. 765; 9 Asp. M.L.C. 596; 41 Digest 613, *4418*.

Brown v. *Johnson*, (1842), 10 M. & W. 331; 11 L.J.Ex. 373; 152 E.R. 497; 41 Digest 568, *3926*.

Davies v. *McVeagh*, (1879), 4 Ex.D. 265; 48 L.J.Q.B. 686; 41 L.T. 308; 4 Asp. M.L.C. 149; 41 Digest 572, *3961*.

Ford v. *Cotesworth*, (1868), L.R. 4 Q.B. 127; 38 L.J.Q.B. 52; 19 L.T. 634; *affd.* Ex.Ch. (1870), L.R. 5 Q.B. 544; 41 Digest 532, *3602*.

Gardiner v. *Macfarlane, McCrindell & Co., The Lismore*, (1893), 20 R. (Ct. of Sess.) 414; 30 Sc.L.R. 54; 41 Digest 579, *4030i*.

Garston Sailing Ship Co. v. *Hickie*, (1885), 15 Q.B.D. 580; 53 L.T. 795; 5 Asp. M.L.C. 499; 41 Digest 312, *1733*.

Hogarth v. *Cory Brothers & Co.*, (1926), L.R. 53 Ind. App. 230; 95 L.J.P.C. 204; 136 L.T. 172; 17 Asp. M.L.C. 175; 32 Com. Cas. 174; 41 Digest 579, *4030*.

Hudson's Bay Co. v. *Domingo Mumbru S.A.*, (1922), 10 Lloyd's Rep. 476; *affg.*, (1921), 9 Lloyd's Rep. 196.

Jones, Ltd. v. *Green & Co.*, [1904] 2 K.B. 275; 73 L.J.K.B. 601; 90 L.T. 768; 9 Asp. M.L.C. 600; 41 Digest 457, *2872*.

Kell v. *Anderson*, (1842), 10 M. & W. 498; 12 L.J.Ex. 101; 152 E.R. 567; 41 Digest 568, *3922*.

Kokusai Kisen Kabushiki Kaisha v. *Flack & Son*, (1922), 10 Lloyd's Rep. 635.

Krog & Co. v. *Burns & Lindemann, The Avis*, (1903), 5 F. (Ct. of Sess.) 1189; 40 Sc. L.R. 874; 41 Digest 456*a*.

Leonis S.S. Co., Ltd. v. *Rank (Joseph), Ltd.*, [1908] 1 K.B. 499; 77 L.J.K.B. 224; *revsg.*, [1907] 1 K.B. 344; 41 Digest 569, *3937*.

Little v. *Stevenson & Co.*, [1896] A.C. 108; 65 L.J.P.C. 69; 74 L.T. 529; 8 Asp. M.L.C. 162; 41 Digest 457, *2874*; *affg.*, (1895), 22 R. (Ct. of Sess.) 796.

Lilly & Co. v. *Stevenson* (*D. M.*) *& Co.*, (1895), 22 R. (Ct. of Sess.) 278; 32 Sc. L.R. 212; 41 Digest 561, *3868ii.*

Mackay v. *Dick*, (1881), 6 App. Cas. 251; 39 Digest 647, *2424.*

Nelson v. *Dahl*, (1879), 12 Ch.D. 568; *affd.* H.L., sub nom. *Dahl* v. *Nelson, Donkin & Co.*, (1881), 6 App. Cas. 38; 50 L.J.Ch. 411; 44 L.T. 381; 4 Asp. M.L.C. 392; 41 Digest 517, *3471.*

Postlethwaite v. *Freeland*, (1880), 5 App. Cas. 599; 49 L.J.Q.B. 630; 42 L.T. 845; 4 Asp. M.L.C. 302; 41 Digest 539, *3666.*

Pyman Brothers v. *Dreyfus Brothers & Co.*, (1889), 24 Q.B.D. 152; sub nom. *Re Pyman & Co. & Dreyfus & Co.*, 59 L.J.Q.B. 13; 61 L.T. 724; 6 Asp. M.L.C. 444; 41 Digest 571, *3947.*

Tapscott v. *Balfour*, (1872), L.R. 8 C.P. 46; 42 L.J.C.P. 16; 27 L.T. 710; 1 Asp. M.L.C. 501; 41 Digest 559, *3851.*

United States Shipping Board v. *Strick* (*Frank C.*) *& Co.*, [1926] A.C. 545; 95 L.J.K.B. 776; 135 L.T. 185; 17 Asp. M.L.C. 40; 41 Digest 614, *4423*; *affg.*, (1924), 30 Com. Cas. 210.

Van Nievelt Goudrian & Co., Stoomvaart Maatschappij v. *Forslind* (*C. H.*) *& Son*, [1925] All E.R. Rep. 505; 133 L.T. 457; 16 Asp. M.L.C. 521; 30 Com. Cas. 263; 41 Digest 568, *3925.*

Vergottis v. *Cory* (*William*) *& Son, Ltd.*, [1926] 2 K.B. 344; 95 L.J.K.B. 1002; 135 L.T. 254; 17 Asp. M.L.C. 71; 41 Digest 565, *3899.*

White (*John & James*) v. *Steamship Winchester Co.*, (1886), 13 R. (Ct. of Sess.) 524.

Appeal.

Appeal by the shipowners, Sociedad Financiera de Bienes Raices S.A., and cross-appeal by the charterers, Agrimpex Hungarian Trading Company for Agricultural Products, from an order of the Court of Appeal (LORD GODDARD, C.J., PARKER, L.J., and LLOYD-JACOB, J.), dated June 27, 1958, and reported sub nom. *Agrimpex Hungarian Trading Company for Agricultural Products* v. *Sociedad Financiera de Bienes Raices S.A.*, [1958] 2 All E.R. 695, affirming an order of ASHWORTH, J., dated Nov. 18, 1957, and reported [1957] 3 All E.R. 626. The charterers claimed against the owners a despatch rebate of £1,064 4s. 8d. (later reduced to £864 4s. 8d.) and the return of £1,887 10s. being a sum paid by the charterers to the owners under protest, as demurrage. The owners denied liability to repay the demurrage, and counterclaimed for the amount of any liability arising from the charterers' claim, less a sum of £25, on the ground of the charterers' breach of charterparty. The facts are set out in the opinion of LORD RADCLIFFE.

A. A. Mocatta, Q.C., and *R. A. MacCrindle* for the appellants, the owners.

Eustace Roskill, Q.C., and *J. F. Donaldson* for the respondents, the charterers.

Their Lordships took time for consideration.

June 2. The following opinions were read.

LORD RADCLIFFE: My Lords, the appeal and cross-appeal in this case relate to small sums of money in themselves, but the issues they raise are of considerable general importance and are not at all easy of solution. The main point to be decided on the appeal is at what date the appellants' ship the Aello became an " arrived ship " in the port of Buenos Aires on a voyage to River Plate ports during the months of September/November, 1954, that date determining the start of her lay days for loading cargo in the port. The cross-appeal, on the other hand, turns on the issue whether, if she did not become an arrived ship on the date claimed by the appellants, Oct. 12, 1954, the respondents incurred liability as charterers for the voyage to pay damages in respect of the detention of the ship in the circumstances which I will later narrate. Both these questions involve consideration of certain earlier decisions either of this House or of the Court of Appeal. Those decisions are well known and of long standing. It is not

A my intention in anything that I shall say to depart from the principles there established; nor, I am sure, is that the intention of any other of your Lordships. But I am bound to say that, after listening to the careful and sustained argument that we heard from counsel on both sides, I have been left with the conviction that it is not as easy as I could wish to say what those principles are when they have to be applied to the incidents of the present case; and, moreover, I have found B very considerable difficulties in reconciling all that has been said in their formulation, either in different judgments on the same case or in different decisions in different cases. The unfortunate situation that I describe is not altogether a novelty in this tangled branch of commercial law.

I will set out the relevant facts as shortly as I can. By a charterparty dated Aug. 24, 1954, the Aello was chartered by the respondents from the appellants to C load grain

> " at one or two safe loading ports or places in the River Parana, not higher than San Lorenzo . . . quantity at charterers' option, but not more than the steamer . . . can safely carry over Martin Garcia Bar . . . the balance of the cargo in the port of Buenos Aires or Eva Peron [La Plata] or Montevideo."

D The charterparty was in the " Centrocon " form, subject to considerable variations. There was a stipulated rate of loading at so many tons per day, with exceptions, and a fixed rate of demurrage at £200 per running day. Despatch rebate for all time saved in loading was at the rate of £100 per day. The first port to which the Aello was ordered was Rosario on the River Parana. This river and the River Uruguay are the two main contributories whose confluence forms the E River Plate. Rosario, therefore, lies inland, to the north-west of Buenos Aires itself. The Aello took on a part cargo of maize at Rosario, having obtained there free pratique in respect of health and quarantine and also police and customs clearance. This she was bound to do before any loading operations could be begun. On Oct. 11 she left Rosario for Buenos Aires to complete there the loading of her maize cargo, as the charterparty required. At 1.30 p.m. on the next day, Oct. 12, F she dropped anchor in the " Free Anchorage " of the Buenos Aires roads and there remained until Oct. 29 waiting for the permission of the port authority to proceed nearer to her eventual destination, a loading berth in the inner harbour. The clue to this case lies in an appreciation of the reasons why the Aello had to wait for this period at this anchorage, and of the relationship of the anchorage to the port of Buenos Aires as a whole. I must, therefore, deal with this matter in G some detail.

The River Plate is the estuary of the two rivers, Parana and Uruguay, which meet a few miles north of Buenos Aires. It thus forms a very large expanse of fresh water of no great depth. On its south shore lies the Argentine port of La Plata; opposite to that, on the north shore, is the Uruguayan port of Colonia and on the same shore, near the mouth, Montevideo. At the western or inner H end of the River Plate, some two hundred kilometres up from the mouth, is the city and port of Buenos Aires, which itself grew up round the spot where the River Riachuelo runs into the River Plate. The inner harbour of Buenos Aires consists of a long frontage of basins and docks, equipped with very large installations for warehousing and loading and unloading goods. The Nuevo Porte, at the north end of this harbour, has an outer wall or mole built in the river. Access I from the River Plate is provided by two dredged channels, the north and south channels, which themselves join to form a single channel at a point nine kilometres outwards from the inner harbour. This channel continues seaward and, at a point in it between kilometre 29 and kilometre 37, there is stationed a hulk for the use of pilots in the open waters of the estuary. This is the point known as " Intersection ", because it is, in effect, a cross-roads for the various channels in the River Plate. Along this strip of water between kilometre 29 and kilometre 37 are formed two anchorages where vessels lie on entering Argentine territorial jurisdiction, one to the north being known as the " Zone for steamers awaiting orders " or the free anchorage, the other, to the south, " Zone for steamers awaiting A sanitary visit ". It is in the free anchorage, as I have said, that the Aello lay from Oct. 12 to Oct. 29, 1954. This part of the estuary is known generally as the roads or the outer roads of Buenos Aires, and has a long-established connexion with the port as a place of maritime commerce. The purposes served by these two anchorages are various. The quarantine zone speaks for itself; a vessel whose first Argentine port is Buenos Aires or La Plata lies there until she obtains health B clearance by receiving her free pratique. The free anchorage is primarily a waiting place serving these two ports on occasions when waiting is necessary. Vessels lying there are subject to customs and police clearance, are under the control of the pilotage authority and the maritime police, and cannot proceed further into the port of destination until the berthing office of the harbour authority has designated a berth or place in the inner harbour (I speak of Buenos C Aires), the designation constituting the necessary permit of entry to load or discharge. Apart from its use as a waiting place, the free anchorage is also used by vessels who wish to lighten by off-loading there part of their cargoes of oil or coal; vessels bunker and take in stores there; and dangerous cargo, which is not allowed to be taken into the inner harbour, must be discharged into lighters at this point. On the other hand, grain itself is not loaded in the D anchorage.

A ship lying in the anchorage at the roads pays anchorage dues to the harbour authority of the port to which she is bound; if merchandise is discharged there for the port or loaded from the port, additional harbour dues are payable on the same tariff as would be applicable if the ship had entered and berthed in second tier. By art. 1702 and art. 1703 of the MARITIME AND RIVER DIGEST, there is E constituted a joint port of the Capital and La Plata, of which the channels and anchorages (including the free anchorage) form the exterior part or 4th Section. Probably the fairest practical statement of the status of the Buenos Aires roads in relation to the port of Buenos Aires (not the joint port) as a whole is that given at p. 289 of the MAR YEAR BOOK for 1954, in which, under the legend " Description of the port ", the roads are listed with the explanatory note " Considered F an extension of the port ". In normal circumstances, a ship that has her orders has no occasion to wait at the anchorage. The berthing permit, or " giro ", which constitutes the permission to enter the inner harbour, is forthcoming without delay, tugs and pilots are sent down, and the vessel proceeds to take station in the inner harbour as directed by the berthing office of the port authority, which is in this port the board of customs. On her way in, she passes one or other G of the Vanguardias or hailing stations at the inner end of the north or south channel, and it is at that moment that she is " entered " at the customs and becomes liable to pay entrance dues, permanency dues and wharfage dues in addition to any anchorage dues already paid in respect of use of the roads. The receipt of the giro does not mean that the berth or loading spot allocated is immediately available. The vessel may enter the inner harbour and still find that H she is there only as a waiting vessel.

The circumstances with regard to the Argentine maize trade during the autumn of 1954 were, however, not at all normal. What had happened was that the Government Board responsible for the sale of all maize for export had much over-estimated the quantities that would be coming forward at the times for which it had contracted. The result was that, at any rate by the month of August, I ships waiting for maize cargoes began to pile up in the inner harbour. The congestion which these ships, lying in second and third tier off the quays, in basins and in the waters of the harbour, caused to each other and to other vessels was accentuated by the fact that, though the New Port and the South Dock between them contained several grain elevators and ample loading space and lighterage facilities, only one elevator, that in Darsena D in the New Port, was in fact being used, its capacity being more than sufficient to deal with all the maize that was available for loading. The shortage that was the cause of all the trouble was not a shortage of berths or of loading facilities; it was simply a shortage of maize cargoes. By the end of August, the congestion of shipping in the vicinity of the loading elevator had got so bad that the port authority and the Grain Board, the agency that owned and handled all loading facilities for grain, decided to put into force a new scheme for vessels arriving to load maize. On Sept. 1 the authority adopted a resolution that no vessel was to be allowed to berth in third tier at the elevator or to be sent to a waiting berth in the North Basin or the New Port, as hitherto; all maize vessels were to anchor and wait at the free anchorage in the roads until a berth was available either in first or second tier at the elevator. The scheme became effective by the middle of September. To quote from the evidence of one of the witnesses from Buenos Aires (affidavit of W. H. Fowler, para. 33),

> " This resolution of the Berthing Office was made for practical reasons, in order to avoid useless waste of time and money in continual shiftings of the maize vessels which were cluttering up the approaches of the elevator. It was a measure of traffic control . . ."

It is necessary to add only two facts to complete the account of the régime that was in operation when the Aello anchored in the roads on Oct. 12. First, it was the standing practice of the berthing office not to grant a giro for a vessel loading grain unless she had first received from the shippers a certificate of the Grain Board allocating the parcel of grain required for the cargo. Secondly, the special régime instituted for maize vessels by the resolution of Sept. 1 was terminated some time in December, 1954, by which time the disproportion between ships and available cargoes had been adjusted.

Now, these being the facts, did the Aello become an arrived ship at the port of Buenos Aires on Oct. 12, as the appellants claim, or did she not become arrived until the 29th when, having obtained her giro, she entered the inner harbour and berthed in second tier beside the grain elevator in the New Port? The latter is the view which has hitherto prevailed in the courts below, both before ASHWORTH, J., who tried the case, and in the Court of Appeal. It has throughout been assumed that the governing test for the determination of this issue is to be found in the judgments of BUCKLEY and KENNEDY, L.JJ., in *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (1), and with that I agree. The decision was something of a landmark in the judicial development of the doctrine of the " arrived ship ", and it has stood for so long in its field that, in my view, all later decisions must be built on it. The real difficulty of the present case is to be sure how the test propounded there ought to be applied to the somewhat special circumstances that are now before us. There are one or two things that can be said without raising any controversy. The Aello was sailing under a port charter, as distinguished from a dock charter or a berth charter. Therefore, it was not incumbent on her to reach a loading berth before she became an arrived ship and so set the lay days in motion; it was sufficient if she reached the named destination, the port itself. On the other hand, it is not enough for that purpose merely to be within the confines of the port in the sense of being at any point within its legal or administrative limits or, I think, at any point within the area of the port as understood by maritime or commercial men. They might understand by the port different things for different purposes. The thing to remember is that, at whatever moment of time before actually berthing she might become an arrived ship, her ultimate duty under the charterparty remained the same: to reach with all due despatch the loading berth to which the charterers might order her. However, therefore, the exact definition of her destination for " arrival " is to be phrased, it must be some part of the whole area, the port, which marks for the time being the proper limit of her effort to reach her ultimate berth. If she can go straight in, cadit quaestio. Disputes about arrived ships under a port charter are essentially disputes about what is a proper waiting place, lay days being, as LORD SUMNER once said, " the contractual adjustment of the incidence of risks of delay ".

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(1) [1908] 1 K.B. 499.

It has been said that, to become an arrived ship under a port charter, a vessel must reach the " commercial area " of the port. With this, too, I agree, so long as there is no misunderstanding as to what is implied by the use of that phrase. If in the law we speak of the " commercial area " of a port, we are not employing a phrase that has been adopted and used in charterparties themselves, so far as I know, or a phrase that is in use in the speech of maritime or commercial persons. It is, I think, impossible to hope to identify it in any particular port by inquiring in what part of the port " commercial operations " are carried on. Commercial operations embrace a great variety of different activities, many of which are properly carried on in different parts of the port; and the parts that may be resorted to in connexion with one class of cargo may be, and often are, different from the parts resorted to for dealing with another. In fact, the phrase " commercial operations " does not occur at any point in the judgments in *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (2). Nor do I find it any more acceptable to try to define it, as has been done by the judgment of the Court of Appeal in the present case, as (3)

> " that part of the port where a ship can be loaded when a berth is available, albeit she cannot be loaded until a berth is available."

It is not only that such a description is, if I may say so with all respect, altogether too imprecise as a general guide for identifying the relevant area; it is also, in my opinion, a misunderstanding of the true significance of the *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (2) decision to seek to treat the " commercial area " for the purposes of any particular charterparty as if it were a fixed area of defined geographical limits which the ship must be treated as reaching or failing to reach without regard to the actual circumstances that prevailed at the time when the obligations of the particular voyage matured. " Commercial area ", as applied to ships waiting for cargo, is more accurately understood as defining a set of circumstances relevant to the voyage and the port than as delimiting a " part of the port where a ship can be loaded ". I think that this is clearly the meaning and effect of the judgment of KENNEDY, L.J., in *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (2). I regard this, as others have (see, for instance, ATKIN, L.J., in *Hudson's Bay Co.* v. *Domingo Mumbru S.A.* (4)), as the leading judgment in that case, both because it provides a fuller and more authoritative treatment of the earlier decisions and because it is free from certain internal inconsistencies which mar the other judgment, that of BUCKLEY, L.J. If the two judgments do not in all respects make the same approach to the conception of the " commercial area ", I do not hesitate to prefer that of KENNEDY, L.J., and to treat it as the more accurate exposition of the law. It is, perhaps, right at this stage to recall that the issue before the court in *Leonis* (2) was whether a ship's lay days even under a port charter could not begin until she had actually reached her loading berth the view contended for by Mr. Scrutton, of counsel; that the port was Bahia Blanca at which no loading could take place until a ship was alongside a single jetty which ran out into the harbour; and that the " commercial area " in which the Leonis anchored waiting her turn was simply her waiting place in the waters of the harbour, as near as she was allowed to go to the jetty.

My Lords, I may have some doubts as to what proposition BUCKLEY, L.J., intended to establish. I do not feel the same doubts about the judgment of KENNEDY, L.J. I can state the essence of it by marshalling a few extracts from it with a minimum of commentary of my own. (i) For the purpose of deciding whether a ship is an arrived ship, it is " immaterial whether the physical act of loading was possible or impossible " at the spot where she lay. (ii) *Nelson* v.

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(2) [1908] 1 K.B. 499. (3) [1958] 2 All E.R. at p. 699; [1958] 2 Q.B. at p. 401.
(4) (1922), 10 Lloyd's Rep. 476 at pp. 478, 479.

Dahl (5) and *Pyman Brothers* v. *Dreyfus Brothers & Co.* (6) were the most directly relevant of the earlier authorities. The key words in *Nelson* v. *Dahl* (7) for the purpose of describing the agreed destination are the words of Brett, L.J. " the area in the port within which vessels whose obligation and purpose is to receive a cargo lie ". Or again, the " usual place in it at which loading vessels lie ". The context of that passage shows that " loading vessels " must mean " vessels whose purpose it is to load ". (iii) " Port " in a port charter is to be (8) " construed in a commercial sense in relation to the objects of the particular transaction ". " Commercial area " means (9)

> " that port in its commercial sense, that is to say, as it would be understood by persons engaged in shipping business, and in regard to the arrival of a ship there for the purpose of the charterparty."

(iv) (10)

> " . . . the commercial area of a port, arrival within which makes the ship an arrived ship . . . ought . . . to be that area of the named port of destination on arrival within which the master can effectively place his ship at the disposal of the charterer, the vessel herself being then . . . as near as circumstances permit to the actual loading ' spot ' . . . and in a place where ships waiting for access to that spot usually lie . . ."

(v) The Leonis, therefore, was an arrived ship (11)

> " when she was at that anchorage in the area within which, according to the evidence, steamers usually lie awaiting their turn at the pier . . ."

(vi) Accordingly, the rule on the point was correctly expressed in s. 627 of the then current edition of Carver's Carriage of Goods by Sea:

> " though she may not be in a position to take in or discharge cargo, and though she may not be at the wharf, dock, or other part of the place to which the charterer may have properly required her to go."

I do not feel sure that Buckley, L.J., intended to adopt any principle for determining a ship's arrival that differs from these. Evidently Lord Alverstone, C.J., detected no divergence, since he agreed with both of his colleagues' judgments. The general position of Buckley, L.J., seems to be stated in his words (12):

> " The true proposition, I think, is that where the charter is to discharge in a named place which is a larger area in some part or in several parts of which the ship can discharge, the lay days commence so soon as the shipowner has placed the ship at the disposal of the charterer in that named place as a ship ready, so far as she is concerned, to discharge . . ."

The test there is whether the ship is truly at the disposal of the charterer, waiting for him to name his berth or for it to become available. But, as the judgment proceeds, it does introduce some difficulties of expression, arising, I think, from the learned lord justice's wish to establish an analogy closer than circumstances allow between obligations under a dock charter and obligations under a port charter. A dock is a defined geographical space and, under a dock charter, any part of it, if reached, will do; the area of a port is not necessarily a defined space (e.g., Bahia Blanca itself) and, under a port charter, not every part of it will do. The judgment does not keep in mind this unavoidable distinction between the two cases. In consequence, words used by Bovill, C.J., in *Tapscott* v. *Balfour* (13) (a dock charter case in which a ship at its waiting place in a dock was in fact held to be an arrived ship) are adapted or misquoted —it is difficult to know what

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(5) (1879), 12 Ch.D. 568.

(6) (1889), 24 Q.B.D. 152; 6 Asp. M.L.C. 444.

(7) See [1908] 1 K.B. at p. 523.

(8) [1908] 1 K.B. at p. 519.

(9) [1908] 1 K.B. at p. 520.

(10) [1908] 1 K.B. at p. 521.

(11) [1908] 1 K.B. at p. 527.

(12) [1908] 1 K.B. at p. 512.

(13) (1872), L.R. 8 C.P. 46; 1 Asp. M.L.C. 501.

A the lord justice's exact meaning is—to suggest that, under a port charter, a vessel can never be an arrived ship unless she has reached the usual " place of loading ". I allude to this rather unfortunate passage only because it leads directly to the statement that the " commercial ambit " of the port as distinguished from the port in a geographical or maritime sense must be understood as " the usual place of loading " or " the proper place for discharging, whether the vessel has reached a berth or not ". B It is this attempt to define the commercial area in terms that ignore the proper or usual place of waiting for those whose purpose it is to load, and instead concentrate on the proper place of loading even for those who are not yet able to do it that, in my view, has confused the issue and has directly led to the Court of Appeal in the present case laying down the rule that a ship cannot be arrived unless she has reached " that part of the port where a ship can be loaded ". C Yet, if it is common ground that a ship can, nevertheless, be arrived under a port charter though she is anchored in a place where no loading is possible, what significance can there be in her having to reach " the usual place of loading " when, for the time being, her only purpose and her only duty are to keep herself in readiness to enter a berth?

It seems to me to do no good to ignore that there is this difficulty in relating D what was said by BUCKLEY, L.J., to the more authoritative statement of the law contained in KENNEDY, L.J.'s judgment. On the other hand, it is important to remember that both judges concurred in explicitly approving the decision of *Pyman Brothers* v. *Dreyfus Brothers & Co.* (14) as good law. Now *Pyman Brothers* v. *Dreyfus Brothers & Co.* (14) was a case in which the charterparty destination was simply " Odessa " and the vessel lay waiting in the outer harbour, under in- E structions of the port authority, until she could move into a berth in the inner harbour. It seems that there were berths in the outer harbour but not one that suited the charterers' purpose. She was held to be an arrived ship, not in the least because she was at a place where ships usually load—no one spoke of that—but because she had got herself to the point where she was at the disposition of the charterers. " They had only to indicate the place to which she was to go for F her cargo, and she would have been there immediately ". Both the judges who decided the case (HUDDLESTON, B., and MATHEW, J.) regarded it as an application of the rule laid down in *Nelson* v. *Dahl* (15)

> ". . . the notice may be given, though the ship is not then in the particular part of the port or dock in which the particular cargo is to be loaded."

G The objection that I entertain to the Court of Appeal's judgment is that it exactly reverses this rule and declares that lay days cannot begin until the ship is in that particular part of the port where loading is to take place. Indeed, their judgment is in conflict with *Pyman Brothers* v. *Dreyfus Brothers & Co.* (14), unless "immediately" excludes two to three hours' steaming under tugs. I do not think that it does.

H *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (16) has always been treated as having settled for good whatever it is that it did decide. I think it important to refer your Lordships to some interpretations of the decision that have commended themselves to judges profoundly versed in commercial law. I will make only three citations; none of them seems to afford any support for the Court of Appeal's view that a ship cannot " arrive " until it has reached a part of the port I where a ship can be loaded, whereas two explicitly identify the commercial area with the place of waiting. The first citation is *Kokusai Kisen Kabushiki Kaisha* v. *Flack & Son* (17). The *Leonis* decision (16), said SCRUTTON, L.J., decided that, under a port charter (18), " the time for loading . . . begins when the vessel is at that place in the port where vessels awaiting for a berth usually lie ". ATKIN, L.J., took, apparently, the same view. And it is evident that LORD SUMNER, in his massive and exhaustive marshalling of the authorities in *United States Shipping Board* v. *Frank C. Strick & Co.* (19), approved of what they had said. Next is *Van Nievelt Goudrian & Co. Stoomvaart Maatschappij* v. *C. H. Forslind & Son* (20). All three members of the Court of Appeal, Bankes, Scrutton and Atkin, L.JJ., referred to the *Leonis* decision (21) and its effect. It " decides . . . this vessel was an arrived vessel when she arrived within the limits of the port " (Bankes, L.J. (22)). " She is to proceed to the port, and when she has got to the port the lay days begin " (Scrutton, L.J. (23)). ". . . she is an arrived ship when she gets into the port " (Atkin, L.J. (24)). The simplicity of their account may seem a little old-fashioned nowadays; but it certainly gives no hint of the crucial importance of any " loading area ". Thirdly, there is *United States Shipping Board* v. *Frank C. Strick & Co.* (25) itself. *Leonis* (21), said Scrutton, L.J. (26), decided that

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(14) (1889), 24 Q.B.D. 152; 6 Asp. M.L.C. 444. (15) (1879), 12 Ch.D. at p. 581.
(16) [1908] 1 K.B. 499. (17) (1922), 10 Lloyd's Rep. 635.
(18) (1922), 10 Lloyd's Rep. at p. 638.

> " the time began . . . when the ship was in a part of the port where ships waiting for loading would lie, although she had not got the berth where she could load."

These words were quoted by Lord Sumner when the case reached the House of Lords (27) and he accepted them as correct.

My Lords, applying the principle of the *Leonis* case (21) as I have tried to explain it, I am of the opinion that the Aello arrived in the port of Buenos Aires on Oct. 12. My reason for thinking so is based on the combination of the following facts. She was under the control of the port authority at Buenos Aires in the anchorage. She was lying in what was by the prevailing régime of the port the proper waiting place for vessels under orders to load maize. She could go no further into the port without the giro which would allocate her a berth. She was at the disposition of the charterers, ready to take up the berth selected by them, as soon as they provided the cargo which would make the berth available. The free anchorage was an " extension of the port of Buenos Aires " which, at the relevant date, was in a commercial sense " the port " for the purposes of the chartered voyage. I am bound to say that I regard this conclusion as more satisfactory than the suggested alternative. It seems to me that, if we are looking for a general test of an " arrived ship " applicable to all ports with their great varieties of structure, formation and local condition, it is unwise to identify the " commercial area " too closely with the idea of a fixed geographical limit. True, at Buenos Aires itself you do have the inner harbour, with the hailing stations at the channel entrances; and it may be that all this area is intended to be covered by the Court of Appeal's decision. It is impossible to say. On the evidence I do not see any particular reason why the whole of it should be described as " a part of the port where a ship can be loaded ". But consider the conditions at another port, Bahia Blanca, with which the *Leonis* (21) was concerned. Who can say what the limits of the " commercial area " were at that port, except that it was any place away from the jetty where it was reasonable and possible for a ship to lie waiting its turn to load?

It can, no doubt, be said that it was only the resolution of the port authority of Sept. 1, 1954, that made the free anchorage a proper, as, indeed, it was the only permitted, waiting place for maize ships and from that it can be argued that it was not, therefore, the " usual waiting place " intended by the decisions I have quoted. It was this line of argument, I think, that led Ashworth, J., to decide (28) that, though the Buenos Aires roads are within the " legal, fiscal and administrative limits of the port " of Buenos Aires, the Aello was not an arrived ship on Oct. 12, because the " exclusion of vessels from the dock area did not have the effect of extending the commercial area to the roads." He did not think that there could be a " fluctuating commercial area " consistently with the authorities. With all respect to the contrary opinion expressed in his most valuable judgment, that is just what I do think, given the necessary conditions that I have outlined. I intend no disrespect if I put it in a homely metaphor, but it appears to me a mistake to regard this legal conception of a " commercial area " as if the area were a green on a golf links which the parties to the charterparties positively identified in their minds at the date of the making of their contract; within its limits one set of circumstances, outside them another. If that were the right view, I should agree that you could not, as it were, change the rules of the game during the course of it. But I do not think that the parties ought to be treated as contracting with each other in this precise way; in other words, it is not the port conditions as at Aug. 27, the charterparty date, that govern the conception of " commercial area " but the port conditions as the vessel found them when she arrived there in due course in October. Nevertheless, I ought to say that I find the ground on which he based his judgment more satisfactory than the different test adopted by the Court of Appeal, since his depends essentially on the transitory nature of the September resolution.

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(19) [1926] A.C. 545 at pp. 573, 574; 17 Asp. M.L.C. 40 at pp. 50, 51.
(20) [1925] All E.R. Rep. 505; 16 Asp. M.L.C. 521.
(21) [1908] 1 K.B. 499.
(22) [1925] All E.R. Rep. at p. 507; 16 Asp. M.L.C. at p. 522.
(23) [1925] All E.R. Rep. at p. 508; 16 Asp. M.L.C. at p. 523.
(24) [1925] All E.R. Rep. at p. 510; 16 Asp. M.L.C. at p. 523.
(25) (1924), 30 Com. Cas. 210.
(26) (1924), 30 Com. Cas. at p. 224.
(27) [1926] A.C. at p. 579; 17 Asp. M.L.C. at p. 52.
(28) [1957] 3 All E.R. at p. 635.

It is true, too, that the free anchorage lies some twenty-nine to thirty-seven kilometres down the estuary from what was to be the eventual loading spot. Is that mere defect of propinquity an essential point? I cannot help thinking that the Court of Appeal did so regard it; and a close following of that passage of Buckley, L.J.'s judgment on which I have commented would justify that view. But I cannot see why this is important in the circumstances. How much propinquity is needed to qualify a ship as arrived, and why? It seems to be common ground that, if the Aello had entered the inner harbour on Oct. 12, and been assigned to a waiting mooring or berth, say in the Darsena Norte or, perhaps, out in the waters of the harbour, she would have been arrived, even though she was not in a position where she could be loaded and would have had to wait just as long for her loading berth. If so, the resolution of Sept. 1 merely substituted one permitted waiting place for another. The reason for it, according to the evidence, was to save time and money for waiting ships, not to add to them. The new system meant that when the Aello did get her giro, she could go straight into her berth in second tier. It was two and a half to three hours' steaming time from her anchorage to the berth. There is no worth-while difference between this length of time and the time, longer or shorter, that would have been occupied in getting her out of a waiting berth or mooring in the inner harbour, under congested conditions, and into a loading berth. It is time that matters in this context, not propinquity as such. In my opinion, propinquity is only of importance as showing that a vessel has been brought as near as conditions allow to what will be the eventual loading spot, and normally, of course, waiting vessels should and will want to get as near in as they can; but, given the special conditions imposed by the port authority and prevailing in October, 1954, it was no objection to the Aello being an arrived ship in the port that the part of it she anchored in was some twenty-two miles from her loading berth.

The respondents' argument, however, embraced two other points on the issue whether the lay days could begin before Oct. 29. Even supposing, they said, that the Aello was arrived when she reached the free anchorage in the sense that she was then in a place that could be called the commercial area, yet she was not " ready to load " until Oct. 29, because (a) she did not obtain the giro or permit to enter the area where she could be loaded until that date, and (b) she did not get her police permit allowing communication with the shore until she actually berthed. The Court of Appeal did not find it necessary to deal with either of these points owing to their finding that she was not in the commercial area when in the free anchorage. Ashworth, J., rejected the argument based on the police permit but accepted that based on the giro. I am, myself, clearly of the opinion that, if the Aello was or had been on Oct. 12, an arrived ship in what has been called the geographical sense, the absence of police permit or giro did not prevent or would not have prevented her lay days from beginning and I will deal very shortly with the two points.

To take the giro. It is, of course, possible to take the view that, until the giro was granted, the Aello had not arrived because she had not got into the required area of the port. That is one thing. But, if you do not take that view and think that she was in the port within the meaning of the charterparty, the giro became under the prevailing conditions nothing but official permission to enter a loading berth. If the absence of such permission prevents an arrived ship from claiming that its lay days have begun, the distinction between port charters and berth charters established by *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (29) disappears again and every ship waiting for a berth, however correct its standard of propinquity, must also be waiting for its lay days to begin. In my opinion, this point is unmaintainable. As SCRUTTON, L.J., pointed out in *Armement Adolf Deppe* v. *John Robinson & Co., Ltd.* (30), the *Leonis* decision (29) that lay days can begin for a vessel under a port charter even though she is in a spot where loading is impossible does involve some adaptation of the significance of " ready to load " to those circumstances. I think that the point about the police permit fails too. Certainly it has been held that a vessel which has not obtained her quarantine clearance is not ready to load (see *The Austin Friars* (31)); but quarantine requirements strike directly at the state of the ship and its crew and passengers and failure to obtain clearance leads to positive detention of the ship. The police clearance that the Aello required, coming from an up-river port, was something altogether different from this. The usual course for such a vessel was to wait until she had entered a waiting berth or a loading berth in the inner harbour—the evidence is not clear on this point—and then to ask for her police clearance. No one could come on board from the shore until this was obtained, but the ship having already been cleared at Rosario in Argentine territory, the Buenos Aires clearance was, according to the evidence, little more than a formality. It was not to be expected that it would take long enough to cause any impediment to the commencement of loading, and, even if for some reason the crew state was not such as to satisfy police requirements, the use of the vessel was not interfered with. Whatever the consequences were, they would be exacted by subsequent proceedings. I am in full agreement with the learned trial judge that the absence of the police permit did not prevent the Aello from being " ready to load " while in the free anchorage.

For these reasons, I take the view that the appeal ought to succeed. The action was one in which the respondents were the plaintiffs, their claim being for a sum of money consisting partly of demurrage which they had paid under protest on the vessel leaving Buenos Aires and partly of despatch money which they claimed to be due to them on the basis that lay days began only on Oct. 29. In my opinion, the action ought to have been dismissed.

There remains the question of the cross-appeal. This does not arise for consideration unless the Aello is held not to have been an arrived ship during the period Oct. 12/29, because, if she was, the shipowners have nothing to complain of—the delay has fallen on the charterers. On the other hand, if she was not then an arrived ship, the owners have this claim against the charterers, which has so far prevailed in the first court and the Court of Appeal, that the cause of her failure lay in the charterers not providing the necessary cargo and cargo certificate to qualify her for the giro as soon as she reached the free anchorage and that, accordingly, the charterers must make good in damages the amount of demurrage and despatch money which the owners lose in the action. On this issue I agree with the conclusion of ASHWORTH, J., and the Court of Appeal, though it seems to A me an oddity that the law should have to take such a roundabout method of establishing that, as between owner and charterer, the lay days began on Oct. 12, not Oct. 29. I think that the point is concluded by the decision of this House in *Ardan S.S. Co.* v. *Andrew Weir & Co.* (32). Moreover, I have had an opportunity of reading in advance the opinion that has been prepared by my noble and learned friend, LORD COHEN, and I am in full agreement with what he says on the point. B I do not think it necessary, therefore, to take up your Lordships' time by travelling over it separately; but, in deference to the able argument that was pressed on us by counsel for the respondents, I will say a word or two about the legal position as I understand it.

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(29) [1908] 1 K.B. 499.

(30) [1917] 2 K.B. 204 at p. 212; 14 Asp. M.L.C. 84 at p. 87.

(31) (1894), 71 L.T. 27; 7 Asp. M.L.C. 503.

The problem that faces any court today is that of producing some reading of the law that takes account of and gives proper weight to three such divergent C decisions as those of *Little* v. *Stevenson & Co.* (33); *Jones, Ltd.* v. *Green & Co.* (34), and *Ardan S.S. Co.* v. *Andrew Weir & Co.* (32). Of the three, I think that we are bound to treat the last as containing the general rule and the other two as being special cases dependent on bargains that excepted them from the ordinary. *Ardan S.S. Co.* v. *Andrew Weir & Co.* (32) was decided with the other cases before the minds of the learned members of this House; they refer D to one expressly and the other by implication; and their decision was clearly intended to establish a general rule for the future. It remains difficult not to accept that *Little* v. *Stevenson & Co.* (33) and *Ardan S.S. Co.* v. *Andrew Weir & Co.* (32) represent different lines of thought about the same subject, because the explanation of the former which is given by the latter fails to make plain what is the " ordinary course " or the " contingency or fortuitous circum- E stance not contemplated by either of the parties " (see per LORD DAVEY (35)) which in the one case does and in the other does not make the charterer liable. If his duty is to have his cargo ready when the ship has got as near as she can until it is ready, which is what *Ardan S.S. Co.* v. *Andrew Weir & Co.* (32) seems to decide, what does it matter if the vacancy that occurs thereafter is fortuitous or unforeseen? He is already in default. In my view, the only way of reconciling F all three decisions is to treat *Little* v. *Stevenson & Co.* (33) as if it were really the same sort of case as *Jones, Ltd.* v. *Green & Co.* (34), namely, one in which the owners are taken to have deliberately agreed with the charterers to take their ship to the port and, in effect, to keep it there at their own risk until the charterers provided the cargo for it in some such turn as that afforded by the orders on a colliery book. In such a context, references to unexpected or G fortuitous vacancies have their relevance; without that context, I cannot see that they do.

Contests of this sort are essentially disputes about the placing of the risk of delay as between charterer and owner. That being so, I think it much better to have a clear general rule such as that propounded in *Ardan S.S. Co.* v. *Andrew Weir & Co.* (32) and not to introduce exceptions on it. As between the two H of them, the provision of cargo is the charterer's concern, and so are all the steps which lead up to its being available. Where the completion of the ship's voyage is entirely dependent on the availability of the cargo, I think it only natural that the law should throw the burden of any delay that occurs on the charterer's side. I do not, myself, share therefore the wishes expressed by GREER, J., in *Vergottis* v. *William Cory & Son, Ltd.* (36), or by PARKER, L.J., in the Court of I Appeal in the present case (37) that the charterer's responsibility could be limited to that of doing whatever was reasonable to get the ship to the contractual

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(32) [1905] A.C. 501; 10 Asp. M.L.C. 135.
(33) [1896] A.C. 108; 8 Asp. M.L.C. 162.
(34) [1904] 2 K.B. 275; 9 Asp. M.L.C. 600.
(35) [1905] A.C. at p. 512; 10 Asp. M.L.C. at p. 137.
(36) [1926] 2 K.B. 344 at p. 354; 17 Asp. M.L.C. 71 at p. 73.
(37) [1958] 2 All E.R. at p. 699; [1958] 2 Q.B. at p. 402.

A destination. After all, how far back do you go to start the reasonable course? Is the court to investigate the date and placing of the charterer's contracts that secure the cargo, the possible alternative sources of supply, the various courses of action open to him when his suppliers looked like failing to meet their commitments? I am sure that in this case, as the parties have agreed in their admissions, the charterers did everything that was reasonable to do to
B procure the completion cargo, the cargo certificate and the giro; but that, in itself, seems to me an insufficient reason for throwing the consequences of their failure on to the owners of the ship.

LORD COHEN: My Lords, in this action the respondents claim (i) despatch rebate which they allege to be payable under cl. 16 of the charterparty
C relating to the s.s. Aello, and (ii) refund of demurrage which they paid to the appellants under protest in order to obtain the bills of lading relating to the cargo on the said ship. The appellants resist the claim, and in the alternative counterclaim damages for an alleged breach by the respondents of the charterparty in not having a cargo available to enable the appellants to obtain a giro and become an arrived ship on Oct. 12, 1954. The facts have been fully stated
D by the noble and learned Lord on the Woolsack. I will only refer to them so far as is necessary to explain my reasons for the conclusions I have reached on the various points which were argued before your Lordships.

The two main points at issue were stated by PARKER, L.J., in the Court of Appeal as follows (38):—(i) Whether the appellants' ship the Aello became an arrived ship when she anchored in the roads at Buenos Aires on Oct. 12, 1954. (ii) Whether, if the Aello was not then an arrived ship, the respondents were
E themselves in breach of any duty which prevented her from being an arrived ship at any time before Oct. 29, 1954. If the first question is answered in the affirmative, the appellants will be entitled to succeed on their appeal. It is only if it is answered in the negative that the second question arises.

In connexion with the first question three subsidiary questions were discussed: (i) What were the legal, fiscal and administrative limits of the port of Buenos
F Aires? The importance of this point is that if the free anchorage in the roads lay outside these limits (I shall refer to them hereafter as "the legal limits") the appeal necessarily fails because it was common ground between the parties that the commercial area of the port, the attainment of which has been held to be essential if a ship is to become an arrived ship, could not extend beyond the legal limits of the port. (ii) Does the fact that the Aello had not got a police
G permit before it entered the inner harbour prevent it being an arrived ship before that time? (iii) A similar question arises from the absence of a giro (berthing permit). I shall deal first with these subsidiary questions.

Like the learned trial judge (39), I have no hesitation in holding on the evidence that the free anchorage in the roads is within the legal limits of the port of Buenos Aires. Like him, I rely on the contents of the DIGEST, an official publi-
H cation of the Argentine Government. This conclusion is also supported by the affidavit evidence, in particular that of Mr. Rafael de la Vega, sworn on Mar. 13, 1957. Mr. de la Vega is a member of the Argentine Bar specialising in Argentine maritime law, and he is the only qualified expert on that law who gave evidence in the case. He deposes, in para. 7, para. 8 and para. 9 of his affidavit, as follows:

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> "7. Decided cases and authorities can be cited in abundance to prove that the Argentine Government, which owns and controls every part of the port and its vicinity, is always ready both to allow and at times to order merchant vessels to use the Buenos Aires roads for every kind of commercial operations, as it considers the roads or outer harbour as a valuable auxiliary to the inner harbour of Buenos Aires and of La Plata.

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(38) [1958] 2 All E.R. at p. 697; [1958] 2 Q.B. at p. 400.
(39) [1957] 3 All E.R. at p. 632.

> A "8. The roads have been and are continually used for discharging part-cargoes, such as oil from vessels whose draft does not permit them to enter the docks or basins with their full cargo, as also for discharging any cargo which the authorities consider to be of an explosive or dangerous nature, or otherwise undesirable for introduction into the inner harbour.
>
> "9. Another use of the roads is as a waiting-place for vessels booked to load or discharge at Buenos Aires, but for which no berth is presently B available in the inner harbour. Our roads constitute a satisfactory outer harbour, being cheaper than the inner harbour and have from the earliest times been used as an anchorage . . ."

From other evidence it appears that grain cargoes were not loaded or discharged in the roads, but this is irrelevant in considering the legal limits of the port. C It was objected that the roads were described in art. 1703 as part of the ports of Buenos Aires and La Plata and not merely as part of the port of Buenos Aires and could not, therefore, be within the legal limits, still less within the commercial area of the port of Buenos Aires. I do not think this objection is sound. The same stretch of water may, in my opinion, lie within the legal limits of each of two ports, and this seems to be the position in the case of Buenos Aires roads. D It is clear from the evidence that some commercial operations were performed in the roads by ships destined for the port of Buenos Aires, and that, when they were performed, the same appropriate dues were charged as would have been payable had they taken place in the inner part of the port.

I turn to the question of the effect of the absence of a police permit before Oct. 29. On this point, also, I agree with the learned trial judge. As he says E (40), evidence which was uncontradicted establishes that, in the case of a vessel, which, like the Aello, has already loaded part of her cargo at an up-river port and has, therefore, satisfied the police authorities there, the police inspection at Buenos Aires when she arrives to load the balance of her cargo is little more than a formality, the necessity for the compliance with which will not normally hold up commercial operations. One witness, Mr. Thomas Reece Thomas, F in his affidavit sworn on Mar. 13, 1957, puts it even more strongly. Paragraph 10 of his affidavit is in these terms:

> "The big difference is that an irregularity discovered by the quarantine officer may hold up the readiness for loading, but any irregularity discovered through the customs or the prefecture visits will not delay the vessel's commercial operations."

G As appears from para. 9 of the same affiadvit, "the prefecture" means the maritime police. I have called attention to para. 10 because of the distinction drawn therein between breaches of quarantine regulations and breaches of police requirements. This distinction is important, since it has been held by SIR FRANCIS JEUNE, P., in *The Austin Friars* (41), and by a Scottish court in *John & James White* v. *Steamship Winchester Co.* (42), that failure to comply with a H quarantine regulation would prevent a ship being ready to load. As LORD SHAND said in the latter case in the passage cited by SIR FRANCIS JEUNE in *The Austin Friars* (43):

> "The vessel would be an arrived ship in name only, but not in reality, so far as regarded the charterer, whose duty and obligation—the loading or unloading—should begin on arrival. The charterer might be quite ready I to unload, or ready with a cargo waiting to load the vessel, but the disqualification of the ship would prevent this . . ."

In other words, commercial operations would be impossible. The evidence in the present case to which I have already referred shows that the effect of the want of a police permit is very different. It would not delay commercial operations, though it would, no doubt, expose those who established contact with the shore without it to penalties. The case is really more on a par with *Armement Adolf Deppe* v. *John Robinson & Co., Ltd.* (44). In that case, the ship was allowed to enter the dock and was attached to mooring buoys on Oct. 28 as there was no berth then available. She had not opened hatches or made other preparations at the buoys as the merchants were not ready to receive cargo. The Court of Appeal held that lay days ran from Oct. 28, SWINFEN EADY, L.J., saying (45):

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(40) [1957] 3 All E.R. at p. 636.

(41) (1894), 71 L.T. 27; 7 Asp. M.L.C. 503.

(42) (1886), 13 R. (Ct. of Sess.) 524.

(43) (1894), 71 L.T. at p. 29; 7 Asp. M.L.C. at p. 505.

> "The ship was ready to discharge in a business and mercantile sense, and the idle formality of incurring useless expense was not necessary as a condition precedent to the commencement of the lay days."

I turn now to the question of the giro. The Court of Appeal, having decided that the Aello was not an arrived ship because it was not within the commercial area of the port before Oct. 29, did not find it necessary to decide whether the absence of a giro prevented her from being an arrived ship. ASHWORTH, J., held (46) that the want of a giro was fatal to the Aello being an arrived ship before Oct. 29, 1954. I am unable to agree that this is necessarily so. We are dealing here with a port charter, not a berth charter. If the free anchorage was not within the commercial area of the port, the Aello could not, in my opinion, be an arrived ship before Oct. 29, 1954, and the appeal must fail; but, if the free anchorage was within the commercial area of the port, the Aello might have become an arrived ship when she entered the free anchorage on Oct. 12, since that was the spot where maize ships awaiting access to a berth had then to lie.

I turn, therefore, to the first question posed by PARKER, L.J., namely—Was the Aello, apart from any question of police permit or giro, an arrived ship when she anchored in the free anchorage on Oct. 12, 1954? I have been privileged to read the opinion which has been delivered by my noble and learned friend, LORD RADCLIFFE, on this question. I agree with his reasoning and conclusions and desire to add but few observations of my own.

As I read the judgment of KENNEDY, L.J., in *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (47), he was saying that, in the case of a charterparty naming a port and nothing more as the point of destination, the test whether a ship had become an arrived ship was whether the ship had reached the commercial area of the port; he regarded, I think, the question what was the commercial area in any particular case, as one to be decided on the facts of the case. To put the matter in other words, he was saying that the test to be applied was what would a man of business, a marine officious bystander, to adapt MACKINNON, L.J.'s well-known phrase, looking at all the facts of the case, including any relevant port regulations, regard as the commercial area of the port. I cannot doubt that a resolution such as the oral resolution adopted by the port authority on Sept. 1, 1954, prescribing the place where ships intending to load maize cargoes were to await their turn for a berth is a relevant regulation. The propinquity of a ship to the actual loading spot is, of course, an important factor in reaching a conclusion whether a ship has become an arrived ship, and I am not aware of any case where a ship as far away as twenty-two miles from the loading berth has been held to have arrived; but, as speed increases, distance loses some of its importance and, if the port authority prescribes that ships intending to load or unload a particular class of cargo are to await their loading turn to berth in a particular area within the legal limits of the port, I think that that area is, so far as that category of ship is concerned, within the commercial area of the port. It is, to adapt the language of KENNEDY, L.J., the place where maize ships awaiting access to a berth usually lie.

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(44) [1917] 2 K.B. 204; 14 Asp. M.L.C. 84.

(45) [1917] 2 K.B. at p. 208; 14 Asp. M.L.C. at p. 85.

(46) [1957] 3 All E.R. at p. 637.

(47) [1908] 1 K.B. 499.

A I have not overlooked the fact that, at the time when the charterparty was made, the resolution in question was not in force, but I think that, in determining whether a ship is an arrived ship, it is right to regard the position as it is at the date when the ship is alleged to have arrived. I should have felt much doubt as to what the position would have been before Sept. 1 but I differ from PARKER, L.J., in that I think that, whatever may have been the position before that date, the commercial area of the port, so far as ships intending to load B maize were concerned, included the free anchorage so long as the resolution of Sept. 1 remained in force.

For these reasons, as well as for the reasons given by LORD RADCLIFFE, I cannot resist the conclusion that a business man, if he were asked the question while the resolution of Sept. 1, 1954, was in force whether a maize-carrying ship awaiting its turn in the roads was an arrived ship would have answered C the question in the affirmative.

If this view be correct, it would be unnecessary to consider the cross-appeal, but, as I understand the majority of your Lordships agree with the Court of Appeal, I proceed to consider the cross-appeal. On this point, I respectfully agree with PARKER, L.J., that the principle laid down in *Ardan S.S. Co.* v. *Andrew Weir & Co.* (48) is plain and that it governs the present case. PARKER, D L.J., states that principle in these terms (49):

> " if the provision of a cargo is necessary to enable the ship to perform its obligation, viz., to become an arrived ship, the absolute obligation of the shipper is to provide the cargo, or at any rate a reasonable part of it, in time to enable the ship to perform its obligation."

E Bearing in mind PARKER, L.J.'s injunction that a judgment must be read in the light of the facts of the case in which it is delivered, I return to *Ardan S.S. Co.* v. *Andrew Weir & Co.* (48). In that case, the charterparty was a berth charterparty and the ship was to proceed to the port of Newcastle, New South Wales, to collect a cargo of coal. It was a custom of the port of Newcastle that a vessel was not allowed to occupy a loading berth until she had received F a loading order from a colliery. The ship arrived at her destination on July 14, 1900, and was ready to load, but there was no cargo ready for her until Aug. 13, and then not enough. She had twice to be removed from her berth under a regulation of the port that she must not occupy a berth when not loading, and her loading was not completed until Aug. 23. The appellants claimed damages on the footing that the reasonable time within which loading should G have been completed began on July 14. This House, restoring the judgment of the Lord Ordinary (LORD PEARSON), upheld the claim. The respondents in that case relied on the decision of this House in *Little* v. *Stevenson & Co.* (50), but the EARL OF HALSBURY, L.C., who had been party to the decision in that case, and LORD DAVEY distinguished it. LORD HALSBURY said (51):

> H " My Lords, I am very sorry if any observations of mine or of the late LORD HERSCHELL have been supposed to throw any doubt upon so well-recognised a principle of commercial law as that a merchant is under an absolute obligation to supply the cargo. The case which is supposed to have created the doubt is *Little* v. *Stevenson & Co.* (50), and the passage referred to is at p. 116, beginning: 'The proposition of law' (that I disputed) was 'that a merchant must be always ready with his cargo at all times I and in all places, and under all circumstances to take advantage of any such contingency, if it should arise.' My Lords, the passage itself should be referred to, and LORD HERSCHELL's, which is at p. 118, three lines from the bottom: 'It is alleged that the obligation existed in point of law,

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(48) [1905] A.C. 501; 10 Asp. M.L.C. 135.
(49) [1958] 2 All E.R. at p. 701; [1958] 2 Q.B. at p. 405.
(50) [1896] A.C. 108; 8 Asp. M.L.C. 162.
(51) [1905] A.C. at p. 510; 10 Asp. M.L.C. at p. 136.

> that at all ports, under all circumstances, however unreasonable it might be to anticipate such a contingency, however deficient the quay might be in the means necessary for storing, or protecting, or preserving cargo, whatever difficulties there might be, in short, that was an obligation always resting upon the shipper.' My Lords, I thought then, and I think still, that, to use LORD HERSCHELL'S language, such an obligation on the shipper would be most unreasonable."

LORD DAVEY, speaking of *Little* v. *Stevenson & Co.* (52), said (53):

> "I think that what was there laid down must be read with regard to the facts of that case, and that all that was meant was that the shipper's or charterer's obligation is only to have his cargo ready when the ship is ready to receive it in ordinary course, and that he is not bound to be prepared for a contingency or fortuitous circumstance not contemplated by either of the parties."

My Lords, in *Ardan S.S. Co.* v. *Andrew Weir & Co.* (54), the charterparty was a berth charterparty, whereas in the present case we are concerned with a port charterparty. I cannot think that this difference affects the principle. In either case, if the provision of a cargo is necessary to enable a ship to become an arrived ship, the absolute obligation of the charterer is to provide the cargo, or at any rate a reasonable part of it, in time to enable the ship to perform its obligation. In the present case, the Aello was within the legal limits of the port; to enable it to get a giro and proceed to the loading point, the only missing requisite was the availability of the cargo. In these circumstances, it seems to me to follow that the respondents were in breach of the obligation of a charterer as defined by their Lordships in *Ardan S.S. Co.* v. *Andrew Weir & Co.* (54). This conclusion is supported by two decisions of the First Division of the Court of Session, *Lilly & Co.* v. *D. M. Stevenson & Co.* (55), and *Krog & Co.* v. *Burns & Lindemann, The Avis* (56). In the last-mentioned case, the loading berth only became available as a result of a chance vacancy and the charterers relied on *Little* v. *Stevenson & Co.* (52), but both the Lord Ordinary (LORD STORMONTH-DARLING) and the First Division distinguished that case saying, I quote from the judgment of the Lord Ordinary (57):

> "the only qualification of that duty [the duty of the charterer to do anything that is necessary on his part, according to the custom of the port to enable the vessel to get a berth] which the House recognised was that the charterer was not bound to have cargo ready in anticipation of a remote and improbable contingency."

The judgment of LORD M'LAREN in the Inner House put the point less forcibly, but he was clearly of opinion that the charterer's liability extended to cover any foreseeable contingency.

Counsel for the respondents contended that the true principle could be stated as follows:

> "If . . . the arrival of the ship or the commencement of lay time is dependent upon some antecedent act of the charterer, the charterer is under a duty to co-operate with the shipowner so far as lies in the charterer's power to enable the ship to arrive and lay time to commence."

He submitted that, if this were the measure of the obligation, his clients could not be liable in damages since it was admitted in para. 3 of the amended Admissions

> "That at all material times . . . (iii) That there was nothing which

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(52) [1896] A.C. 108; 8 Asp. M.L.C. 162.
(53) [1905] A.C. at p. 512; 10 Asp. M.L.C. at p. 137.
(54) [1905] A.C. 501; 10 Asp. M.L.C. 135.
(55) (1895), 22 R. (Ct. of Sess.) 278.
(56) (1903), 5 F. (Ct. of Sess.) 1189.
(57) (1903), 5 F. (Ct. of Sess.) at p. 1193.

> the plaintiffs [respondents], Bunge & Born Ltda., or (to the extent that they were concerned) Agencia Maritima Sudocean S.R.L., could have done which would have resulted in the procurement of a completion cargo or in a certificate of the Junta Nacional de Granos or a 'giro' being issued before they were in fact procured or issued."

He relied, in support of his proposition, on the speech of LORD HERSCHELL in *Little* v. *Stevenson & Co.* (58), and on the observations of GREER, J., in *Vergottis* v. *William Cory & Son, Ltd.* (59). Having regard to the explanation of *Little* v. *Stevenson & Co.* (60) given by their Lordships in *Ardan S.S. Co.* v. *Andrew Weir & Co.* (61), I do not think LORD HERSCHELL's observations assist counsel for the respondents. The observations of GREER, J., in *Vergottis* v. *William Cory & Son, Ltd.* (62) express an opinion which would assist counsel for the respondents, but they are prefaced by the words "Unless the decision of the House of Lords in the *Ardan S.S. Co.* v. *Andrew Weir & Co.* (61) compels me to decide otherwise". PARKER, L.J., in the present case cited with approval (63) the observations of GREER, J., to which I have referred but, having no such way out as GREER, J., was able to find in *Vergotti's* case (64), he went on to consider whether he was precluded from giving effect to his prima facie opinion by the decision in *Ardan S.S. Co.* v. *Andrew Weir & Co.* (61) and answered the question in the affirmative. I respectfully agree with him.

Counsel for the respondents also relied on the decision of the Court of Appeal in *Jones, Ltd.* v. *Green & Co.* (65). That case also related to coal cargoes from Newcastle, New South Wales. The ship arrived at Newcastle on Sept. 1, 1900, but was unable to obtain a loading berth until Dec. 15, 1900, because the coaling order which, according to the custom of the port, was a sine qua non to obtaining the berth was only forthcoming on the previous day. The court held that the charterers had fulfilled their obligations as the ship had obtained a berth in accordance with her proper turn at the colliery. VAUGHAN WILLIAMS, L.J., relied on the decision in *Little* v. *Stevenson & Co.* (60), and based himself on the state of knowledge of the parties to the contract. It may be that the decision can be supported on that ground, but, if not, I agree with what is said in SCRUTTON ON CHARTERPARTIES (16th Edn.), p. 152, note (i), that *Jones, Ltd.* v. *Green & Co.* (65) must be regarded as overruled by *Ardan S.S. Co.* v. *Andrew Weir & Co.* (61).

In the present case, I do not think there were any facts known to both parties which modify the obligation of the charterers to provide a cargo. The material factor which prevented the ship becoming an arrived ship was the resolution of Sept. 1, 1954. That, at the date of the charterparty, was known to neither party. There is no evidence whether the shortage of maize which caused the hold-up at the roads was known to either party, but I think it would be more likely to be known to the charterer than to the shipowner and, if the loss caused by the delay has to be borne by one or other of two innocent parties, I see nothing unjust in its falling on the charterers.

For these reasons, I would dismiss the cross-appeal.

It was argued that the breach of the charterer's obligations was a matter of defence as well as of counterclaim on the principle referred to in *Mackay* v. *Dick* (66), that a party may be precluded from relying on the other party's failure to perform some act, when that failure resulted from the first party's own omission. I do not think that principle can assist the appellants in the present case. If I am wrong in the opinion I have expressed that the ship is an arrived ship, like PARKER, L.J., I think that the failure of the respondents to provide a cargo is a matter of counterclaim, not defence.

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(58) [1896] A.C. at pp. 117-119; 8 Asp. M.L.C. at p. 163.
(59) [1926] 2 K.B. 344 at p. 354; 17 Asp. M.L.C. 71 at p. 73.
(60) [1896] A.C. 108; 8 Asp. M.L.C. 162.
(61) [1905] A.C. 501; 10 Asp. M.L.C. 135.
(62) [1926] 2 K.B. at p. 354; 17 Asp. M.L.C. at p. 73.
(63) [1958] 2 All E.R. at p. 700; [1958] 2 Q.B. at p. 402.
(64) [1926] 2 K.B. 344; 17 Asp. M.L.C. 71.
(65) [1904] 2 K.B. 275; 9 Asp. M.L.C. 600.
(66) (1881), 6 App. Cas. 251.

In the result, I would allow the appeal and dismiss the action on the ground that the ship was an arrived ship on Oct. 12, 1954. I would, therefore, make no order on the counterclaim. If, however, the majority of your Lordships are of opinion that the ship did not become an arrived ship until Oct. 29, 1954, I would dismiss both appeal and cross-appeal.

LORD KEITH OF AVONHOLM: My Lords, I direct myself to the two substantial questions in this case, for on all other points I agree with what I understand to be the opinions of all your Lordships. The first main question is whether the Aello was an arrived ship when she anchored in the Buenos Aires roads on Oct. 12, 1954. I have no reason to think that the question cannot be answered satisfactorily by an application of the principles elaborated in *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (67). I had intended to examine the opinions in that case somewhat closely, but having had the advantage of reading the opinion about to be delivered by my noble and learned friend, LORD JENKINS, on this part of the case, with which I entirely agree, I find myself relieved of this task.

I would only add a few words on my view of the facts to which the principles of the *Leonis* case (67) fall to be applied. It is clear on the evidence that, prior to Sept. 1, 1954, the usual place for grain ships to lie for loading was somewhere in the dock area reached after traversing a dredged channel leading from the "intersection" to Buenos Aires. I would have no hesitation in holding that, prior to the coming into operation of the resolution that compelled the Aello to anchor in the roads when she arrived there on Oct. 12, the free anchorage was not within the commercial area of the port for ships such as the Aello. After that date, the position, I think, remained the same. I tabulate shortly the considerations that have led me to form this opinion, most of which cover the position before, as well as after, the coming into operation of the resolution of Sept. 1, 1954. (i) The free anchorage was not an area within the port in which grain ships usually lay when waiting to load. (ii) The lying of the Aello in the roads was a purely temporary incident, the result of a temporary restriction imposed by the port authority. It does not appear to me to present a materially different situation from what would have arisen if, owing to congestion of shipping in the port or some obstruction in the entrance channel, the Aello had had to wait in the roads till there was room for her to move in. LORD WATSON in *Dahl* v. *Nelson, Donkin & Co.* (68), regarded such an order as equivalent to a physical obstacle to entering a dock. (iii) The vessel lay some twenty-two miles from the dock area and had still to finish her voyage to Buenos Aires in the sense that she had to be piloted and be assisted with tugs along a twenty-two mile channel in order to reach the usual "place" for loading as distinguished from the actual loading "spot". (iv) No restriction such as was imposed by the resolution of Sept. 1, 1954, was known to, or could reasonably have been contemplated by, charterer, shipper or shipowner when the charterparty was made. (v) No loading or unloading of grain ships ever took place at the anchorage in the roads. There was evidence that such a proceeding would be dangerous if not impracticable. (vi) The ship was, no doubt, as near as she could get to "the actual loading spot" for some time after her arrival at the anchorage, but that, in my opinion, is immaterial. A point "as near as circumstances permit to the actual loading spot" must, in my opinion, be within the port in its commercial sense, apart from stipulation in the charterparty. (vii) The ship could not, in my view (though this is, perhaps, more a conclusion from the foregoing facts), be reasonably held to have been placed at the disposal of the charterer while she was lying at the roads. (viii) The fact that oil vessels or other types of vessel might load or discharge in the roads is nothing to the point. There may be different commercial areas in a port for different types of vessel and cargo, or a vessel may have to load or discharge outside a port. In any event, we do not know the terms of the charterparties for oil vessels. They may contain a clause " as near thereto as she may safely get " or " as near thereto as circumstances permit ", a clause which is absent from the present charterparty. For these reasons, I reach the conclusion that the Aello was not an arrived ship when she anchored in the roads. Ashworth, J., and the Court of Appeal, in my view, arrived at a correct result on this point.

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(67) [1908] 1 K.B. 499.

(68) (1881), 6 App. Cas. 38 at p. 58; 4 Asp. M.L.C. 392 at p. 398.

The second main question is whether, if the vessel was not an arrived ship so far as her position was concerned when she anchored in the roads on Oct. 12, 1954, she must be deemed to be an " arrived ship " and ready to load because she could go no further and could not obtain a giro by reason of the charterers' failure to have any cargo available to load aboard her on her arrival in the roads. The affirmative to this question, which is maintained by the appellants, proceeds on a line of authority which I find it necessary to examine with some care. The principle which I understand is relied on seems first to have made its appearance clearly in a number of Scottish shipping cases where there was applied, or rejected, a principle approved by this House in another Scottish case which was not a shipping case. In *Mackay* v. *Dick* (69), Lord Blackburn stated the proposition thus:

> " I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances."

Lord Watson in the same case accepted a passage from Bell's Principles which, though adequate to cover the case then in hand, is, according to the late Professor Gloag in his erudite work on Contract (2nd Edn.), at p. 279, too widely stated. Gloag states the principle thus:

> " Where the condition under which an obligation is undertaken is potestative, so that its accomplishment is within the power of the party conditionally liable, it may be held that his implied obligation is not merely to impose no obstacle to accomplishment, but to take active steps to promote it."

He adds: " This is by no means a general rule." After illustrations of cases in which it could not apply, he concludes that the cases where an obligation to promote the accomplishment of a condition has been applied are those which fall within the rule formulated by Lord Blackburn. So far as I have observed, *Mackay* v. *Dick* (70) was first referred to in a shipping case in *Lilly & Co.* v. *D. M. Stevenson & Co.* (71). It was also cited in this House in *Little* v. *Stevenson & Co.* (72) and in *Vergottis* v. *William Cory & Son, Ltd.* (73). This rule is stated in very much the same way in English shipping cases. It is clearly recognised by Brett, L.J., in *Nelson* v. *Dahl* (74), a charterparty case, where he says:

> " that where the act to be accomplished is to be brought about by the joint effort of both parties, the only implication, in the absence of an express contract to the contrary, is that each will use his best endeavours to forward the accomplishment of the common object."

In *Barque Quilpué, Ltd.* v. *Brown* (75), another charterparty case, Vaughan Williams, L.J., said:

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(69) (1881), 6 App. Cas. 251 at p. 263. (70) (1881), 6 App. Cas. 251.
(71) (1895), 22 R. (Ct. of Sess.) 278. (72) [1896] A.C. 108; 8 Asp. M.L.C. 162.
(73) [1926] 2 K.B. 344; 17 Asp. M.L.C. 71. (74) (1879), 12 Ch.D. 568 at p. 592.
(75) [1904] 2 K.B. 264 at p. 271; 9 Asp. M.L.C. 596 at p. 598.

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> "The second point is, that in this contract, as in every other, there is an implied contract by each party that he will not do anything to prevent the other party from performing the contract or to delay him in performing it."

He adds that this is not to be taken as a special affirmative contract, but a stipulation implied in every contract.

B Starting from this point, I would examine a number of cases cited at the hearing in which there was considered the liability of charterers in damages for detention of ships which, through alleged failure of the charterers to provide a cargo, were prevented from arriving in dock, or at a berth, so as to become arrived ships. I shall take these in order of date. In *Lilly & Co.* v. *D. M. Stevenson & Co.* (76), a vessel under charterparty had to proceed to a port C in the Forth and receive at a berth or berths pointed out by the charterers a full cargo of coals. The ship arrived at Bo'ness on Nov. 13. A berth was available on Nov. 14, but, as no coal was ready for her, the ship lost her turn. The Lord Ordinary (LORD WELLWOOD) held that the berth was lost through the fault of the charterer in not having a cargo ready, relying on the rule of *Mackay* v. *Dick* (77). The fault would appear to have been in the arrangements made D with the colliery company by the charterers who were fully familiar with the rule of the port. His judgment was affirmed by the Second Division of the Court of Session.

Little v. *Stevenson & Co.* (78) was a case that originated in the Sheriff Court, and this House was, accordingly, not at liberty to consider the evidence in the case, being confined to the facts found in the interlocutor of the Second Division. E The Second Division, reversing the sheriff, had found that the charterers under a berth charterparty were not liable for failing to provide a cargo which would have enabled the ship to become an arrived ship. Under the charterparty, the ship was to load a cargo of coal at Bo'ness "at the berth pointed out by the charterers' agent, if required", and

> "Lay days to count from the time the master has got the ship reported F berthed and ready to receive cargo, and given notice of same in writing to charterers", etc.

What had happened, as appears from the opinion of LORD TRAYNER in the Court of Session, though not fully set out in the interlocutor of the court, was that the ship arrived off Bo'ness on Oct. 19, 1893. She could not get into the G docks, the usual "place" of loading and discharge, because of congestion of shipping. On Oct. 21 a loading berth became vacant which the ship could have had, if she had had a cargo ready, out of her turn, for there were some twenty or thirty ships ahead of her. It was on this fact that the shipowners relied, and it would seem that appellants' counsel in this House wished the case to be remitted to the Court of Session for this fact to be added to the facts H found in the interlocutor under appeal. In the Court of Session, LORD TRAYNER, finding for the charterers, referred to *Lilly & Co.* v. *D. M. Stevenson & Co.* (76) and held that it did not apply. He said (79):

> "But to prevent any misapprehension I may repeat here, that if the reporting or berthing of the ship had been prevented or hindered by the act or fault of the defenders, I should have been prepared to again hold I that such a state of facts did not prevent the running of the lay days, not because there had then been fulfilment of the obligation on the part of the ship, but because the shipper by his act or fault having prevented such fulfilment, he could not take advantage to the detriment of another from what had been brought about by his own fault."

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(76) (1895), 22 R. (Ct. of Sess.) 278.

(77) (1881), 6 App. Cas. 251.

(78) [1896] A.C. 108; 8 Asp. M.L.C. 162.

(79) (1895), 22 R. (Ct. of Sess.) at p. 800.

In this House, LORD HALSBURY, L.C., referring to the opportunity that had arisen for a berth on Oct. 21, said (80):

> " The proposition of law is that a merchant must be always ready with his cargo at all times and in all places and under all circumstances to take advantage of any such contingency if it should arise. There is not a fragment of authority for any such proposition."

LORD HERSCHELL used almost identical language. Referring also to the conditions of the charterparty, he said that they would imply a duty on the charterer (81) " of doing any act that was necessary on his part, according to the custom of the port, to enable her to get a berth " and, in a later passage (82), that the shipper was " bound to do whatever is reasonable on his part, with the view of getting the ship berthed at the earliest period that is reasonably possible ". In certain circumstances, that might be his duty but not " at all ports, and under all circumstances, however remote and improbable might be the contingency ". I think it must be assumed that the House saw no reason to send the case back to the Court of Session for any additional statement of facts or to differ from the opinion of LORD TRAYNER. The appeal was, accordingly, dismissed.

In *Krog & Co.* v. *Burns & Lindemann, The Avis* (83), a ship under charterparty had to proceed to Methil, and there load a cargo of coals from such colliery as the charterers should select. She was to be loaded in seventy-two running hours commencing when the steamer was ready to receive cargo, reported at custom house, berthed and written notice given to charterers' agent. The ship arrived at Methil on July 28 and gave notice that she was ready. There were then ten ships ahead of her, and there was no vacancy at the loading crane. A chance vacancy occurred at an unsuitable berth on July 29, and another vacancy at a suitable berth on July 30, owing to the ships ahead having no cargo ready. The ship herself had no cargo ready and so lost the vacant berth. She was finally berthed on Aug. 3, loaded by Aug. 5, and sailed on Aug. 6. The Lord Ordinary (LORD STORMONTH-DARLING) held (84) that it was the duty of a charterer to do " any act that is necessary on his part, according to the custom of the port, to enable the vessel to get a berth ", citing *Little* v. *Stevenson & Co.* (85). He said the charterers were responsible for the acts or omissions of the colliery. They knew that there would be difficulty in providing cargo and they took the risk with their eyes open. He held the charterers liable for the detention. On appeal to the First Division, his judgment was affirmed, LORD M'LAREN pointing out (86) that contingencies of this kind were frequent and that the charterers could have gone to another colliery when they knew (ten days before the ship reached Methil) that the Bowhill colliery could not supply the coal in time.

Jones, Ltd. v. *Green & Co.* (87) (with which may be read *Barque Quilpué, Ltd.* v. *Brown* (88)) was a case which turned on somewhat special circumstances. A ship under charterparty had to proceed to a loading berth at Newcastle, New South Wales, and there load in the usual and customary manner a full cargo of (blank) coals as ordered by the charterers. No loading time was stipulated. Wallsend coal, which was in short supply, was selected by the charterers. It was a custom of the port that no loading berth would be allocated without a coaling order. The ship arrived at Newcastle on Sept. 1, 1900, and was only berthed on Dec. 15 on getting a coaling order. It was held that the charterers were not liable for the delay. KENNEDY, J., held that, under the charterparty, the ship was to load in colliery turn and had been so loaded; also, that the custom of the port in so loading was known to the shipowners, and that it was not unreasonable for the charterers not to substitute another coal which might have enabled them to get a berth sooner. The Court of Appeal (VAUGHAN WILLIAMS, ROMER and STIRLING, L.JJ.) dismissed an appeal, holding that the circumstances were known to both parties and that the charterers were entitled to a reasonable time for getting cargo having regard to the known circumstances of delay. *Ardan S.S. Co.* v. *Andrew Weir & Co.* (89), which at this time had not got further than the Outer House of the Court of Session, was distinguished.

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(80) [1896] A.C. at p. 116; 8 Asp. M.L.C. at p. 163.
(81) [1896] A.C. at p. 118; 8 Asp. M.L.C. at p. 163.
(82) [1896] A.C. at p. 119; 8 Asp. M.L.C. at p. 163.
(83) (1903), 5 F. (Ct. of Sess.) 1189.
(84) (1903), 5 F. (Ct. of Sess.) at p. 1193 n.
(85) [1896] A.C. 108; 8 Asp. M.L.C. 162.
(86) (1903), 5 F. (Ct. of Sess.) at p. 1196.
(87) [1904] 2 K.B. 275; 9 Asp. M.L.C. 600.
(88) [1904] 2 K.B. 264; 9 Asp. M.L.C. 596.

In *Ardan S.S. Co.* v. *Andrew Weir & Co.* (90), the charterparty was in similar terms to that of the preceding case, and for the same loading port. The charterparty was dated May 30, 1900. On June 9 the charterers contracted with the Lambton colliery for coal to be shipped under the charterparty " in regular colliery turn as customary ". On July 14 the ship reached Newcastle, New South Wales. Two ships had arrived just before her intending to ship the same coal. On Aug. 13 the loading of the two ships ahead was completed and a colliery order and a berth was obtained for the ship in question (the Ardandearg). Two shifts from the berth during loading were required because of shortage of coal, and loading was not completed until Aug. 23. Damages for thirty-one days' detention were claimed, that is from July 14 to Aug. 13. This House, reversing the Second Division of the Court of Session, held the charterers liable for the detention. The judgment, as I see it, proceeded entirely on the circumstances of that case. The House took the view, differing from the Lord President (LORD KINROSS) in the Court of Session, as appears most clearly from LORD DAVEY's speech, that there were no special circumstances known to both parties which modified the obligation of the charterers. After pointing out that the berthing master at Newcastle could have given a berth to the Ardandearg on July 14, 1900, the day following her arrival in port if coal had been ready for her, he poses the question (91):

> " By whose default was it that the ship did not get a loading order? The answer, in my opinion, can only be that it was the default of the respondents in not providing the cargo when the ship was ready to go on the berth to receive it . . . In short, the respondents have not satisfied my mind that it was any part of their contract with the appellants that the latter should await the turn of the colliery or take the risk of the cargo not being ready."

I would treat this case as turning simply on fault on the part of the charterers in failing to have a cargo ready to enable a ship to become an arrived ship. The charterers could not say that there was any contingency not contemplated by them for they had contracted for coal " in regular colliery turn ", and the colliery company was not able to supply sooner than it did. In other words, the ratio is the same as entered into the decisions in *Lilly & Co.* v. *D. M. Stevenson & Co.* (92) and *Krog & Co.* v. *Burns & Lindemann, The Avis* (93). That this is so can, I think, be seen from the judgment of the Lord Ordinary (LORD PEARSON) in the Court of Session (89), which was restored by this House. The Lord Ordinary (94) points out that the charterers had contracted with the colliery company to load " in regular colliery turn as customary, strikes, &c. excepted ". These words, he says,

> " gave the defenders [the charterers] the right to have the ship served in

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(89) (1904), 6 F. (Ct. of Sess.) 294. (90) [1905] A.C. 501; 10 Asp. M.L.C. 135.

(91) [1905] A.C. at p. 514; 10 Asp. M.L.C. at p. 138.

(92) (1895), 22 R. (Ct. of Sess.) 278. (93) (1903), 5 F. (Ct. of Sess.) 1189.

(94) (1904), 6 F. (Ct. of Sess.) at p. 298 n.

> regular turn, but exposed them to the risk of having to wait for her turn until ships arriving earlier were loaded. This contract was not disclosed to the pursuers [the shipowners], who contracted with the defenders alone." A

And later he says (95):

> "I hold then (1) that the delay was caused not by the exceptional congestion of shipping, but by the failure of the defenders to perform their primary duty of providing a cargo." B

In these circumstances, it seems to me that there was good ground for saying that it was the act of the charterers, in entering into such a contract, that impeded them in providing a cargo that would have enabled the ship to be berthed earlier and become an arrived ship.

C In *Vergottis* v. *William Cory & Son, Ltd.* (96), the defendants had contracted to buy coal from a colliery company for shipment from Barry. They chartered the Panaghis Vergottis to proceed to a Welsh port and load a cargo of nominated coal in such dock as might be ordered by them, with a loading time of 144 running hours. The vessel was nominated to and accepted by the colliery company. She arrived in the roads on Apr. 10, but did not, owing to absence of cargo, enter dock till Apr. 19. D Detention damages were claimed, for the period from Apr. 11 to 19, for failure by the charterers to take steps that would have let the ship enter the dock when she arrived in the roads. Sufficient coal had not been provided to satisfy the dock authorities' requirements, with the result that several ships which arrived in the roads after the Panaghis Vergottis were allowed to load ahead of her, and the Panaghis Vergottis lost her turn. E The court held that there was no absolute obligation to provide a cargo until a ship was an arrived ship, but that the charterers should have had a cargo ready when the ordinary turn came for the ship to enter the dock. GREER, J., said (97):

> "I think there is an implied term in the charterparty that the defendants would do whatever was reasonable in order to enable the plaintiff's ship to get into the dock and so become an arrived ship"; F

and later (98):

> "... in refusing to assist the plaintiff's ship to get into the dock by complying with the requirements of the dock authority, the charterers broke their contract, and are liable to pay the agreed damages."

G *Hogarth* v. *Cory Brothers & Co.* (99) was the case of a ship under charterparty to load coal at Calcutta on a berth charter. The ship arrived in the port on Dec. 27, 1920, but was not berthed till Feb. 13, 1921. She could have been berthed earlier if the dock authorities had been informed that coal for the ship was available; which in fact it was, but it was allowed to be put on other ships. The charterers were held to be in default. Delivering judgment of a Board of the Privy Council, LORD PHILLIMORE said (100): H

> "If a ship is prevented from getting to a loading berth owing to an obstacle created by the charterer, or owing to the default of the charterer in performing his duty, then it is well established that the shipowner has done all that is needful to bring the ship to the loading place, and that the charterer must pay for the subsequent delay." I

My Lords, all these cases are, in my view, but illustrations of the application of the principle stated by LORD BLACKBURN in *Mackay* v. *Dick* (101), BRETT,

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(95) (1904), 6 F. (Ct. of Sess.) at p. 300 n.
(96) [1926] 2 K.B. 344; 17 Asp. M.L.C. 71.
(97) [1926] 2 K.B. at p. 355; 17 Asp. M.L.C. at p. 74.
(98) [1926] 2 K.B. at p. 356; 17 Asp. M.L.C. at p. 74.
(99) (1926), 17 Asp. M.L.C. 175.
(100) (1926), 17 Asp. M.L.C. at p. 176.
(101) (1881), 6 App. Cas. at p. 263.

A L.J., in *Nelson* v. *Dahl* (102), VAUGHAN WILLIAMS, L.J., in *Barque Quilpué, Ltd.* v. *Brown* (103) and GLOAG ON CONTRACT, to which I have already referred. The obligation on the charterer is not the same as is placed on him in the case of an arrived ship. There the obligation to have a cargo ready is absolute and immediate, frustration or exceptions in the charterparty apart. The charterer takes the risk of difficulties or delays in bringing a cargo forward, however B unforeseen and unexpected, if he has not provided against them in his contract. In the case of a ship that has not arrived, he is not, in my opinion, responsible for such contingencies. Absolute obligation there may be to provide a cargo, but the question is when does that obligation mature. His obligation in such a case is, under an implied term of the contract, to do what within him lies to secure for his part the performance of the contract, that is the arrival C of the ship, without undue delay. It will, I think, be found that in the cases unjustifiable failure to fulfil the implied term is expressed not in terms of breach of contract, but as fault, or failure of duty, of the charterer. The accomplishment must be something that is, or should have been, within the power of the charterer to perform. The failure may be in a lack of foresight, or in the arrangements made beforehand for having cargo available at the right time. D It would, indeed, be unfortunate if it were otherwise, for it would obliterate any distinction between an arrived ship and a ship which had not arrived, so far as concerned the obligation of the charterer to supply a cargo. One reason for the difference is that, in the case of an arrived ship, so far as the provision of cargo is concerned no question of joint performance arises. In the case of a non-arrived ship, there is a duty on both parties to secure the arrival of the ship E as speedily as possible. This is the joint act to which both must make his contribution. The charterer is responsible if he impedes its accomplishment by failing to take such measures as are, or should have been, in his power to achieve that result. He might do so by nominating an unsuitable berth, or in some other way. But the most common cause is by failing to take proper and reasonable steps to have a cargo available. This is, I think, too often spoken of as F if it was an independent obligation on a level with that arising in the case of an arrived ship, whereas it is merely one of the contributions that the charterer must make, for his part, to the achievement of a common object. It also lacks the absoluteness of the other, for failure in performance must, in my opinion, be judged by what was reasonably possible, or reasonably to be anticipated, in all the circumstances of the case. Some reference was made by LORD DAVEY G in the *Ardan S.S. Co.* case (104) to dicta of LORD BLACKBURN in *Postlethwaite* v. *Freeland* (105) and in *Ford* v. *Cotesworth* (106). I should doubt whether LORD BLACKBURN had anything other than the general principle in mind or was thinking of the obligation except in the context of an arrived ship. LORD DAVEY also referred to *Gardiner* v. *Macfarlane, McCrindell & Co., The Lismore* (107), but *Gardiner* v. *Macfarlane, McCrindell & Co., The Lismore* (107) was H clearly a case of an arrived ship.

I turn then to the relevant circumstances of this case, which may be very shortly stated. It is clear that the sellers of the maize, an Argentine State organisation, referred to conveniently as I.A.P.I., had sold in short supply. They had a monopoly of purchase from Argentine farmers and of sale for export. Maize was, accordingly, not coming forward to the port in sufficient quantity I to supply the ships in port waiting to receive it. It was because of the congestion of maize ships in the vicinity of the docks and wharves that the order of Sept. 1, 1954, was made by the port authority which, when it came into operation later in the month, required maize ships to wait in the roads and to take their turn in obtaining a berth for loading as maize came forward. As a completion cargo came forward, each ship in turn received from the berthing officer a giro, or berthing permit, and moved in to a loading berth. No ship did, or could, get a berthing permit to load maize except in strict turn and according to the availability of maize for loading at the port. Nor did the Aello miss her turn. This situation, of course, had not arisen when the charterparty was made, and there is nothing in the evidence to suggest that it could even have been anticipated. When the ship arrived in the roads, charterer and shipowner were tied hand and foot. There was nothing either could do to enable the ship to enter the port. The charterer could do nothing to accelerate or improve the arrival of maize, and nothing that he could have done at the time of the contract with the Argentine Government could, so far as the evidence goes, have made any difference in the result. Allocation, indeed, of any cargo of maize would seem to have depended on the coincidence of the arrival at the port of sufficient maize for a ship, or ships, with the turn of the ship in the roads. I am unable to see, in the circumstances, that there was any failure by the charterers to do anything in their power to facilitate the entrance of the ship into the port. Reasonable measures were what was required of them. But no measure, reasonable or unreasonable, could, as I see it, have had any different result.

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(102) (1879), 12 Ch. D. at p. 592.
(103) [1904] 2 K.B. at p. 271; 9 Asp. M.L.C. at p. 598.
(104) [1905] A.C. at pp. 511, 512; 10 Asp. M.L.C. at p. 137.
(105) (1880), 5 App. Cas. 599 at p. 619; 4 Asp. M.L.C. 302 at p. 306.
(106) (1868), L.R. 4 Q.B. 127 at p. 134.
(107) (1893), 20 R. (Ct. of Sess.) 414.

This situation may be thought to be unusual, but it is a situation which may become increasingly common, and may present charterers and shipowners with difficult problems. It is a situation in which the sale and export of grain are a government monopoly, and in which the operation of the ports which are nationalised undertakings is also a government monopoly. Shippers and shipowners if they are going to trade and traffic with the Argentine at all must submit to the dictates and regulations of the Argentine Government. The circumstances do not provide a situation in which it can easily be said that the shipper or charterer is responsible for the failures or omissions of the government. It is idle for the shipowner to say to the charterer: " If you had provided a cargo I could have got entry to the port ". The reply is: " There was no point in my providing a cargo until the ships ahead of you had been served. Only then could you have got entry to the port ". True, there were a number of empty loading berths. But these were out of commission for the loading of maize, and maize ships were not being sent there. (See the evidence of Barzacos and Fowler.) The suggestion that the Aello failed to get a berth because of the failure of the charterers to have a cargo ready is, in the circumstances, quite unreal. I find difficulty in distinguishing the situation from that which might arise from a congestion of shipping preventing entry to a port, or some temporary closing of a port, which, in a sense, this was so far as maize ships were concerned. As the witness Fowler put it, the situation in September and October had developed to the point at which with the shortage of maize there was " a glut of ships ". On its facts, I should say that this case is a fortiori of *Little* v. *Stevenson & Co.* (108), for there there was a chance opportunity of the ship getting a berth if a cargo had been ready, whereas here there was no such opportunity at all. It was in that case that LORD HALSBURY, L.C., said (109):

> " And I can imagine it would be a most serious thing if such a proposition [that a merchant must always be ready with his cargo] were supposed to be laid down to regulate the mercantile community, because it might very seriously imperil the conduct of merchants in their business if it were to be supposed that all those twenty or thirty ships (for it is said there were twenty or thirty ships there) were guilty of a breach of an implied duty (the charterparty being in the ordinary form) in not having all their cargoes

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(108) [1896] A.C. 108; 8 Asp. M.L.C. 162.
(109) [1896] A.C. at p. 116; 8 Asp. M.L.C. at p. 163.

A ready. I think I am entitled to say that no such case has ever been suggested in the courts."

In the whole circumstances, I cannot hold that there was any failure of performance on the part of the charterers here to enable the Aello to become an arrived ship. I should add that, had I thought otherwise, I would have found no difficulty, B from the fact that we have here a port charterparty, in applying the ratio of *Ardan S.S. Co.* (110) and similar cases relating to berth or dock charterparties to entry to a port.

For the reasons, however, which I have endeavoured to state, I would dismiss the appeal and allow the cross-appeal.

LORD JENKINS: My Lords, the appellant shipowners and the respondent C charterers are agreed that the question whether the Aello became an arrived ship, and lay days began to run, when she anchored in Buenos Aires roads on Oct. 12, 1954, as contended by the shipowners, or only when she entered the inner harbour on Oct. 29, 1954, as contended by the charterers, should be resolved by the application to the facts of this case of the general principles with respect to the ascertainment of the time of arrival of ships engaged under D port, as distinct from dock or berth, charterparties, laid down in the well-known case of *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (111). The principles there stated have been accepted as correct in a number of subsequent cases, including the case in your Lordships' House of *United States Shipping Board* v. *Frank C. Strick & Co.* (112), in which their validity as general principles was clearly recognised, although the actual decision of a majority of the House was to E the effect that their application was excluded or qualified by the terms of the particular charterparty then under consideration. It is not suggested that the charterparty in the case now before your Lordships contains any provision which could have the effect of ousting or modifying these well-established general principles. But, granted acceptance of their validity as general principles, and their applicability to a charterparty in the terms of the document F now before your Lordships, ample room, of which counsel on both sides have fully availed themselves, is left for controversy as to the precise meaning of some of the language used by BUCKLEY, L.J., and KENNEDY, L.J., in the course of their exposition (concurred in by LORD ALVERSTONE, C.J.) of these general principles in *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (111); and as to the result of their application to the facts of this particular case.

G I should next refer to the main statements of principle contained in the judgments of BUCKLEY and KENNEDY, L.JJ., in *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (111), which was a case where a vessel ordered under a port charterparty to Bahia Blanca to load wheat duly entered the named port and anchored within a few ship-lengths of the railway pier from which cereals were usually loaded and gave notice of readiness to load, but was delayed in getting a berth H there owing to the crowded state of the port, and it was held that the lay days commenced twelve hours (the period stipulated by the charterparty) after the notice of readiness, and not from the time the vessel obtained a berth alongside the pier. BUCKLEY, L.J., said (113):

> "The true proposition, I think, is that where the charter is to discharge in a named place which is a larger area in some part or in several parts of I which the ship can discharge, the lay days commence so soon as the shipowner has placed the ship at the disposal of the charterer in that named place as a ship ready, so far as she is concerned, to discharge, notwithstanding that the charterer has not named, or has been unable owing to the crowded state of the port to name, a berth at which in fact the discharge can take place.
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> "In that which follows I shall use the word 'berth' to express and

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(110) [1905] A.C. 501; 10 Asp. M.L.C. 135.
(111) [1908] 1 K.B. 499.
(112) [1926] A.C. 545; 17 Asp. M.L.C. 40.
(113) [1908] 1 K.B. at p. 512.

> include a berth, or a wharf or a quay, or a place where by the use of lighters or other means a vessel can load or discharge, and the words 'place of discharge' as meaning a place named in the charterparty of larger area than a berth within which are a berth or berths, and investigate whether the authorities do not support the proposition that under such a charter as this the lay days begin to run when the vessel has reached the place of discharge, but has not reached a berth. The proposition is certainly true where the named place is a dock. It is not disputed that the second proposition in MR. CARVER'S work on CARRIAGE BY SEA (4th Edn.), s. 627 (2), is correct, namely, that 'When a particular dock is named the lay days will begin as soon as the ship is ready, and at the freighter's disposal, inside the dock, though not alongside the quay; even though the work can only take place at the quay.' If this is so it is difficult to grasp any ground of principle differentiating a dock from that part of a port at which the ship would be as closely proximate to a berth as she would be in a dock. What logical difference can exist? The ship either is not or is an arrived ship when she has not reached a berth. If she is when the named place is a dock, why is she not when the named place is a port and she is at a place as closely proximate to a berth as she would be in a dock? "

BUCKLEY, L.J., referred (114) to *Tapscott* v. *Balfour* (115) and continued:

> " He [that is to say, BOVILL, C.J., in that case] said (116): 'If, when she arrives there, the place is so crowded that she cannot load, the loss must fall on the charterer; the shipowner has done all he was required to do when he has taken his vessel to the usual place of loading in the port.' I point attention to those words—' the usual place of loading in the port.' In those words I find an expression of the meaning to be given to what has been called the commercial ambit of the port as distinguished from the whole port in a geographical or maritime sense. It means, not the whole port, but such part of the port as is a proper place for discharging, whether the vessel has reached a berth or not. It is that part of the larger area (the port) which can appropriately be described as the place of discharge, meaning by that expression an area, and not a berth."

After reviewing a number of authorities, BUCKLEY, L.J. (117) referred to *Pyman Brothers* v. *Dreyfus Brothers & Co.* (118), and continued:

> " For the reasons which I have given I think it is right, and at any rate I think we should not disturb it. The proposition which it affirms seems to me to have been this: that under a charterparty which names an area, but not expressly or by the words 'as ordered' a berth, the lay days run from the time when the ship arrives in the named place of larger area (in that case it was the outer harbour of Odessa), and is at the disposition of the charterers for loading . . ."

He concluded his judgment by saying (119):

> " *Pyman* v. *Dreyfus* (118), I think, is good law, and it governs this case. The lay days here began, I think, when the vessel anchored near the railway pier. The appellants, therefore, are entitled to succeed."

KENNEDY, L.J., said (120):

> " Now, the answer to the inquiry whether the ship can or cannot properly be described as an 'arrived' ship obviously depends upon the point which the parties have chosen to designate in the charterparty as the destination. The degree of precision is purely a matter of agreement between them."

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(114) [1908] 1 K.B. at p. 513. (115) (1872), L.R. 8 C.P. 46; 1 Asp. M.L.C. 501.
(116) (1872), L.R. 8 C.P. at p. 52; 1 Asp. M.L.C. at p. 502.
(117) [1908] 1 K.B. at p. 516. (118) (1889), 24 Q.B.D. 152; 6 Asp. M.L.C. 444.
(119) [1908] 1 K.B. at p. 517. (120) [1908] 1 K.B. at p. 518.

A He went on to distinguish between port, dock and berth charterparties, and observed (121):

> "It is when the stipulated destination is a port only without further limitation, as in the present case, that a question as to the fact of the ship's arrival at her destination is likely to arise."

B Then, after quoting (122) a passage in the judgment of BRETT, M.R., in *Garston Sailing Ship Co.* v. *Hickie* (123), and referring to *Brown* v. *Johnson* (124) and *Kell* v. *Anderson* (125), the learned lord justice said this (126):

> "If, then, we find a charterparty naming a 'port' simply, and without further particularity or qualification, as the destination for the purpose of loading or unloading, we must construe it in regard to the 'arrival' of C the ship at that destination as meaning that port in its commercial sense, that is to say, as it would be understood by persons engaged in shipping business, and in regard to the arrival of a ship there for the purposes of the charterparty. In the case of a small port, 'port' may or may not mean the whole of the geographical port. In the case of a widely extended area, such as London, Liverpool or Hull, it certainly signifies some area which D is less than the geographical port, and which may, I think, not unfitly be called the commercial area.
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> "But then comes the question what does the expression the 'port', viewed commercially, or the 'commercial area' in this connexion mean? Certainly it does not mean the loading berth, that is to say, the actual spot at which the work of loading or unloading the ship is performed. E As CHANNELL, J., remarks in his judgment in the present case (127): 'it would be very peculiar if there was a greater obligation on the ship as to going to a specific berth where the charterparty was less specific by naming a port only than where it was more specific and named a dock.'"

Then, after discussing the effect that custom might have on the question, he F continued (128):

> "In the absence of any proof of a custom of this kind—and I may note in passing that no evidence of such a custom was given in the present case—the commercial area of a port, arrival within which makes the ship an arrived ship, and, as such, entitled to give notice of readiness to load, and at the expiration of the notice to begin to count lay days, ought, I think, to G be that area of the named port of destination on arrival within which the master can effectively place his ship at the disposal of the charterer, the vessel herself being then, so far as she is concerned, ready to load, and as near as circumstances permit to the actual loading 'spot' (I use the convenient word which was employed by DENMAN, J., in *Tapscott* v. *Balfour* (129) and by BRAMWELL, L.J., in *Davies* v. *McVeagh* (130)), be it quay or wharf, or H pier, or mooring, and in a place where ships waiting for access to that spot usually lie, or, if there be more such loading spots than one, as near as circumstances permit to that one of such spots which the charterer prefers."

Later KENNEDY, L.J., said (131):

> "The proposition which is stated by Mr. CARVER at pp. 751 and 752 (s. 624a) of the 4th edition of his most valuable work on CARRIAGE BY SEA, I and is restated at p. 760 (s. 627), appears to me to be entirely right: 'When

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(121) [1908] 1 K.B. at p. 518.
(122) [1908] 1 K.B. at p. 519.
(123) (1885), 15 Q.B.D. 580 at p. 587; 5 Asp. M.L.C. 499 at p. 500.
(124) (1842), 10 M. & W. 331.
(125) (1842), 10 M. & W. 498.
(126) [1908] 1 K.B. at p. 520.
(127) [1907] 1 K.B. 344 at p. 354.
(128) [1908] 1 K.B. at p. 521.
(129) (1872), L.R. 8 C.P. at p. 55; 1 Asp. M.L.C. at p. 503.
(130) (1879), 4 Ex.D. 265 at p. 268; 4 Asp. M.L.C. 149 at p. 150.
(131) [1908] 1 K.B. at p. 523.

> the place named is a port, or other wide district, the lay days begin when the ship is ready, and at the freighter's disposal, within the named place in its commercial sense; though she may not be in a position to take in or discharge cargo, and though she may not be at the wharf, dock, or other part of the place to which the charterer may have properly required her to go.' "

I think that the only other citation I need make from this judgment is where the learned lord justice said (132):

> " If, as she [sc. the Leonis] then lay, she was then an ' arrived ' ship at the charterers' disposal, and ready to load, it is, under such a charterparty as the present charterparty of the Leonis, immaterial whether she was in a place in which the physical act of loading was possible or impossible."

Such being the general principles to be followed in determining the time and place at which a vessel under a port charterparty becomes an arrived ship, I should next state briefly the facts to which they have to be applied in the present case. Pursuant to the charterers' orders, the Aello in the first instance proceeded up the River Parana to Rosario and there loaded a part cargo of maize, completing this operation at 6 p.m. on Oct. 11, 1954. She was then ordered by the charterers to proceed to Buenos Aires and there load the balance of such cargo (no further notice of readiness to load being required under the charterparty). Accordingly, the Aello returned down river to Buenos Aires and anchored in Buenos Aires roads at 1.30 p.m. on Oct. 12, 1954. Buenos Aires roads are in the vicinity of a point in the estuary known as " Intersection " which is marked by a moored hulk for the use of port officials. From " Intersection " a dredged channel leads upstream to a point some six miles below the water-front of the city where it bifurcates into north and south channels leading into basins or docks disposed along the water-front. " Intersection " has no artificial features apart from the moored hulk to which I have referred, all the docks, basins, quays, grain elevators and other facilities for the loading and unloading of vessels being located along the water-front in what is (without prejudice) conveniently described by Ashworth, J., as the dock area. Disposed along the outer edge of the dock area are three vanguardia, or hailing stations, from which the arrivals and departures of ships are recorded. " Intersection " is some twenty-two miles down river from the nearest point in the dock area at which facilities for loading grain are provided. Vessels proceeding from or to the dock area to or from " Intersection " or the roads adjacent thereto have to keep to the dredged channels, and there is no question of their anchoring at any intermediate point. The roads include two anchorages known as the quarantine anchorage and the free anchorage, in the latter of which the Aello anchored on Oct. 12, 1954. At " Intersection ", vessels coming in from abroad are subjected to medical, customs and police examinations of the usual character. Vessels coming in from up-river ports, such as the Aello in the present case, having received the necessary clearances with respect to these matters on their original entry, are not as a rule troubled with them again, but are required, as are all vessels, to obtain a final police permit before being allowed to commence loading, such permit being normally obtained at the quayside immediately before loading begins. I should add that port pilots (as distinct from river or deep sea pilots, as the case may be) are taken on at " Intersection "; and that dues are charged on vessels anchoring in the roads, and also for special operations such as lightering. So far as commercial operations are concerned, incoming vessels are required by the port regulations to unload inflammable or explosive cargo at " Intersection ". Cargo is sometimes also unloaded there for the purpose of lightening a vessel proceeding up-river, and it appears that bunkering and the taking on of stores may also be carried out there. It appears also that ships with " free pratique ", that is to say, passed out of quarantine, are allowed to wait in the free anchorage if unable to enter the inner harbour, or if waiting for orders. But the loading of grain at " Intersection " which (like any other loading or unloading operations at " Intersection ") would have to be carried out by means of lighters sent out from the dock area, is considered impracticable and is never done.

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(132) [1908] 1 K.B. at p. 527.

The Aello was obliged to remain in the free anchorage until Oct. 29, 1954, when she proceeded to a berth in the inner harbour and was ready to load by 2 p.m. on that day. The reasons for the delay between Oct. 12 when the Aello anchored in the roads and Oct. 29 when she went on to berth in the inner harbour were that, under a resolution passed by the port authorities on Sept. 1 in consequence of an acute shortage of maize cargoes, no vessel intending to load maize was allowed to enter the inner harbour without a giro or berthing permit, and no giro could be issued to any vessel unless a cargo of maize was available for her; and that no such cargo became available for the Aello until Oct. 29. Before Sept. 1 it was not necessary in order to obtain a giro that a cargo of maize should be actually available, and maize ships were allowed to enter the inner harbour and wait there for their cargo, and they usually did so. Under the system introduced by the resolution of Sept. 1, 1954, maize cargoes as and when available were allotted to vessels in turns fixed by the order in which they came into the roads. There was never any shortage of berths. The difficulty lay solely in the fact that the demand for maize cargoes exceeded the supply.

On behalf of the owners, counsel applying to the facts of the present case the language used by KENNEDY, L.J., in the passage already quoted from his judgment in *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (133) beginning: " In the absence of any proof of a custom of this kind . . .", contended that the Aello when she anchored in Buenos Aires roads on Oct. 12, 1954, was within the commercial area of the port as therein defined. Counsel said that, when anchored in the roads, the Aello satisfied the prerequisite of being within the legal administrative and fiscal limits of the port, a proposition which I am content to accept, notwithstanding counsel for the charterers' argument to the contrary based on evidence to the effect that the roads were used in common by the ports of Buenos Aires and La Plata. Counsel for the owners went on to say that, when in the roads, the Aello satisfied KENNEDY, L.J.'s requirements of being (i) within that area of the named port of Buenos Aires on arrival within which the master could effectively place his ship at the disposal of the charterers, (ii) so far as she was concerned ready to load, (iii) as near as circumstances permitted to the actual loading spot, and (iv) in a place where ships waiting for access to that spot usually lay. Counsel went on to argue that it was not necessary that the Aello, in order to be an arrived ship, should be in a place where it was possible or usual to load or discharge (see, e.g., KENNEDY, L.J.'s citation from CARVER'S CARRIAGE BY SEA (134), and his observation (135) to the effect that it was immaterial whether the Leonis was " in a place in which the physical act of loading was possible or impossible "); and that the distance from the actual loading spot was immaterial. Counsel relied on " The true proposition " stated by BUCKLEY, L.J., in the passage to which I have already referred (136), and claimed that it was satisfied by the Aello on the facts of this case. But BUCKLEY, L.J., explained his meaning more clearly and, as I think, more correctly in his definition of what he called " the commercial ambit " of the port in the passage already quoted (137).

I find myself unable to accept counsel for the owners' submissions on this part of the case. If there had been no shortage of maize and no resolution of Sept. 1, 1954, I think that it would have been manifestly impossible to hold that the Aello was an arrived ship in point of geographical position when she anchored in the roads. I do not see how it could then reasonably have been A held that the Aello could effectively have been placed at the disposal of the charterers, lying as she did twenty-two miles from the nearest "actual loading spot" for maize and in a place in which the loading of maize was, for practical purposes, in fact inherently and permanently impossible. Nor do I see how it could reasonably have been held that the Aello, when anchored in the roads, was as near as circumstances permitted to the actual loading spot, seeing that B she could have proceeded into the inner harbour, as in the conditions I am postulating she would have been allowed to do. I do not think that the resolution of Sept. 1 makes any difference in the result. Its effect was to oblige the Aello to stay in the roads pending the availability of cargo entitling her to enter the inner harbour, and counsel claimed that, when in the roads, she was, by reason of the resolution of Sept. 1, which allowed her to go no further, within KENNEDY, C L.J.'s requirement of being as near to the actual loading spot as circumstances permitted. I hope that I am not doing less than justice to counsel's argument if I put it thus: (i) The Aello was within the legal fiscal and administrative limits of the port; (ii) She was as near as circumstances permitted to the actual loading spot for maize; (iii) She was where she lay at the disposal of the charterers in that, so soon as cargo was made available for her (which it was D the charterers' business to do), she could enter the inner harbour, berth, and begin loading in a matter of three hours; (iv) It mattered not that where she lay it was impossible for her to load; (v) The roads were a place in which, under the resolution of Sept. 1, vessels awaiting access to the actual loading spot usually lay; (vi) The roads were within the commercial area of the port, in view of the commercial activities carried on there as above described, albeit they did E not include the loading of maize.

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(133) [1908] 1 K.B. at pp. 521, 522.
(134) [1908] 1 K.B. at p. 523.
(135) [1908] 1 K.B. at p. 527.
(136) [1908] 1 K.B. at p. 512.
(137) [1908] 1 K.B. at p. 513.

I do not think this line of reasoning can be accepted consistently with the principles stated in *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (138). The essential effect of those principles is, as I understand them, to impute to charterer and shipowner under a charterparty requiring a vessel to proceed to a given port and there load, without further details as to place, the intention that the ship- F owner will (in point of geographical position) have performed his duty of making the vessel available to load at the port in question when he has brought it to the "commercial area" of the port, that is to say, the area in which the actual loading spot is to be found and to which vessels seeking to load cargo of the relevant description usually go, and in which the business of loading such cargo is usually carried out. The area presumed to be intended by the hypothetical G owner and charterer is further particularised in point of proximity to the actual loading spot as being the area on arrival within which the master can effectively place the ship at the disposal of the charterer, and the position of the ship in which is to be as near as circumstances permit to the actual loading spot and in a place where ships waiting for access to that spot usually lie. The judgments, as I think, clearly postulate as the "commercial area" a physical area capable H (though, no doubt, only within broad limits) of identification on a map. When the given ship enters that area and positions herself within it in accordance with the requirements just stated, she is (in point of geographical position) an arrived ship; until she does so, she is not an arrived ship, and lay days and demurrage are to be calculated accordingly.

It is, of course, essential for the purpose of apportioning responsibility for I delay between owner and charterer that the ship, having complied with such requirements, should not be prevented from being an arrived ship because conditions at or in the vicinity of the actual loading spot in the shape, e.g., of obstruction by other vessels are such as to make loading for the time being impossible. So to hold would be to cast on the owner the responsibility for delay which should properly fall on the charterer, and, in effect, to obliterate the distinction between port and berth charters which BUCKLEY and KENNEDY, L.JJ., were at such pains to draw. But this affords no support for the proposition that a ship which is compelled by port regulations to remain for the time being in a place in which it is impossible to load her is, while remaining in that position, an arrived ship because she is not allowed to go any further. I agree with the passage in the judgment in the present case of PARKER, L.J., (139) where he says:

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(138) [1908] 1 K.B. 499.

> "The commercial area was intended to be that part of the port where a ship can be loaded when a berth is available, albeit she cannot be loaded until a berth is available."

I also agree with his view (expressed on the same page) to the effect that there is no conflict between the judgments of BUCKLEY and KENNEDY, L.JJ. It appears to me that counsel for the owners' argument in effect does away entirely with the conception of "the commercial area of the port" and substitutes a wholly different test, viz.,

> "Is the ship within the legal fiscal and administrative limits of the port, and if so is she as near as circumstances admit to the actual loading spot?"

If this test is satisfied, the ship is an arrived ship however far (within the limits aforesaid) the ship may be from the actual loading spot and although it may be wholly impossible to load her where she lies, provided that she is as near the actual loading spot as port regulations or other circumstances permit her to go, and time begins to run against the charterer accordingly. I see no justification for this radical departure from the principles of *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (140) as heretofore understood. Counsel for the owners placed considerable reliance on *Pyman Brothers* v. *Dreyfus Brothers & Co.* (141), which was cited with approval in *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (140), but I do not think that it affords any real support for his argument.

As to the submission that, under the resolution of Sept. 1, the roads were a place where vessels awaiting access to the actual loading spot usually lay, I think that the true view is that these vessels were awaiting access to the commercial area of the port as distinct from being in the commercial area of the port and awaiting access to the actual loading spot in that area. As to the commercial activities carried on at "Intersection" as above described, it appears to me that these did not make "Intersection" a commercial area of the port for the purpose of loading maize. As to the resolution of Sept. 1, 1954, I think it operated to exclude the Aello from the commercial area of the port (which I take broadly speaking to comprise the inner harbour and dock area) and not to extend the commercial area of the port to "Intersection".

The view which I have formed to the effect that the Aello was not an arrived ship in point of geographical position until she entered the inner harbour and went on berth on Oct. 29, 1954, makes it unnecessary for me to express any opinion on the questions whether her lack of a giro and/or a police permit until Oct. 29 would have prevented her from being ready to load until that date even if she had been in other respects an arrived ship, and I refrain from doing so.

I would, accordingly, dismiss the appeal.

As to the defence based on the principle of *Mackay* v. *Dick* (142), I agree with my noble and learned friend, LORD COHEN, that this principle has no application here. I also agree with LORD COHEN, for the reasons which he gives, that the owners' counterclaim for damages based on the charterers' absolute obligation to provide cargo was rightly allowed by ASHWORTH, J., and upheld in the Court of Appeal, and is, indeed, concluded against the charterers by the case in your Lordships' House of *Ardan S.S. Co.* v. *Andrew Weir & Co.* (143). I would, accordingly, dismiss the cross-appeal.

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(139) [1958] 2 All E.R. at p. 699; [1958] 2 Q.B. at p. 401.
(140) [1908] 1 K.B. 499.
(141) (1889), 24 Q.B.D. 152; 6 Asp. M.L.C. 444.
(142) (1881), 6 App. Cas. 251.

LORD MORRIS OF BORTH-Y-GEST: My Lords, the first main issue in this litigation is whether the ship Aello was an arrived ship when, at 1.30 p.m. on Oct. 12, 1954, she anchored in the free anchorage in the roads at Buenos Aires. Under the charterparty entered into on the Centrocon form on Aug. 27, 1954, it was provided, by cl. 2, that the ship was to proceed as ordered by the respondent charterers " to the undermentioned ports or places " and there receive from them a full and complete cargo of wheat and/or maize and/or rye in bulk which cargo the charterers bound themselves to ship. Clause 3, so far as material, provided:

> " The steamer shall load as follows, viz., at one or two safe loading ports or places in the River Parana, not higher than San Lorenzo . . . quantity at charterers' option, but not more than the steamer . . . can safely carry over Martin Garcia Bar . . . and the balance of the cargo in the port of Buenos Aires or Eva Peron or Montevideo at charterers' option (to be declared by charterers in writing before the steamer is ready to leave her last up-river loading port)."

From that clause it is apparent, and it is not in contest, that the charterparty was within the category of port charterparties. The charterparty provided that, after loading, the steamer was to proceed to Hamburg and there discharge. The Aello was directed by the charterers to proceed up river to Rosario. She there loaded a quantity of 5,750 metric tons of maize. A letter dated Oct. 11 was then sent to the master of the Aello, requesting him to proceed with the ship " to the port of Buenos Aires in order to continue loading there." Accordingly, she sailed from Rosario at 7.40 p.m. on Oct. 11. When she anchored in the Buenos Aires roads at 1.30 p.m. on Oct. 12, she was between nineteen and twenty-two miles from what might be called the docks area of Buenos Aires. It would have taken the Aello about 2½ to three hours to cover the intervening distance. In order to proceed to the docks area, it was necessary for the ship to have a giro or berthing permit. Under the system prevailing before September, a giro would readily have been issued provided that the Argentinian Grain Board (which controlled the arrangements for exporting maize) issued a certificate allocating the parcel of grain required to complete a cargo. But, in the period preceding Sept. 1, 1954, the supplies of maize that were reaching the grain board were inadequate, and the consequence of this was that ships were delayed in loading and had to wait either in one of the basins or alongside ships that were being loaded. Consequent on this, a new system was put into operation as the result of a resolution adopted on Sept. 1, 1954; under the new system, a giro would only be issued if, in addition to the possession of a certificate of the grain board, it could be shown that the requisite cargo of maize for the particular ship was, in fact, immediately available.

The charterers, who carry on business in Budapest, make purchases in bulk of cereals, including maize, for the Hungarian Government. In entering into the charterparty of Aug. 27, 1954, they assumed an absolute obligation to supply cargo to the ship in accordance with the terms of the charterparty. The arrangements that they had chosen to make to such end were no concern of, and no responsibility of, the appellant shipowners. Because the sale of maize from the Argentine was controlled, purchases for export could only be made from a government organisation which was referred to in the litigation as I.A.P.I. That organisation purchased its maize from farmers and producers. The exporting arrangements were then regulated by the grain board. The charterers had, on June 23, 1954, made contracts with Bunge Aktiengesellschaft, Zurich, under which maize was to be shipped by Messrs. Bunge & Born Lda, Buenos Aires, and they in turn made a contract to purchase from I.A.P.I. In the period after the middle of September, 1954, I.A.P.I. were still receiving inadequate supplies of maize. As a consequence of this, when the Aello arrived in the roads at Buenos Aires, her cargo was not available. The same state of affairs applied in the case of other ships whose purpose was to load maize at Buenos Aires. As I.A.P.I. were the only suppliers on whom to draw supplies of maize, supplies were made available in the order of the sequence in which ships which were to load maize had reached the roads. So it came about that, under the system which had been put into operation in September, the Aello was not permitted to proceed beyond the roads. She was not allowed to do so until her cargo was available for her. It was not until Oct. 29 that the availability of maize made the issuing of a giro possible. When it was issued, a pilot was sent so that the Aello could proceed. The pilot went on board at 10.0 a.m. and, assisted by tugs, the ship started to move in. She was ready to start loading at 2.0 p.m. and actually began loading at 3.15 p.m. If she was an arrived ship on Oct. 29, and not before, then it is common ground that the loading performance would give entitlement to despatch money and the sum demanded by the shipowners as a payment for demurrage was not owing.

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(143) [1905] A.C. 501; 10 Asp. M.L.C. 135.

It was contended, however, on behalf of the shipowners that lay days ran after the ship reached the roads. It was said that she was then an arrived ship (a) because of the position that she had reached, and (b) because, so far as the ship was concerned, she was ready to load. It was said that, so far as position was concerned, the ship was within the legal, fiscal and administrative limits of the port of Buenos Aires, and was within an area where her master could effectively place her at the disposal of the charterers, and was as near as the circumstances permitted to the actual loading " spot ", and was in a place where ships waiting for access to that spot usually lay.

The question is posed, therefore—Was the Aello an arrived ship on Oct. 12? In the competing submissions made on behalf of charterers and shipowners, reliance was placed by each party on the decision of the Court of Appeal in the celebrated case of *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (144). The authority of that case has not been assailed, and in the years since 1908 it must have guided shipowners and charterers in the ordering of their affairs. In his speech in your Lordships' House in *United States Shipping Board* v. *Frank C. Strick & Co.* (145), Viscount Cave, L.C., spoke of " a series of authorities which cannot now be shaken ", and within that category included *Nelson* v. *Dahl* (146) and *Pyman Brothers* v. *Dreyfus Brothers & Co.* (147) and *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (144), and Lord Sumner (148) spoke of " the rule as settled in *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (144) ". The problem becomes one as to its interpretation and its application to the facts of the present case. In that case, the charterparty provided that the Leonis, after arrival at Montevideo, should proceed as ordered by the charterer to one or two loading ports or places in the River Parana but with certain options in the charterers which included an option to load the entire cargo at Bahia Blanca. The vessel was, in fact, ordered to Bahia Blanca, and so the charter fell to be construed as though it had merely provided that the vessel was to proceed to Bahia Blanca and there load. It was provided by the charterparty that lay days were to commence twelve hours after notice that the vessel was ready to load. The vessel arrived off the pier at Bahia Blanca; she anchored, as Channell, J., held (149), " in the river within the port a few ship's lengths off the pier." The evidence showed that Bahia Blanca was a port at which cereals were usually loaded alongside the pier. When the vessel arrived, there were many vessels waiting to be loaded. The charterer wanted the ship to go alongside the pier to load but the crowded state of the port caused a long delay before that was possible. So the vessel was kept waiting for a berth at the pier. She was anchored in the place where vessels usually lay while so waiting. After she had anchored, her master gave a notice that the vessel was ready to load. The question arose whether the vessel was an " arrived " ship, and the Court of Appeal held that she was, so that lay days commenced twelve hours after the notice was given.

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(144) [1908] 1 K.B. 499.
(145) [1926] A.C. 545 at p. 551; 17 Asp. M.L.C. 40 at p. 42.
(146) (1879), 12 Ch.D. 568. (147) (1889), 24 Q.B.D. 152; 6 Asp. M.L.C. 444.
(148) [1926] A.C. at p. 567; 17 Asp. M.L.C. at p. 48.
(149) [1907] 1 K.B. 344 at p. 351.

The essence of the inquiry in that case was whether the vessel had reached the port of Bahia Blanca which she was contractually obliged to reach before her master could properly inform the charterers that the ship was at their disposal for loading purposes. In effect, the inquiry was what the contracting parties meant when they referred to the port of Bahia Blanca. So, in the present case, the question arises what the parties meant when they referred to the port of Buenos Aires. Had the Aello, on Oct. 12, 1954, reached the port of Buenos Aires? If the port of Buenos Aires had, on Oct. 12, 1954, some different identity from that which it possessed a few weeks previously (i.e., on Aug. 27, 1954, the date of the contract), I approach the inquiry on the basis that it is to the position on Oct. 12 that regard must be had. I think that it is clear that, over a period of time, there may, as a result of the operations of man or possibly of the forces of nature, be change effected in that which is denoted when mention is made of a particular port. Such changes are unlikely to occur within the brief period of a few weeks. Over a period of years the size of ships may increase and the places for their reception may need to be enlarged. If, then, there is a contractual provision that a ship must proceed to a named port, how is a court to approach the mixed inquiry of law and fact whether the ship has reached its destination? If a charter provides that a ship must go to some named berth, it will ordinarily be a straightforward issue of fact whether the ship has reached that berth. If the obligation is to reach a named dock, the limits of possible controversy whether a ship has reached such dock will be narrow. But, if the obligation is to go to a port, there is less precision in the contractual definition of the destination which is to be reached. If some pilotage questions were involved in reference to a named port, it would not at all follow that the term " port " in such context meant the same as it would mean if there were questions of port dues or of customs duties; nor does it follow that the term " port " when used to designate the place where a ship is to go to load cargo, means the same as in any of such other contexts. If a charter provides that a vessel is to proceed to a port and there load it is, I think, clear, as was said by CHANNELL, J., in *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (150), that it would not be sufficient for the vessel to get to the outskirts of the port. He indorsed the view that the ship must get within the commercial port as distinguished from the legal or geographical port.

In his judgment in *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (151), BUCKLEY, L.J., referred with approval to a passage in MR. CARVER'S work on CARRIAGE BY SEA (4th Edn.), s. 627 (2), to the effect that, if a particular dock is named in a charter, lay days would begin to run when the ship was ready, and at the freighter's disposal, inside the dock, even though the ship was not alongside a quay, and even though the work could only take place at the quay. BUCKLEY, L.J., then proceeded:

> " If this is so it is difficult to grasp any ground of principle differentiating a dock from that part of a port at which the ship would be as closely proximate to a berth as she would be in a dock. What logical difference can exist? The ship either is not or is an arrived ship when she has not reached a berth. If she is when the named place is a dock, why is she not

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(150) [1907] 1 K.B. at p. 352.

(151) [1908] 1 K.B. at p. 512.

> when the named place is a port and she is at a place as closely proximate to a berth as she would be in a dock? "

This passage emphasises that, if a ship is required to go to a certain port so that she may there load, she may become an arrived ship even if she is at anchor at a place where the charterer does not intend to load her, or even could not load her, provided that the place bears a relationship to the actual or probable loading spot comparable with that which would exist between presence in a dock and presence at a particular berth in a dock. BUCKLEY, L.J., was dealing with a case where the ship lay but a few ship's length from the pier at which she was to load. He referred with approval to *Pyman Brothers* v. *Dreyfus Brothers & Co.* (152), in which case, in reference to a ship which had to proceed to Odessa and there load, and which reached the outer harbour of Odessa, MATHEW, J., said (153):

> " Here the vessel arrived on Dec. 22 at a point where she was at the disposition of the charterers. They had only to indicate the place to which she was to go for her cargo, and she would have been there immediately."

In the judgment of KENNEDY, L.J., there is a passage which directs a clear approach. The lord justice said (154):

> " In the case of a port, and nothing more, being designated in a charterparty as the point of destination our courts have acted in accordance with those dictates of reason and practical expediency which ought to be paramount especially in the region of mercantile business. Just as a port may have one set of limits, if viewed geographically, and another for fiscal or for pilotage purposes, so when it is named in a commercial document, and for commercial purposes, the term is to be construed in a commercial sense in relation to the objects of the particular transaction."

My Lords, the parties to the charterparty now being considered knew and understood that, if the ship should be required to go to the port of Buenos Aires, it would be with the object of loading wheat and/or maize and/or rye. The evidence shows that it was never contemplated that such loading would take place in the Buenos Aires roads. It was commercially impracticable to load a cargo of grain in the roads, and it was never done. There was, in the present case, no necessity for the master of the Aello to give a notice of readiness to load after arrival at the port of Buenos Aires. That was because of the provisions of cl. 13 of the charter, and because the ship had in the first place gone to Rosario. But, had there been any such necessity, I do not think that, if the Aello had been due to arrive in the port of Buenos Aires in the period before September, the master could have served such a notice on arrival at the roads. The reason would have been that the Aello would not then have been at the port (155)

> " in its commercial sense, that is to say, as it would be understood by persons engaged in shipping business, and in regard to the arrival of a ship there for the purposes of the charterparty."

My Lords, I do not think that there was any difference in the period after the middle of September. The purposes of the charterparty did not change. The Aello could only load when she reached " the commercial area ", which, in this case, meant the commercial area within which cereals were loaded. It was such area that both parties had in mind, certainly before September, when they used the designation " port of Buenos Aires ". That area was not changed by the order of Sept. 1. The port of Buenos Aires as designated for the purposes of this charterparty was not thereby enlarged. In my view, the effect of the order of Sept. 1 was to prevent some ships from entering the port. The ships so prevented were those which were destined to load maize. In the case of such ships, the authorities in effect ordained that, because they were purposing to enter the port in order to load maize, they should not be allowed to enter until such time as it could be shown that, after entering the port, they would be able to carry out their purpose of loading. In his judgment, Kennedy, L.J., explained (156) that, when he spoke of the "commercial area", he meant that area of the named port of destination on arrival within which a master can effectively place his ship at the disposal of the charterer, the vessel being ready to load and as near as circumstances permit to the actual loading "spot", and in a place where ships waiting for access to that spot usually lie, or, if there be more loading spots than one, as near as circumstances permit to that one of such spots which the charterer prefers. The element of proximity was present in the facts of the case with which the lord justice was dealing, and he illustrated what he regarded as "the point of arrival" by reference to *Pyman Brothers* v. *Dreyfus Brothers & Co.* (157). The lord justice also quoted the words of Mathew, J., to which I have already referred.

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(152) (1889), 24 Q.B.D. 152; 6 Asp. M.L.C. 444.
(153) (1889), 24 Q.B.D. at p. 157.
(154) [1908] 1 K.B. at p. 519.
(155) See [1908] 1 K.B. at p. 520, per KENNEDY, L.J.

The phraseology used in *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (158) and other cases shows that it is no easy matter to employ the appropriate words to describe an area of water which is itself within a larger area, but Kennedy, L.J., conveys the conception when (159) he speaks of the commercial area within the port which is usually occupied by vessels whose obligation and purpose is to receive a cargo. A vessel may be within that area but may not be actually loading; she may be waiting to be loaded—or waiting to move to a berth at which she can be loaded. But, if it can reasonably be said that a ship which is required to go to a port in order there to load has reached the commercial area of the port within which are the loading spots for her specified cargo so that she next awaits details as to her particular loading spots and directions as to proceeding to them, then it can also fairly be said that she has arrived at her destination. I agree with Parker, L.J., in thinking that Kennedy, L.J., was in his judgment making a contrast between an area where loading takes place as opposed to the actual loading spot. Where loading is to be at a berth, Parker, L.J., neatly stated the matter as follows (160):

> "The commercial area was intended to be that part of the port where a ship can be loaded when a berth is available, albeit she cannot be loaded until a berth is available."

If there had been no temporary port regulation such as that which operated from the middle of September until the month of December, I do not consider that, if the Aello had been directed to the port of Buenos Aires in order to load maize, the shipowners would, or could, have considered that the Aello had reached her destination when she reached the roads. When, on a date subsequent to Sept. 1, the Aello was directed to the port of Buenos Aires in order to load maize, her destination was no different from that which it would have been under a direction earlier given. The effect of the order of Sept. 1 was to make access to the destination dependent on a condition being satisfied.

It would be wrong to suppose that in no case could a ship which was ordered to a particular port in order there to load become an arrived ship unless she had reached a position equally as close to her probable or possible loading spot as was the ship in *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (158). The application of the tests laid down in that case must have widely varying results which will reflect the widely varying circumstances in different ports. The evidence in the present case leads me to the view that, certainly before the resolution of Sept. 1, those concerned with the movements of the Aello would not have considered that she had reached her destination (i.e., the port of Buenos Aires) until she had passed one or other of the hailing stations. Though overmuch importance should not be attached to words used by particular persons, it is at least of interest to note how one practical man, the master of the Aello, made his entries in his log book. Thus, the entry in reference to Oct. 12—1.30 p.m. was: " Anchored off Buenos Aires. Waiting for our turn to enter the port . . ." The entries relating to the days from Oct. 13 to 27 were: " Anchored and awaiting orders to enter the port ". It must be added, however, that there is an entry on the 28th—" The lay days expire ". Entries on the 29th include the following:—10.15 p.m.—" Weighed anchor. Full steam ahead to enter the port ", and 1.0 p.m.—" Entering the port assisted by two tugs ".

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(156) [1908] 1 K.B. at p. 521. (157) (1889), 24 Q.B.D. 152; 6 Asp. M.L.C. 444.
(158) [1908] 1 K.B. 499. (159) [1908] 1 K.B. at p. 523.
(160) [1958] 2 All E.R. at p. 699; [1958] 2 Q.B. at p. 401.

So, also, is it of interest to note the terms in which information was supplied in response to a request made in November, 1954, to the port administrator. The information sought was as to the purport of the official verbal resolution of Sept. 1, 1954, which issued from the berthing office of the Buenos Aires port administration, and which came into force about the middle of that month. The answers of the port exploitation department included the following:

> " Point I. Up to Sept. 1 last, all seagoing ships coming from foreign ports, and/or home ports, obtained their entry to the port without any delay, including the ships which had to load or complete loading maize, which all berthed at the elevator in the 1st, 2nd or 3rd tier in the new port or anchored in the north basin, either to operate or to await their loading turn.
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> " Point II. The resolution referred to in this point was taken as a measure to relieve a purely circumstantial situation existing in only one certain section of the port, it being decided for this reason that, as from Sept. 1 last, ships should not be placed in the third tier nor should they anchor in the north basin waiting turn to load grain, but that they must do this in the roads. This measure only affected the ships destined to load maize, whereas those that had to load other cereals or general cargo came directly into port."

The words " came directly into port " were there used in their colloquial sense as a general term covering the docks, the basins, the boca, the riachuelo. The words indicate the geographical delimitation which was so much emphasised in *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (161).

> " Point IV. Regarding this matter, we have to say that the steps taken to anchor ships in the roads were not due to a state of congestion in the port, but to ensure orderly operating to avoid berthing ships in certain sections. (Basin ' D ' south side, pierhead No. 4 and basin ' E ' of the new port)."

These answers seem to illustrate and to reinforce the view that the Aello was excluded from the port of Buenos Aires until Oct. 29. Such exclusion resulted not from congestion in the port but from a shortage of maize. A further answer showed that, in the case of ships destined to load maize, the grain board loaded them in turn in the order of their arrival in the roads. The evidence showed that a ship could not proceed from the roads without having received a giro. The roads served both Buenos Aires and La Plata. Thus, art. 1705 of the DIGEST provided:

> " All ships may enter the port of the Capital or of La Plata at any hour of the day or night, provided that they have first obtained the authorisation of the control office after having fulfilled the requirements called for by the health and navigation laws."

All these references serve to illustrate how the term " the port of Buenos Aires " was, in practice, used by those concerned with the movements of cargo-carrying ships to designate an area—which may broadly be referred to as the docks area or the commercial area. That area was contained within such wider area as constituted the port for legal, administrative or fiscal purposes. The docks area or the commercial area would have places which were regularly used by ships which were loading or discharging particular types or classes of cargo. The places, or probable places, from which maize would be loaded were recognisable and identifiable.

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(161) [1908] 1 K.B. 499.

My Lords, for the reasons that I have indicated, I conclude that, in a business and commercial sense, the Aello had not completed her passage to the port of Buenos Aires in order there to load maize until she had arrived within what might in this case be called the docks or commercial area and which contained the places where the loading of maize would take place. The Aello would not, in any event, be an arrived ship when she anchored in the roads if, as counsel for the charterers contended, the roads were not within the legal, fiscal and administrative limits of the port of Buenos Aires. A consideration of the evidence relating to this matter has not led me to differ from the conclusion reached by ASHWORTH, J. (162) that the roads can properly be said to be within those limits.

It was further contended by counsel for the charterers that even if, contrary to his contention, the Aello was an arrived ship when she reached the roads on Oct. 12, the lay days would not then begin because, as he contended, she was not then ready to load and could not have given a notice of readiness to load had there been an obligation to give such a notice. In the first place, counsel submitted that the absence of a "giro" prevented the ship from being ready to load. My Lords, a giro is a permit to go to a particular berth and, if the Aello had, on Oct. 12, arrived at the port of Buenos Aires, the failure of the charterers to obtain the berthing permit that they needed would not have meant that the ship was not ready to load. But, on the view that I have formed, the Aello was not an arrived ship on Oct. 12 for the reason that she had not completed her journey to her destination which was the commercial area which contained the loading spots where the loading of maize took place. The absence of a giro was a circumstance which showed that the ship was not allowed to proceed to her destination, but the absence of a giro did not constitute some separate reason for saying that the ship was not ready to load. The ship had not reached the area within which she was to be loaded, and her readiness to load would have to be considered when she did reach it. In the second place, counsel for the charterers submitted that, as the Aello did not possess a police permit, she was not ready to load; until the police had gone on board and given their permit there was, he submitted, no right of passage for any person to or from the shore. But the evidence showed that the necessity for a police visit, with a view to giving a police permit, which visit in practice would not take place at the roads but when a ship was in the commercial area, would not, in fact, cause any delay in actual loading.

My Lords, on the view that the Aello was not an arrived ship on Oct. 12, it is, I think, apparent, on the facts of the case, that she would have been an arrived ship on that date, and at a time approximately three hours after she had reached the roads, had the charterers had their cargo ready. There was no shortage of space or of berths at the places where maize could be loaded. The charterers required the ship to proceed to the port of Buenos Aires. The instruction was given so that the ship should load maize. The ship proceeded to and attempted to comply with the instruction, but was prevented from completing her voyage because the charterers had no maize to load. It would be a strange result if, in such circumstances, the charterers could, without incurring liability, bring about the losses to the shipowners which delay would cause. If, then, the charterers choose to order the ship to enter the port of Buenos Aires in order to load maize, and if the only reason why the ship does not and cannot enter the port is because the charterers have no maize, and if the ship is kept idly waiting until they get some maize—are they responsible to the ship for such damage as the delay has caused? The general legal position relating to the availability of cargo for arrived ships does not present itself for consideration. It is to be observed also that there are no provisions in the charterparty introducing any contractual terms as to waiting for turns to load. In the present case, the ship could not arrive, and lay time could not begin unless and until the charterers had cargo available. In those circumstances, it was acknowledged that the charterers were under some measure of duty to co-operate. It was said, however, that the charterers were under no higher obligation than to take all reasonable steps to have a cargo available, and that the admissions of fact made by the parties record that the charterers acted reasonably in every step which they took to procure a completion cargo, and that such a completion cargo could not have been procured earlier than it was procured. It was said, therefore, that the shipowners were without redress against the charterers for the delays and losses to which the shipowners, certainly without any fault on their part, had been subjected.

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(162) [1957] 3 All E.R. at p. 635.

My Lords, it is not disputed that a charterer is under an absolute obligation to provide a cargo, but the question that is raised concerns the time when that obligation must be fulfilled under circumstances such as those of the present case. If charterers require a ship to proceed to a destination which can only be reached if the charterers have their cargo at that destination, are the charterers under obligation to avoid causing delay to the ship by a failure to have their cargo there? Can the charterers resist any claim by proving that they had acted reasonably and had done their best? If the charterers say that they will have their cargo available after the ship has arrived so that loading can thereafter take place within the lay days, but if the ship is not permitted to arrive because cargo is not available, must shipowners suffer the loss occasioned by the delay and which results from circumstances not within their control? My Lords, in the answering of the questions that I have posed, direct guidance is, I consider, to be found in the decision in your Lordships' House in *Ardan S.S. Co.* v. *Andrew Weir & Co.* (163). The steamship in that case was chartered under a berth charter to proceed to a berth to be named at Newcastle, New South Wales, in order to load coal. The ship reached Newcastle on July 14 and was ready to load, but had to wait until Aug. 13 before she could arrive at her berth. The delay was owing to no fault on the part of the ship but resulted from the fact that coal could not be loaded on the ship on July 14. Coal could not then be loaded, because at Newcastle a ship was not permitted to occupy a loading berth unless actually loading coal pursuant to a loading order from a colliery. Such orders were issued to ships in turn. Even after the ship was able to arrive at a berth in order to load, she was twice required to leave the berth because the supply of coal failed. It was contended that, if the ship had been able to load in ordinary course, the loading would have been completed by July 23. In fact, it was not completed until Aug. 23. The shipowners claimed damages for the detention of the ship for thirty-one days. The delay and loss of time was, they said, caused by the fact that the charterers had not timeously provided a cargo. In spite of a submission that the charterers had done everything reasonable to get a cargo and were not answerable for delay, the claim succeeded. It succeeded after the hearing of full arguments in which the effect of *Little* v. *Stevenson & Co.* (164) and *Jones, Ltd.* v. *Green & Co.* (165) was debated. The EARL OF HALSBURY, L.C., in the course of his speech (166) distinguished

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(163) [1905] A.C. 501; 10 Asp. M.L.C. 135.
(164) [1896] A.C. 108; 8 Asp. M.L.C. 162.
(165) [1904] 2 K.B. 275; 9 Asp. M.L.C. 600.
(166) [1905] A.C. at p. 511; 10 Asp. M.L.C. at p. 137.

> "cases in which it is either proved or assumed that there are particular circumstances known to both the parties, and with reference to what they may be supposed to contract, which may affect both the providing and the loading of the cargo."

So, also, Lord Davey in his speech (167) referred to cases where the cargo is to be provided from a particular place, and the charter has been made in view of circumstances by which, as both parties know, the procuring of a cargo from that place may be delayed. Lord Davey referred to the regulation of the port in regard to the occupation of loading berths, and proceeded (168):

> ". . . it is also said that by the regulation 'the turn of the colliery' became incorporated in and formed part of 'the turn of the port', and therefore that the delay took place from the practice of the port, over which the respondents had no control, and which they had no power to displace, for the benefit of this particular ship. This, I think, is the main ground of Lord Kinnear's opinion.
>
> "But, however the argument is put, I cannot accede to it. It appears to me that it is only putting the old question in another way. By whose default was it that the ship did not get a loading order? The answer, in my opinion, can only be that it was the default of the respondents in not providing the cargo when the ship was ready to go on the berth to receive it. It is said that the respondents did nothing unreasonable. Be it so. But through their misfortune (it may be) they have failed to perform their contract with the shipowners. In short, the respondents have not satisfied my mind that it was any part of their contract with the appellants that the latter should await the turn of the colliery or take the risk of the cargo not being ready. And I am of opinion that, in accordance with the authorities which were cited in the course of the argument, the respondents are liable to pay damages to the appellants for the detention of the ship."

In that passage, Lord Davey clearly rejected the submission that the charterers could repel liability for delay if they could show that they had done what was reasonable to obtain a cargo. My Lords, in the present case, it is shown that the ship was delayed between Oct. 12 and 29 solely because the charterers had no cargo available, and the charterers ought not to be permitted to exonerate themselves from liability by showing that they had acted reasonably. The arrangements for having cargo available were entirely their concern and not the concern of the shipowners. The shipowners had no control over the arrangements that the charterers had made. Even though the charterers had made their arrangements with care, the fact remained that they failed to have cargo available at the time when it should have been available.

The claim for the shipowners was, I think, properly framed as one for damages. Their ship ought not to be deemed to have arrived in a place at which it had not in fact arrived.

I would dismiss both appeal and cross-appeal.

Appeal and cross-appeal dismissed.

Solicitors: *Holman, Fenwick & Willan* (for the appellants, the owners); *Richards, Butler & Co.* (for the respondents, the charterers).

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

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(167) [1905] A.C. at p. 512; 10 Asp. M.L.C. at p. 137.
(168) [1905] A.C. at p. 513; 10 Asp. M.L.C. at p. 138.

Re A SOLICITOR.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Byrne and Donovan, JJ.), May 25, 1960.]

Solicitor—Discipline—Conduct unbefitting a solicitor, not being professional misconduct—Insulting behaviour—Previous convictions for indecent assault—Solicitor's name struck off the roll—Suitability of sentence.

A solicitor was convicted in 1959 under the Metropolitan Police Act, 1839, s. 54, para. 13, for using insulting behaviour whereby a breach of the peace might be occasioned, and was sentenced to the maximum fine of £10. Disciplinary proceedings were taken before the Disciplinary Committee of the Law Society. No evidence was before the committee as to the circumstances giving rise to the conviction. The solicitor had previously been convicted on two charges of indecent assault, as a result of which he had been suspended from practice in 1956 for two years. He did not tender any explanation to the committee concerning the conviction of 1959. The committee, in their findings concerning that offence, found that he had been guilty of conduct unbefitting a solicitor, stating in their findings that " the fact that a solicitor has been convicted of an offence of this nature tends to bring the profession as a whole into disrepute and conduct which results in a conviction for such an offence can only be regarded as unbefitting a solicitor ". The committee ordered that the solicitor's name should be struck off the roll. Conduct constituting an offence under s. 54, para. 13, of the Act of 1839 could differ greatly in culpability according to the type of conduct that was the subject of the conviction. The solicitor appealed against finding and sentence.

Held: (i) although it was not conviction of every type of criminal offence that would show of itself conduct unbefitting a solicitor, yet a conviction of insulting behaviour followed by sentence to the maximum fine showed conduct unbefitting a solicitor; the finding, therefore, should stand.

(ii) it was the duty of the disciplinary committee to inquire into the circumstances before they inflicted a penalty, and they were not entitled to assume, in the absence of any explanation by the solicitor, that the offence of 1959 was of the same nature as the offences of 1956 (see p. 623, letter I, to p. 624, letter A, post); accordingly, as the circumstances of the offence might have been of a different and minor character, and as the misconduct was not professional misconduct (in which case the court would not interfere with the penalty imposed), a sentence of suspension from practice for one year would be substituted (see p. 624, letter C, post).

Re Weare ([1893] 2 Q.B. 439) considered.

Re a Solicitor ([1956] 3 All E.R. 516) applied.

Practice of the disciplinary committee, as regards taking into consideration, after deciding on their finding, previous disciplinary findings and orders relating to the same solicitor, approved (see p. 623, letters E and F, post).

Appeal allowed in part.

[As to striking the name of a solicitor off the roll for conviction of a criminal offence, see 31 HALSBURY'S LAWS (2nd Edn.) 296, para. 319; and for cases on the subject, see 42 DIGEST 397, 398, *4469-4498*.

As to appeal to the Divisional Court, see 31 HALSBURY'S LAWS (2nd Edn.) 302, 303, para. 327; and for cases on the subject, see 42 DIGEST 407, 408, *4652-4660*.]

Cases referred to:

Solicitor, Re a, [1956] 3 All E.R. 516; [1956] 1 W.L.R. 1312; 3rd Digest Supp.

Weare, Re, [1893] 2 Q.B. 439; 62 L.J.Q.B. 596; 58 J.P. 6; sub nom. *Re a Solicitor, Ex p. Incorporated Law Society*, 69 L.T. 522; 42 Digest 394, *4434*.

Appeal.

This was an appeal by a solicitor against both the findings and the order, dated Mar. 3, 1960, of the Disciplinary Committee of the Law Society, whereby it was ordered that the name of the appellant should be struck off the roll of solicitors.

J. C. Rutter for the solicitor.
P. E. Webster for the Law Society.

LORD PARKER, C.J.: The short facts so far as they were proved before the committee were these. That the appellant was a solicitor who had been admitted in 1932, and at the material time was practising at Merthyr Tydfil; that on Aug. 25, 1959, he had been convicted under s. 54 of the Metropolitan Police Act, 1839, of using insulting behaviour whereby a breach of the peace might be occasioned and was fined £10; and, thirdly, that he had not appealed from and was not intending to appeal from that conviction. On that it was alleged that the appellant, having been convicted and sentenced for that offence, had been guilty of conduct unbefitting a solicitor. The committee found the allegation made against the appellant to have been substantiated and said:

> " The fact that a solicitor has been convicted of an offence of this nature tends to bring the profession as a whole into disrepute and conduct which results in a conviction for such an offence can only be regarded as unbefitting a solicitor."

Pausing there, it is argued by counsel on the appellant's behalf that that finding is not correct. He points out what, for my part I think is undoubtedly true, that today, at any rate, it is not conviction of every type of offence that can be said to amount to conduct unbefitting a solicitor. There are passages in *Re Weare* (1) which would indicate that prima facie when a man is convicted of any criminal offence he is a person unfit to be a member of the profession. It seems to me that whatever may have been the position then, today with the multitude of minor criminal offences—to take only as an illustration, parking offences—it is really impossible to say that the mere conviction of any criminal offence is evidence of conduct unbefitting a solicitor. At the same time, I for my part agree entirely with what the committee say, viz., that conviction of an offence of this nature tends to bring the profession as a whole into disrepute, and the conduct of a solicitor so convicted can only be regarded as unbefitting a solicitor.

The provision in question in para. 13 of s. 54 of the Metropolitan Police Act, 1839, covers a multitude of different circumstances. Sitting here, we often have cases where the insulting words or behaviour whereby a breach of the peace may be occasioned occur in the course of indecent overtures and matters of that sort. At the same time it covers, as has been put in argument, abusive language and a quarrel with a taxi driver about the fare, and a multitude of different matters. Nevertheless, it seems to me that conviction with the maximum penalty, which is (2) now £10, for using insulting behaviour whereby a breach of the peace might be occasioned is, even putting the best interpretation on it, conduct unbefitting a solicitor.

The next question is with regard to the penalty. As I have said, the appellant's name was struck off the roll of solicitors. Pausing there, it seems to me that on that conviction alone and without knowing the circumstances it would be quite wrong to strike a solicitor's name off the roll, which is the maximum penalty. The section covers a number of different circumstances, and indeed counsel for the Law Society has conceded that, if the nature of the offence was, e.g., an argument with a taxi driver, it would be quite inappropriate—and I think it would be idle—to subject a solicitor to the maximum penalty and strike his name off the roll.

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(1) [1893] 2 Q.B. 439.

(2) See Metropolitan Police Act, 1839 (Amendment) Act, 1958, s. 1; 38 Halsbury's Statutes (2nd Edn.) 1111.

A The committee, however, did not strike the appellant's name off the roll on that ground alone, because they went on to refer to the previous trouble which he had had. They say this:

> "On June 8, 1956, the committee found an allegation to have been substantiated that the [appellant] having been convicted and sentenced for B certain criminal offences, namely, on two charges of indecent assault, had been guilty of conduct unbefitting a solicitor and ordered the name of the [appellant] to be struck off the roll of solicitors of the Supreme Court. On Oct. 4, 1956, a Divisional Court of the Queen's Bench Division (3) set aside the order striking the [appellant's] name off the roll and substituted therefor an order that [he] should be suspended from practice as a solicitor for a period C of two years with effect from June 8, 1956. No evidence was before the committee of the events which resulted in the [appellant's] conviction in 1959. In 1956 the committee reached the conclusion that the [appellant] was not a person who should be allowed to remain a member of an honourable profession. Notwithstanding that the recent offence of which he has been convicted was not related to the conduct of his practice, the fact that the D [appellant] has been again convicted confirms the committee in their previous view."

In other words the committee are saying that having regard to what happened in 1956, the facts that the appellant was suspended and within a comparatively short time of resuming practice was guilty of this offence, are a ground for striking E his name off the roll. The first point taken on behalf of the appellant is that no evidence was given before the committee of what happened to him in 1956 and that he had no opportunity of dealing with it. The practice, we are told, is that any previous trouble in which a solicitor may have been is not before the committee at all until after they have decided on their findings. Once having decided on their findings, and the only matter being as to penalty, they obtain F from the clerk to the committee any previous findings and orders that there have been. For my own part, I think that that is a perfectly proper practice. It is true that under that practice neither the appellant nor his counsel is given any opportunity of dealing with the appellant's previous record. If, however, as is most unlikely, the clerk should have made a mistake, the solicitor has the right to appeal to this court. I, for my part, think that that is perfectly good G practice.

The question then remains whether the maximum penalty of striking the solicitor's name off the roll was appropriate in the circumstances of the appellant, who had been convicted in 1956 of two charges of indecent assault, who had been suspended for two years and who in August of 1959 was convicted of this offence under s. 54, para. 13, of the Metropolitan Police Act, 1839. Section 54, H para. 13, of the Act of 1839 covers a multitude of different circumstances, and there is little doubt in my mind that the committee suspected, as indeed I do myself, that the circumstances of his conviction were circumstances in which something in the nature of indecent overtures had been made. At the same time, it may have been an offence of an entirely different nature. The committee had no evidence before them one way or the other as to the circumstances of that I conviction.

It is said, and this is all that really can be said, that where the committee have the evidence of conviction it is really for the solicitor to explain the circumstances and, in effect, to mitigate. I, myself, feel quite unable to subscribe to that view. It seems to me that it is always for the court, in this case the disciplinary committee, to inquire into the circumstances before they inflict a penalty, and certainly before they inflict the maximum penalty. There was suspicion here, suspicion increased by the fact that the solicitor himself made no attempt to A explain the circumstances; but that of itself does not, I think, entitle the committee to assume that the offence was of the same nature as the offences in 1956. Accordingly, it seems to me that the right approach was to say: Here is a man who in 1956 was convicted of two charges of indecent assault. In 1959 he is convicted of an offence which may well have been in regard to an argument with a taxi driver. In those circumstances, and merely on that, I for my part do B not think that the maximum penalty of striking the appellant's name off the roll was appropriate.

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(3) See [1956] 3 All E.R. 516.

I should add this, that in differing in the matter of the penalty, a matter which this court will never do in a case of professional misconduct, I only do so on the authority of *Re a Solicitor* (4), where this court pointed out that they felt at liberty to interfere with the penalty because there, as here, the conduct was not C in regard to his professional capacity.

As regards the penalty, we are left in the dark as much as the committee were as to the exact circumstances but, approaching it as I think that we must, on the basis that this last offence may have been of an entirely different nature from the earlier offences, I would substitute a further period of one year's suspension.

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BYRNE, J.: I agree and have nothing to add.

DONOVAN, J.: In this case, this solicitor was convicted of insulting behaviour. There was no appeal, and I agree that that is conduct clearly unbefitting a solicitor whatever was the insulting behaviour. At any rate that is a conclusion which could legitimately be drawn by the disciplinary committee. For that offence I also agree that one year's suspension is much more appropriate E than striking his name off the roll, and certainly not unjust in a case where a solicitor of set purpose remains dumb as to the details of his offence and is a solicitor who has already been convicted of serious offences three years before.

Appeal allowed in part; sentence varied.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Reginald Freedman & Co.*, Merthyr Tydfil (for the appellant); *Hempsons* (for the Law Society).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

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(4) [1956] 3 All E.R. 516, which case was also an appeal by the present appellant; see p. 623, letter B, ante.

Re BROWNE (a bankrupt), *Ex parte* OFFICIAL RECEIVER *v.* THOMPSON AND ANOTHER.

[CHANCERY DIVISION (Cross, J.), May 16, 23, 30, 1960.]

Bankruptcy—Proof—Expunging proof—Burden of proof—Evidence—Debtor's statement of affairs—Proof admitted many years previously—Estoppel—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5 *c.* 59), *s.* 14 (1), *s.* 141, *Sch.* 2, *r.* 24.

In 1912 a debtor was adjudicated bankrupt and D. was appointed trustee. In April, 1913, the debtor made out, and verified by affidavit a statement of affairs which contained references to a claim of H. for the debt next mentioned. In May, 1913, a proof of debt in the sum of £4,796 was sworn to by a book-keeper to H., a commission agent, and it was stated that the debtor was at the date of the receiving order justly and truly indebted to H. in that sum for money found due to H. on taking accounts between them. In 1919 H. died and in 1921 the debtor died without having obtained his discharge. In 1924 D. admitted the proof of H. for dividend. No dividend was paid and in 1925 D. obtained his release from his trusteeship. In 1958 a reversionary interest belonging to the debtor fell into possession. On application by the official receiver, as trustee of the debtor's estate, to have the proof expunged on the ground that it was a gaming debt and had been "improperly" admitted within r. 24* of Sch. 2 to the Bankruptcy Act, 1914,

Held: (i) the burden was on the applicant and, having regard to the deaths of vital witnesses, the probability of loss of relevant documents and the presumption "omnia praesumuntur rite esse acta", was a burden to satisfy the court beyond any reasonable doubt (and not on a mere balance of probabilities) that the proof was improperly admitted; and the proof would not be expunged because, on the only admissible evidence, namely, the proof itself, the court was not satisfied beyond reasonable doubt that the proof had been improperly admitted, though it appeared probable that the debt had been a gaming debt and that the proof had been admitted "improperly" since the view of the relevant law current at the time had subsequently been found in *Hill* v. *William Hill* (*Park Lane*), *Ltd.* ([1949] 2 All E.R. 452), to be erroneous.

(ii) the debtor's statement of affairs was not admissible against the trustees of the will of H. either as a sworn statement which the debtor was bound to make under the Bankruptcy Act, 1914, s. 14 (1), or as evidence received by the court in any proceeding under the Act of 1914 within s. 141 of that Act.

Re Tollemache, Ex p. Revell ((1884), 13 Q.B.D. 720) applied.

SEMBLE: estoppel can arise against a trustee in bankruptcy who seeks to have a proof expunged (see p. 627, letter A, post).

Re Tait, Ex p. Harper ((1882), 21 Ch.D. 537); and *Re Alexander, Ex p. Sanderson* ((1856), 8 De G.M. & G. 849) considered.

Per CURIAM: I see no reason to doubt that if a trustee admits a proof on a view of the law which is generally thought to be right but subsequently turns out to be wrong the proof has been "improperly" admitted within r. 24 of the rules in Sch. 2 to the Bankruptcy Act, 1914 (see p. 628, letter E, post).

[As to expunging or reduction of proof in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 508, para. 1009; and as to the statement of affairs, see ibid., 331 et seq., paras. 638 et seq.; and for cases on the subject, see 4 DIGEST (Repl.) 367-370, *3333-3375*.

For the Bankruptcy Act, 1914, s. 14 and s. 141, see 2 HALSBURY'S STATUTES (2nd Edn.) 339, 431.]

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*The terms of r. 24 are printed at p. 626, letter I, post.

Cases referred to:

Alberg v. *Chandler*, (1948), 64 T.L.R. 394; 2nd Digest Supp.

Alexander, Re, Ex p. Sanderson, (1856), 8 De G.M. & G. 849; 26 L.J.Bcy. 26; 28 L.T.O.S. 133; 44 E.R. 619; 4 Digest (Repl.) 368, *3345*.

Hill v. *William Hill (Park Lane), Ltd.*, [1949] 2 All E.R. 452; [1949] A.C. 530; [1949] L.J.R. 1383; 2nd Digest Supp.

Hyams v. *Stuart King*, [1908] 2 K.B. 696; 77 L.J.K.B. 794; 99 L.T. 424; 25 Digest 401, *58*.

Law v. *Dearnley*, [1950] 1 All E.R. 124; [1950] 1 K.B. 400; 2nd Digest Supp.

Tait, Re, Ex p. Harper, (1882), 21 Ch.D. 537; 52 L.J.Ch. 117; 47 L.T. 421; 4 Digest (Repl.) 368, *3346*.

Tollemache, Re, Ex p. Revell, (1884), 13 Q.B.D. 720; 54 L.J.Q.B. 89; 51 L.T. 376; *subsequent proceedings*, sub nom. *Re Tollemache, Ex p. Edwards*, (1884), 14 Q.B.D. 415; 4 Digest (Repl.) 353, *3213*.

Motion.

The applicant, the official receiver, as trustee of the property of the deceased bankrupt, applied for an order to expunge the proof of debt sworn on May 21, 1913, on behalf of James Stanley Halsall, deceased, and admitted for dividend on Apr. 3, 1924.

B. J. H. Clauson for the applicant, the official receiver.

Muir Hunter for the respondents, the trustees of the will of the deceased creditor.

Cur. adv. vult.

May 30. **CROSS, J.**, read the following judgment: A receiving order was made against the debtor on Nov. 19, 1912. He was adjudicated bankrupt on Dec. 30, 1912, and a Mr. Laurence Robert Dicksee was appointed trustee. On Apr. 10, 1913, the debtor made out a statement of affairs and verified it by affidavit. The proof in question was sworn to on May 21, 1913, by one John Speers, a book-keeper employed by James Stanley Halsall trading as J. Stanley Halsall & Co. of 18, Chapel Street, Liverpool, commission agent. It stated that the debtor was at the date of the receiving order justly and truly indebted to Mr. Halsall in the sum of £4,796 10s. 1d. for money found due to Mr. Halsall by the debtor on taking accounts between them. Mr. Halsall died in 1919, and the respondents, Gerald Thompson and Doris Flemmich, are the present trustees of his will. On Nov. 28, 1921, the debtor died without having obtained his discharge. On Apr. 3, 1924, Mr. Dicksee admitted Mr. Halsall's proof for dividend together with six other proofs totalling with Mr. Halsall's about £10,000. No dividend was ever paid by Mr. Dicksee, and on Jan. 15, 1925, he obtained his release from his trusteeship, whereupon the official receiver became and has since remained trustee of the debtor's estate.

In 1958 a reversionary interest of the debtor in the estate of a deceased relative fell into possession, and a sum of about £1,300 has thus become available for distribution by way of dividend among the creditors of the debtor. The official receiver has formed the view that five of the seven proofs admitted by Mr. Dicksee, including Mr. Halsall's proof, were in respect of unenforceable gambling debts and ought not to have been admitted by Mr. Dicksee. The motion now before me relates, however, only to Mr. Halsall's proof.

Rule 24 of Sch. 2 to the Bankruptcy Act, 1914, is in the following terms:

> "If the trustee thinks that a proof has been improperly admitted, the court may, on the application of the trustee, after notice to the creditor who made the proof, expunge the proof or reduce its amount."

It is clear that mere lapse of time alone, however long, is no objection to an application to expunge a proof, though the creditor is entitled to retain any dividend which he may previously have received (see *Re Tait, Ex p. Harper* (1)).

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(1) (1882), 21 Ch.D. 537.

I do not, however, read that case as deciding that there can never be any estoppel against a trustee who seeks to have a proof expunged. Thus if the creditor had been given to understand by the trustee that he was going to receive a certain sum by way of dividend and had acted in some way in reliance on the expectation of receiving it, I think that the court might well refuse to expunge his proof even though it was satisfied that it had been wrongly admitted in the first place. This appears to have been the view taken by KNIGHT BRUCE, L.J., in *Re Alexander, Ex p. Sanderson* (2), and I do not think that there is anything in *Re Tait, Ex p. Harper* (3) that is inconsistent with it; but in this case Mr. Halsall's estate cannot rely on any estoppel of this sort since he died before the proof was admitted and the receipt of the £1,300 was entirely unexpected.

This case, however, differs from *Re Tait, Ex p. Harper* (3) in a very material particular. In *Re Tait, Ex p. Harper* (3) there was no doubt as to the facts which existed when the proof was admitted and no doubt that the proof was improperly admitted. The argument turned simply on whether the delay which had occurred precluded the trustee from asking to have the proof expunged. Here, on the other hand, it is by no means clear on what material the trustee admitted the proof. The creditor, Mr. Halsall, died many years ago, and the respondents say that they can find nothing about the debt in such papers of his as survive. The trustee who admitted the proof retired in 1925 and for all I know he may now be dead. At all events, I have no evidence from him. Finally, the debtor himself is long since dead and cannot give any evidence as to the nature of the debt.

Counsel for the official receiver submitted that the references to the nature of Mr. Halsall's claim contained in the debtor's statement of affairs were admissible against the respondents. He did not argue that what a deceased debtor swears with regard to his liabilities in his statement of affairs is admissible in evidence as a statement against interest. He contended first that the statement of affairs was admissible as a sworn statement which the debtor was bound to make in discharge of the duty imposed on him by s. 14 (1) of the Bankruptcy Act, 1914. Alternatively he submitted that it was expressly made admissible by s. 141 of the Act. The first submission was addressed to the Court of Appeal as long ago as 1884 in *Re Tollemache, Ex p. Revell* (4), as an alternative to the argument that the debtor's entry of the debt in his statement of affairs was a statement against interest. The court rejected the latter argument, and though they did not expressly deal with it they must, I think, be taken to have rejected the former as well. The argument based on s. 141 is also, in my judgment, ill founded. That section provides:

> "In the case of the death of the debtor or his wife, or of a witness whose evidence has been received by any court in any proceeding under this Act, the deposition of the person so deceased, purporting to be sealed with the seal of the court, or a copy thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to."

A statement of affairs must, of course, be verified by affidavit, but the debtor cannot be cross-examined on it and I do not think that what is contained in it can fairly be said to be evidence received by the court or that the statement or the affidavit can properly be described as a deposition of the debtor. Section 141 appears to me to be referring to the depositions properly so called of the debtor or of his wife or some third party made either at the public examination of the debtor or at a private examination under s. 25.

As I see the matter, therefore, the only evidence which I have to show that the proof was wrongfully admitted is the proof itself. In a case where the vital witnesses are dead and the relevant documentary evidence may have been lost the maxim omnia praesumuntur rite esse acta applies with peculiar force. In such a case it is not enough for the official receiver to say that, as the terms of the proof suggest that the debt in question was an unenforceable gambling debt, the onus is thrown on the creditors' representatives to show that it was not. It is for the official receiver to satisfy me that the proof was wrongly admitted, and not, as I see it, simply to satisfy me on the balance of probabilities but to satisfy me beyond any reasonable doubt.

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(2) (1856), 8 De G.M. & G. 849.

(3) (1882), 21 Ch.D. 537.

(4) (1884), 13 Q.B.D. 720.

The first thing that strikes me on looking at the proof is that it appears on the face of it to be a claim on an account stated between a bookmaker and a backer. Although the point was not perhaps strictly speaking settled before the decision of Streatfeild, J., in *Alberg* v. *Chandler* (5), it was always, I think, tolerably clear that such a claim was not enforceable at all: see per Tucker, L.J., in *Law* v. *Dearnley* (6). It would be surprising to find any trustee in bankruptcy admitting such a proof without further inquiry, and I think it likely that if one knew the full facts one would find that Mr. Dicksee in admitting the proof was acting on some further information from the creditor not contained in the proof itself. Counsel for the official receiver was disposed to agree that this might well be so, but he argued that any further material on which the trustee acted could at most only have been evidence of a fresh agreement by the debtor to pay the gambling debt founded on some new consideration such as a promise by the creditor to refrain from posting the debtor as a defaulter. Such evidence, he said, might well have justified the trustee in admitting the proof in reliance on the decision of the Court of Appeal in *Hyams* v. *Stuart King* (7); but now that that decision has been overruled by the House of Lords in *Hill* v. *William Hill* (*Park Lane*), *Ltd.* (8), one could see clearly that the proof must have been wrongly admitted.

I agree that it is possible—if not probable—that this was a *Hyams* v. *Stuart King* (7) case, and as at present advised I see no reason to doubt that if a trustee admits a proof on a view of the law which is generally thought to be right but subsequently turns out to be wrong the proof has been " improperly " admitted within the meaning of r. 24 of Sch. 2 to the Bankruptcy Act, 1914. But can I say that I am satisfied beyond reasonable doubt that Mr. Halsall's claim was unenforceable under the law as now understood? As counsel for the respondents pointed out, it is possible—though no doubt unlikely—that despite the reference in the proof to Mr. Halsall's profession the debt was not in respect of betting transactions at all, and even if I disregard this possibility the speeches of the law Lords who took part in the decision in *Hill* v. *William Hill* (*Park Lane*), *Ltd.* (8) show that it is always a question of fact whether or not a fresh agreement arrived at between a bookmaker and an unsuccessful backer results in an enforceable debt or not. The overruling of *Hyams* v. *Stuart King* (7) has much reduced the number of cases in which there will be an enforceable claim, but without knowing the facts of the particular case no one can say for certain that there will not be. If it was my function to guess whether or not Mr. Halsall's proof was properly admitted I should have no hesitation whatever in guessing that it was not; but my function, as I see it, is to refuse the motion unless I am satisfied beyond any reasonable doubt that it was improperly admitted, and in the state of the evidence I cannot say that I am so satisfied.

Therefore, the result is that I must refuse the motion in this case.

Order accordingly.

Solicitors: *Tarry, Sherlock & King* (for the applicant); *Kearton & Co.*, agents for *Garnett, Tarbet, Lindsay & Elsworth*, Liverpool (for the respondents).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

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(5) (1948), 64 T.L.R. 394.

(6) [1950] 1 All E.R. at p. 130; [1950] 1 K.B. at pp. 410, 411.

(7) [1908] 2 K.B. 696.

(8) [1949] 2 All E.R. 452; [1949] A.C. 530.

ADDIS *v.* CROCKER AND OTHERS.

[COURT OF APPEAL (Hodson, Pearce and Upjohn, L.JJ.), May 23, 24, 25, 1960.]

Solicitors—Discipline—Disciplinary committee—Privilege against liability for defamation—Solicitors Act, 1957 (5 *&* 6 *Eliz.* 2 *c.* 27), *s.* 46*—Solicitors (Disciplinary Proceedings) Rules,* 1957 (*S.I.* 1957 *No.* 2240), *r.* 21.

Proceedings before the disciplinary committee constituted under s. 46 of the Solicitors Act, 1957, are judicial in character, and the proceedings (including the committee's findings and order) have the benefit of the absolute privilege against liability for defamation that protects the proceedings before a court of justice, notwithstanding that, under r. 21 of the Solicitors (Disciplinary Proceedings) Rules, 1957, the committee hear all applications in private and only pronounce their findings and order in public.

Principles laid down by LORD ESHER, M.R., in *Royal Aquarium & Summer & Winter Garden Society* v. *Parkinson* ([1892] 1 Q.B. at p. 442) applied.

Barratt v. *Kearns* ([1905] 1 K.B. 504) considered.

Per HODSON, L.J.: if the findings and order, as a document, had contained anything which was not relevant or should not have been contained therein, it would not for that reason have caused the proceedings to lose their judicial character or their protection by absolute privilege (see p. 637, letter I, to p. 638, letter A, post).

Decision of GORMAN, J. ([1959] 2 All E.R. 773) affirmed.

[As to the tribunals and proceedings to which absolute privilege extends, see 24 HALSBURY'S LAWS (3rd Edn.) 49-52, paras. 90, 91; and for cases on the subject, see 32 DIGEST 102-109, *1328-1413.*

For the Solicitors Act, 1957, s. 46, see 37 HALSBURY'S STATUTES (2nd Edn.) 1090.]

Cases referred to:

Barratt v. *Kearns,* [1905] 1 K.B. 504; 74 L.J.K.B. 518; 92 L.T. 255; 32 Digest 104, *1346.*

Copartnership Farms v. *Harvey-Smith,* [1918] 2 K.B. 405; 88 L.J.K.B. 472; 118 L.T. 541; 32 Digest 104, *1347.*

Dawkins v. *Rokeby (Lord),* (1873), L.R. 8 Q.B. 255; 42 L.J.Q.B. 63; 28 L.T. 134; *affd.* H.L., (1875), L.R. 7 H.L. 744; 32 Digest 102, *1339.*

Hollington v. *Hewthorn & Co., Ltd.,* [1943] 2 All E.R. 35; [1943] K.B. 587; 112 L.J.K.B. 463; 169 L.T. 21; 22 Digest (Repl.) 244, *2412.*

Munster v. *Lamb,* (1883), 11 Q.B.D. 588; 52 L.J.Q.B. 726; 49 L.T. 252; 47 J.P. 805; 32 Digest 105, *1368.*

R. v. *Sussex JJ., Ex p. McCarthy,* [1924] 1 K.B. 256; 93 L.J.K.B. 129; 88 J.P. 3; sub nom. *R.* v. *Hurst, Ex p. McCarthy,* 130 L.T. 510; 33 Digest 294, *97.*

R. v. *Wiltshire Appeal Tribunal, Ex p. Thatcher,* (1916), 86 L.J.K.B. 121; 115 L.T. 650; 80 J.P. 409; 22 Digest (Repl.) 447, *4885.*

Royal Aquarium & Summer & Winter Garden Society v. *Parkinson,* [1892] 1 Q.B. 431; 61 L.J.Q.B. 409; 66 L.T. 513; 56 J.P. 404; 32 Digest 128, *1592.*

Scott v. *Scott,* [1913] A.C. 417; 82 L.J.P. 74; 109 L.T. 1; 16 Digest 130, *276.*

Scott v. *Stansfield,* (1868), L.R. 3 Exch. 220; 37 L.J.Ex. 155; 18 L.T. 572; 32 J.P. 423; 32 Digest 104, *1352.*

Shell Co. of Australia, Ltd. v. *Federal Comr. of Taxation,* [1930] All E.R. Rep. 671; [1931] A.C. 275; 100 L.J.P.C. 55; 144 L.T. 421; Digest Supp.

Interlocutory Appeal.

By a writ issued on Jan. 6, 1959, the plaintiff, Jasper Jocelyn John Addis, inquiry agent, claimed damages for libel contained in a document headed

Findings and Orders, No. 2627-1958, dated Aug. 14, 1958, signed by Sir William Charles Crocker, which the plaintiff alleged was falsely and maliciously published by Sir William Charles Crocker, the first defendant, with the knowledge, consent and agreement of the second and third defendants, Sir William Charles Norton and Sir Leslie Peppiatt. The defendants were solicitors and were members of the council of the Law Society. Further, at all material times the defendants were properly appointed members of the disciplinary committee (referred to hereinafter as "the committee") set up by the Master of the Rolls under s. 46 (1) of the Solicitors Act, 1957. By his statement of claim the plaintiff alleged that on May 23, 1958, an application in writing, numbered 2627-1958, was made to the committee on behalf of the Law Society, asking that one Leslie Granville Jones, a solicitor, should be required to answer allegations of professional misconduct which were set out in the application: that on June 12, 1958, the committee met to hear this application and that the plaintiff applied to give evidence before the committee regarding allegations in the application which referred to the plaintiff, but his request was refused; that on Aug. 14, 1958, the defendants as members of the committee published their findings and orders relating to the above application (these being the findings and orders complained of by the plaintiff). By para. 6 of the defence, the defendants pleaded that the publication of the findings and orders was made by them as members of the committee under the provisions of s. 46 to s. 49 of the Solicitors Act, 1957, and under the Solicitors (Disciplinary Proceedings) Rules, 1957, and that the publication occurred in the course of and formed part of proceedings before a statutory tribunal exercising judicial functions and was therefore absolutely privileged. Alternatively, the defendants pleaded (by para. 7) that the publication was protected by qualified privilege. By his reply, the plaintiff denied that there was absolute privilege and, in answer to the plea of qualified privilege, alleged malice against the defendants. An application was made by the defendants, under R.S.C., Ord. 25, r. 4, to strike out the statement of claim and on Feb. 6, 1959, Master Jacob ordered that the statement of claim be struck out on the grounds that it disclosed no reasonable cause of action and that the action was frivolous and vexatious. On appeal to the judge in chambers (Devlin, J.), this order was reversed on Mar. 23, 1959, and by a subsequent order of Master Jacob, dated May 11, 1959, it was ordered that the question whether the publication complained of was absolutely privileged and was made under and in accordance with the authority of the Solicitors Act, 1957, and the Solicitors (Disciplinary Proceedings) Rules, 1957, should be set down for hearing before the trial of the action. On July 8, 9 and 13, 1959, this question was tried by Gorman, J., from whose decision (reported [1959] 2 All E.R. 773) that the publication of the words complained of in para. 5 of the statement of claim was absolutely privileged, and was made under the provisions and in accordance with the authority of the Solicitors Act, 1957, and the Solicitors (Disciplinary Proceedings) Rules, 1957, the plaintiff now appealed. The relevant provisions of the Act and the rules are set out in the judgment of Hodson, L.J.

The plaintiff appeared in person.

T. G. Roche, Q.C., and *H. P. J. Milmo* for the defendants.

HODSON, L.J.: This is an appeal from an order of Gorman, J., dated July 13, 1959, made on a preliminary question ordered to be tried under R.S.C., Ord. 25, r. 2. The action is an action for libel brought by the plaintiff, who has sued three members of the disciplinary committee of the Law Society. The libel is contained in the findings and order, which itself is contained in a document dated Aug. 14, 1958, published by the committee who had heard an application made by the Law Society requiring a solicitor to answer allegations of professional misconduct as a solicitor. The words complained of are defamatory of the plaintiff, but the learned judge held that the defendants were protected by absolute privilege.

A The principle of law to be applied is to be found conveniently stated in the judgment of LORD ESHER, M.R., in *Royal Aquarium & Summer & Winter Garden Society* v. *Parkinson* (1). In that case a meeting of the London County Council for granting music and dancing licences which was held under the provisions of an Act of Parliament was held (1)

> B "not a court within the meaning of the rule by which defamatory statements made in the course of proceedings before a court are absolutely privileged."

LORD ESHER, M.R., said (2):

> "It is true that, in respect of statements made in the course of proceedings before a court of justice, whether by judge, or counsel, or witnesses, there C is an absolute immunity from liability to an action. The ground of that rule is public policy. It is applicable to all kinds of courts of justice; but the doctrine has been carried further; and it seems that this immunity applies wherever there is an authorised inquiry which, though not before a court of justice, is before a tribunal which has similar attributes. In the case of *Dawkins* v. *Lord Rokeby* (3) the doctrine was extended to a D military court of inquiry. It was so extended on the ground that the case was one of an authorised inquiry before a tribunal acting judicially, that is to say, in a manner as nearly as possible similar to that in which a court of justice acts in respect of an inquiry before it. This doctrine has never been extended further than to courts of justice and tribunals acting in a manner similar to that in which such courts act."

E I will refer also to *Dawkins* v. *Lord Rokeby* (3), which is a decision of the House of Lords. That was a case arising out of a military court of inquiry. His Royal Highness the Duke of Cambridge, who was then Commander-in-Chief, directed that a court of inquiry should be held to inquire into certain matters set forth in a letter written under His Royal Highness's authority by the F Adjutant-General of the Forces. The letter directed certain officers to sit as members of a court of inquiry to be assembled under the presidency of General Woodford; and the court of inquiry sat and heard evidence. In the House of Lords, on appeal from the Exchequer Chamber, the Lord Chancellor put the following question to the judges (4):

> "Whether the opinion and ruling of the learned judge in this case, as stated G in the bill of exceptions, and his direction thereupon to the jury, were right in point of law?";

and the following answer to the question proposed was given by the Lord Chief Baron in the name of the judges (4):

> "My Lords, these of Her Majesty's judges who have had the honour of H attending your Lordships during the argument of this case, are unanimously of opinion that the question put to them by your Lordships must be answered in the affirmative. A long series of decisions has settled that no action will lie against a witness for what he says or writes in giving evidence before a court of justice. This does not proceed on the ground that the occasion rebuts the prima facie presumption that words disparaging to another are I maliciously spoken or written. If this were all, evidence of express malice would remove this ground. But the principle, we apprehend, is that public policy requires that witnesses should give their testimony free from any fear of being harassed by an action on an allegation, whether true or false, that they acted from malice. The authorities, as regards witnesses in the ordinary courts of justice, are numerous and uniform. In the present

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(1) [1892] 1 Q.B. 431.
(2) [1892] 1 Q.B. at p. 442.
(3) (1873), L.R. 8 Q.B. 255; *affd.* H.L. (1875), L.R. 7 H.L. 744.
(4) (1875), L.R. 7 H.L. at p. 752.

> case, it appears in the bill of exceptions that the words and writing complained of were published by the defendant, a military man, bound to appear and give testimony before a court of inquiry. All that he said and wrote had reference to that inquiry; and we can see no reason why public policy should not equally prevent an action being brought against such a witness as against one giving evidence in an ordinary court of justice."

The House of Lords adopted the opinion of the judges. I do not think that it is necessary to read their speeches. I only make this observation because it has a bearing on this case—that, so far as one can tell from the report, the inquiry was intended to investigate the fitness of the officer in question for command, and although witnesses were compellable, in the sense that they were ordered to attend, they were not sworn; nor is there any indication that the inquiry was open to the public.

It is necessary, in a matter of this kind, to consider, as SANKEY, J., did in a case to which I shall also refer, the constitution and functions and the procedure of the tribunal which falls to be considered, as to whether the rule of absolute privilege applies. The disciplinary committee is set up under the provisions of an Act of Parliament, the Solicitors Act, 1957, which in turn succeeded earlier Solicitors Acts. The history of the matter, so far as it is necessary to state it, is that by the Solicitors Act, 1888, a statutory committee was for the first time appointed, the members of which were nominated by the Master of the Rolls, with power to inquire and report to the court if there were any case to answer; and by the Solicitors Act, 1919, they were given power to hear and determine matters affecting solicitors, as they have now, and they were given powers of punishment which have since been increased. Moreover, the right of appeal was then introduced.

The present position I must refer to in a little detail. Section 46 (1) of the Act of 1957 provides (5):

> "The Master of the Rolls shall appoint from among members of the council and such former members of the council as are practising as solicitors in England a disciplinary committee consisting of such number of persons, not being less than three nor more than nine, as he may from time to time think fit, and may from time to time remove any member from, or fill any vacancy in, or, subject to the limits aforesaid, increase the number of the members of, that committee."

I omit sub-ss. (2) and (3). Subsection (4):

> "Subject to the last foregoing subsection, the disciplinary committee, with the concurrence of the Master of the Rolls, may from time to time make rules for regulating the making to the committee, and the hearing and determining by the committee or a division thereof, of applications or complaints under this Act."

By sub-s. (5), any such rule may make provision in relation to other matters which I need not read. Subsection (6):

> "For the purposes of any application or complaint made to the disciplinary committee under this Act, the committee or any division thereof may administer oaths, and the applicant or complainant and any person with respect to whom the application or complaint is made may issue writs of subpoena ad testificandum and duces tecum, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action."

Subsection (7):

> "The power to make rules conferred by sub-s. (4) of this section shall be

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(5) The subsection has been amended by the Solicitors (Amendment) Act, 1959, s. 1, but not in a manner material to the decision in the present case.

A exercisable by statutory instrument, and the Statutory Instruments Act, 1946, shall apply to a statutory instrument containing such rules in like manner as if the rules had been made by a Minister of the Crown."

Section 47 (1) deals with the jurisdiction and powers of the disciplinary committee.

B "In addition to any other jurisdiction conferred upon the disciplinary committee by this Act, any application—(a) by a solicitor to procure his name to be removed from the roll; (b) by another person to strike the name of a solicitor off the roll, or to require a solicitor to answer allegations contained in an affidavit, shall be made to that committee."

C The proviso is important:

"Provided that nothing in this subsection shall affect any jurisdiction of the Master of the Rolls or any judge of the High Court over solicitors exercisable apart from the provisions of this subsection by virtue of s. 50 of this Act."

D I interpose a reference to s. 50 of this Act, which deals with the jurisdiction of the Supreme Court over solicitors; but I do not think it necessary to read the section, which deals with what have been called the concurrent jurisdictions.

Returning to s. 47, sub-s. (2) reads:

"Subject to s. 54 of this Act, on the hearing of any application or complaint made to the disciplinary committee under this Act, other than an E application under s. 38 thereof, the committee or a division thereof shall have power to make such order as they may think fit, and any such order may in particular include provision for any of the following matters, that is to say—(a) removing from or striking off the roll the name of the solicitor to whom the application or complaint relates; (b) suspending that solicitor from practice; (c) payment by that solicitor of a penalty not exceeding F £500, which shall be forfeit to Her Majesty; and (d) payment by any party of costs or of such sum as the committee or division may consider a reasonable contribution towards costs: Provided that upon proof of the commission of an offence with respect to which express provision is made by any section of this Act, the committee or division shall, without prejudice to their power of making an order as to costs, impose the punishment, or G one of the punishments, specified in that section."

Appeals against orders are dealt with in s. 48. Subsection (1) reads:

"Subject to the next following subsection, an appeal against any order made by the disciplinary committee or a division thereof on an application or complaint under this Act shall lie to the High Court at the H instance either of the applicant or complainant or of the person with respect to whom the application or complaint is made, and every such appeal shall be made within such time and in such form and shall be heard in such manner as may be prescribed by rules of court."

Section 49 provides:

I "(1) Every order made by the disciplinary committee or a division thereof on an application or complaint made to the committee under this Act shall be prefaced by a statement of their findings in relation to the facts of the case and shall be signed by the chairman of the committee or by some other member of the committee authorised by the committee in that behalf.

"(2) Every such order [other than an order to which I need not refer in detail] shall be filed with the society, and as soon as it has been so filed shall be acted upon by the society and be enforceable in the same manner as a judgment or order of the High Court to the like effect."

Subsection (3) I need not read; but sub-s. (4) provides that

> " The file kept by the society for the purposes of this section shall be open to inspection by any person during office hours . . ."

I pass now to the general provisions of the Act. Section 88 (1) deals with appeals. Subsection (2) reads:

> " Any instrument or other document whatsoever which was, or was treated as having been, made, issued, served or kept, and any other thing done, under or for the purposes of any enactment repealed by this Act shall be treated as having been made, issued, served, kept or done under or for the purposes of the corresponding provision of this Act; and, save where the context otherwise requires, any document referring, or to be construed as referring, to any enactment repealed by this Act shall be construed as referring to the corresponding provision of this Act."

The plaintiff's contention is that there can be no absolute privilege here, and he has put forward five contentions. First of all, his main contention is that the proceedings were held in private. His second contention is what I call for convenience his autrefois acquit contention, which is in effect this, that a solicitor may well be subject to criminal prosecution and afterwards may be called before this committee on a disciplinary charge, and that the functions of that committee in so acting are inconsistent with those of a judicial body. His third contention is that the procedure laid down by the rules is inconsistent with the judicial function. His fourth contention is that there was here such an irregularity in proceeding (to which I shall refer in further detail) as to show that the tribunal was not acting judicially; and his fifth contention is that even if the hearing itself was protected by absolute privilege, the findings and order, or that part of it which contained the libel, was outside the scope of a judicial inquiry.

Before dealing with those contentions, I must refer to the rules. One of the plaintiff's contentions is that the rules are such that the conduct of the tribunal is inconsistent with that of a judicial body. I can deal with that shortly. We have been referred to a number of the rules, one of which is the one which he of course desires to draw to the particular attention of the court—the rule about hearings in public; but the other rules are, broadly speaking, on the same lines as the Rules of the Supreme Court. It is true that in some respects they go further. There is, for example, r. 31, to which the plaintiff has drawn particular attention and which provides that

> " The committee may dispense with any requirements of these rules respecting notices, affidavits, documents, service, or time, in any case where it appears to the committee to be just so to do."

That is a power which goes further than any Rule of the Supreme Court, which contains only R.S.C., Ord. 70, r. 1, which, in the appropriate cases, enables breaches of the rules to be overlooked. There is a further rule (6) to which the plaintiff has drawn attention with regard to cases in which the tribunal may adjourn proceedings, enabling fresh charges to be made. There again, he says that that goes outside the scope of a judicial inquiry. But however that may be, the answer to this point with which I am dealing first is, I think, that the rules are statutory rules and orders which have come into existence in pursuance of the Act of Parliament to which I have referred, and they do not form any basis for a sound contention that the procedure of this tribunal is such that it cannot properly be regarded as judicial.

Rule 21 is the rule which introduces the first point.

> " The committee shall hear all applications in private, but shall pronounce their findings and orders in public."

The document to which I have referred is headed " Findings and Order " and

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(6) Rule 22.

A is obviously drawn up in that form in order to comply with the rule and with the Act of Parliament the relevant sections of which I have read. It was (as the evidence of a Mr. Warren shows) not read out in full, but it was handed out and published publicly, although the hearing had taken place, in accordance with the rule, in private.

Perhaps, having said that, it may be convenient to postpone returning to the B point about publicity and deal with the last point—that even if the hearing itself was protected the findings and order are not. I think that the short answer to that is that the findings and order were an intrinsic part of the hearing, and if the hearing itself is protected by absolute privilege the same applies to the findings and order; and the subsidiary point that matters irrelevant to the findings and order were included in the document which is called "Findings and Order" C really, I think, comes under another point which the plaintiff has made, to which I shall refer in a moment. So far as publicity is concerned, this is, I think, the most formidable—indeed I think the only formidable—part of the plaintiff's case; because he is quite right in saying that it is axiomatic, so far as British justice is concerned, that proceedings should be, wherever possible or convenient, subject to the overriding rule that justice must be administered in public; and D he quite rightly relies on the observations of the House of Lords in *Scott* v. *Scott* (7) in 1913, where that was laid down in very clear terms, and on the observations of LORD HEWART, C.J., in *R.* v. *Sussex Justices, Ex p. McCarthy* (8), when he said that justice must not only be done but must "be seen to be done". He relies also on, and is able I think to get some assistance from, the decision of SANKEY, J., in *Copartnership Farms* v. *Harvey-Smith* (9). That was a case concerning the E activities of a tribunal which was set up by Act of Parliament for the purpose of dealing with applications for exemption from military service. Clause 4 of the regulations in that case (10) reads as follows:

> "All applications to the local tribunal shall be heard in public, unless the tribunal, in any particular case, due regard being given to the interests of F the parties and of any other person concerned in the application, consider that an application or any part of the proceedings thereon shall be heard in private; provided that the tribunal may exclude the parties and the public at any time during the hearing of an application for the purpose of conferring upon any question affecting the decision of the application."

SANKEY, J., said (10):

> G "In my view that is a power which is one of the attributes of a judicial tribunal, and the mere fact that it is granted to the tribunal in question does not, I think, show that it is not a judicial tribunal. To my mind it points the other way, the intention being that there may be no doubt but that the local tribunal shall have the attributes of a judicial tribunal";

H and he came to the conclusion that the object of these regulations was to assimilate the tribunal to a judicial tribunal—

> "that is to say, to make it a tribunal acting in a manner similar to that in which courts of justice act."

That case is only of assistance in so far as it shows, I think, indirectly, that SANKEY, J., was paying attention (as indeed counsel for the defendants conceded I it was right to pay attention) to this particular feature of justice, that it was prima facie to be administered in public.

But of course the plaintiff Mr. Addis (who conducted this case, if I may say so, with great intelligence) was not able to say that courts must always sit in public, because he knew (as indeed *Scott* v. *Scott* (7) shows) that there are many cases where the courts do not sit in public because the interests of justice demand otherwise: there are cases concerning secret processes and cases of wards of court and so forth. But he says that unless a court generally sits in public (subject to exceptions) the protection should not apply. There is, of course, no authority for such a broad proposition as that, and indeed an examination of the authorities leads to the contrary conclusion, particularly in the cases where this question has arisen. I have already cited *Dawkins* v. *Lord Rokeby* (11); and there is another case which brings out the point very clearly—*Barratt* v. *Kearns* (12), which was a case where a commission had been issued by the bishop of a diocese under the Pluralities Act, 1838, and the Amendment Act of 1885, to inquire into the inadequate performance of the ecclesiastical duties of a benefice, and where the decision was that that was a judicial tribunal and the occasion on which a witness gave evidence before the commissioners was absolutely privileged and no action was maintainable in respect of evidence so given. It so happened that the counsel engaged in the case for the plaintiff drew attention in his argument to the fact that this was a private inquiry; but although he was Mr. Fraser, a man who subsequently became a leading authority on the law of libel, he did not even take the point that the fact that it was a private inquiry disabled the tribunal or those who gave evidence before it from claiming absolute privilege. There is no need for me, I think, to go into the facts of that case. For the purposes of this point it is sufficient to say that the inquiry was in private; it is quite clear that that was so; and nevertheless it was said that the rule of absolute privilege applied. It was pointed out by counsel, on behalf of the defendants that of course there are numbers of other cases where justice is administered in private, as in judges' chambers. No one would be likely to dispute that proceedings in judges' chambers are judicial proceedings for all purposes and would be the subject of absolute privilege. The public has no access to chambers, and justice, in the various divisions of the High Court, not always in respect of the same matters, is administered in chambers. Moreover, there is one Act of Parliament (there may be others) where it is specifically provided that cases shall be tried in private: anatomical evidence in nullity cases is directed by Act of Parliament (13) to be heard in camera. So that in my opinion it is not maintainable, as a matter of law, that the fact that this tribunal is directed by its rules to hear in private and to give its findings and order publicly—and only its findings and order publicly—destroys the right to claim absolute privilege.

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(7) [1913] A.C. 417. (8) [1924] 1 K.B. 256 at p. 259. (9) [1918] 2 K.B. 405. (10) [1918] 2 K.B. at p. 412.

That brings me to consider the way in which this tribunal functions, and the procedure. I have already deliberately read a great part of the Act of Parliament which deals with the functions, and I have referred to the rules which deal with the procedure. The constitution of the tribunal authorised by Act of Parliament speaks for itself. The functions are judicial functions, not administrative functions. This is not comparable with a meeting concerned with the issue of licences. If there is a prima facie case brought before this tribunal, it has to hear and determine it. This does in a sense affect the status of the solicitor: he is liable to be struck off the roll if he is convicted of unprofessional conduct, and disabled from practising. There is power to fine him, power to make him pay costs, power to administer the oath, power to obtain a subpoena. No doubt that last provision was inserted in order to get over the difficulty as to the attendance of witnesses, which would otherwise only be cured by application to the High Court, as in *R.* v. *Wiltshire Appeal Tribunal, Ex p. Thatcher* (14), where the King's Bench Division of the High Court came to the assistance of an inferior court in directing the issue of a subpoena, with the sanction which that involved. The subpoena would, of course, have to be enforced by the High Court. There is further the right of appeal to the High Court. The orders of the committee are enforceable; and there is the further point that the jurisdiction is (as is shown by the passages which I have read from the Act of Parliament) concurrent with the existing High Court jurisdiction: see s. 47 (1) and s. 50 (2) of the Act.

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(11) (1875), L.R. 7 H.L. 744. (12) [1905] 1 K.B. 504.

(13) Matrimonial Causes Act, 1950, s. 32 (4); see also Official Secrets Act, 1920, s. 8 (4), which provides that sentence must be passed in public but that all or part of the rest of the trial may be in camera. (14) (1916), 86 L.J.K.B. 121.

Although I have mentioned the matters of functions and procedure, I think I should add a word of caution, that the plaintiff quite correctly drew attention to some observations which he found in Halsbury's Laws of England (15) which come from the speech of Lord Sankey, L.C., himself, the judge who had heard *Copartnership Farms* v. *Harvey-Smith* (16), in a House of Lords case, *Shell Co. of Australia, Ltd.* v. *Federal Comr. of Taxation* (17), where, in a matter of this kind where the decisions of commissioners of taxation were being considered, Lord Sankey, L.C., said (18):

> " . . . it may be useful to enumerate some negative propositions on this subject: (i) A tribunal is not necessarily a court in this strict sense because it gives a final decision. (ii) Nor because it hears witnesses on oath. (iii) Nor because two or more contending parties appear before it between whom it has to decide. (iv) Nor because it gives decisions which affect the rights of subjects. (v) Nor because there is an appeal to a court. (vi) Nor because it is a body to which a matter is referred by another body."

That should be referred to, in order to show that I am not giving undue weight to the points as to functions and procedure, which, taken individually, may not be decisive but, taken cumulatively, I think have a very strong bearing on the case.

The next point, the autrefois acquit point, does not, I think, bear examination. It is quite obvious that in the ordinary case where a man is prosecuted for a crime he may well be sued in a civil court in respect of the same offence; and indeed the civil hearing is clearly a judicial hearing. That point is illustrated by such a case as *Hollington* v. *Hewthorn & Co., Ltd.* (19) where a man was prosecuted for dangerous driving and was convicted and then in a civil action arising out of the same facts an attempt was made to get in, as evidence of dangerous driving, his conviction: the Court of Appeal held that that could not be done. That is only an illustration of the point, which has no substance.

I have lastly to mention one further point which I listed as one of the points made by the plaintiff, namely, irregularity in the proceedings. The authorities to which I have already made reference, including *Dawkins* v. *Lord Rokeby* itself (20), indicate quite clearly that irregularity in the proceedings does not destroy the privilege. If further authority for that is required it is to be found in *Munster* v. *Lamb* (21), and in *Scott* v. *Stansfield* (22). I mention this point because the plaintiff drew our attention to the fact that, this being an inquiry as to the conduct of a solicitor in permitting his clerk to do something wrong, the solicitor's defence was that whatever had gone wrong had gone wrong without his knowing anything about it, and the only question before the committee, it being admitted that there had been an error, was: was the solicitor himself at fault? He was acquitted. In dealing with that issue, the matter to which evidence was directed was the information that the solicitor had. He thereupon told the committee what he himself had been told. There was nothing irregular in that; but even if there had been, on the authorities to which I have made reference it would not have made any difference. The same, of course, applies to the findings and order: if the findings and order, as a document, had contained anything which was not relevant or should not have been contained therein, it would not for that reason (by virtue of the same authorities) have caused the proceedings to lose their character, which was such that the members of the tribunal, as well as the witnesses and all those who appeared before the tribunal, were protected by absolute privilege.

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(15) See Vol. 9 (3rd Edn.) 343.

(16) [1918] 2 K.B. 405.

(17) [1930] All E.R. Rep. 671; [1931] A.C. 275.

(18) [1930] All E.R. Rep. at p. 680; [1931] A.C. at p. 297.

(19) [1943] 2 All E.R. 35; [1943] K.B. 587.

(20) (1875), L.R. 7 H.L. 744.

(21) (1883), 11 Q.B.D. 588.

(22) (1868), L.R. 3 Exch. 220.

I would dismiss the appeal.

PEARCE, L.J.: I agree with what my Lord has said. It is clear from the cases to which he has referred that absolute privilege is given to proceedings in courts of law in order that judges, advocates and witnesses may perform their respective parts free from a deterrent fear of actions for defamation. This privilege can create hardship for some persons in particular cases, but it is on balance an advantage to the community. For the same reason, the privilege is extended to tribunals which act judicially in a manner similar to courts of justice, but not to merely administrative tribunals. Difficulty may arise in deciding whether a particular tribunal has the characteristics of courts of law sufficiently to entitle it to share their privilege; but in my view this tribunal clearly has those characteristics.

This is a tribunal established and authorised by Act of Parliament. Its members are men of standing in the legal profession chosen and appointed by the Master of the Rolls. Its functions are purely judicial and in no wise administrative. It must adjudicate inter partes on the cases brought before it; and its findings and orders affect status. It has power by s. 47 of the Act to order costs and to administer fines which go to the Crown. Its procedure is governed by statutory instrument. An appeal by way of re-hearing lies to the Divisional Court under a statutory instrument which has effect as if it were a rule of court (s. 48 (1)); and its orders are enforceable in the same manner as a judgment or order of the High Court to the like effect (s. 49 (2)). It may administer the oath to the witnesses before it (s. 46), and their attendance can be enforced by a subpoena issued out of the Crown Office (s. 46 (6)). The purpose of the High Court in lending its power to enforce the attendance of witnesses is to help the judicial process of an inferior court. It would seem anomalous and unfair that the High Court should compel the attendance of a witness before a tribunal, which may administer the oath to him, without extending to that witness the protection of privilege for the evidence which may be elicited from him. Moreover, the jurisdiction exercised by this tribunal is similar to that which from olden days was vested in the Master of the Rolls and the judges, and is still vested in them concurrently with this tribunal (see s. 47 (1) and s. 50 (2)). In the light of all these considerations I find it impossible to say that it is not exercising its functions in a manner similar to those of a court of justice.

It has been argued that this tribunal does not have such privilege because by virtue of r. 21 it hears all applications in private and only pronounces its findings and orders in public. But that fact, though of great importance, is by no means conclusive, as is shown by *Barratt* v. *Kearns* (23) (to which my Lord has referred). In chambers procedure and certain other instances, from long-established custom or for more recent reasons, the High Court has hearings which are not in public. In view of the other attributes of this tribunal, the privacy of its hearings does not, in my opinion, differentiate it from courts of law to an extent sufficient to deprive it of the protection of absolute privilege.

I agree that the appeal should be dismissed.

UPJOHN, L.J.: I agree. The plaintiff, Mr. Addis, has argued his case with considerable skill. Much his strongest point, and one which I found impressive, was his submission that a tribunal which is compellable by its rules on all occasions to conduct its hearings in private so far departs from the idea fundamental to British justice, that in general hearings should be in public, that it does not act in a manner similar to that in which courts of justice act, with the result that the tribunal does not satisfy the test laid down by LORD ESHER, M.R.,

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(23) [1905] 1 K.B. 504.

A in the passage in *Royal Aquarium & Summer & Winter Garden Society* v. *Parkinson* (24) which has already been read by HODSON, L.J. (25). It is clear, however, from earlier authority, that the courts have not taken that view. Two examples may be mentioned. One was the commission that was appointed by the Bishop of Winchester, an ecclesiastical commission which was to deliberate in private. That is *Barratt* v. *Kearns* (26). The second is the leading case of *Dawkins* v. B *Lord Rokeby* (27). A study of the reports both in the House of Lords and in the proceedings in the Exchequer Chamber does not disclose whether the hearing of the court of inquiry which was set up was in public or in private; but it was a court appointed to consider certain matters and to report to the convening authority. The matter that it had to consider was the fitness for command of an officer in the Coldstream Guards who had been put in close arrest by his superior C officer for insubordination. I cannot think for one moment that such an investigation would have been conducted in public. Furthermore, it is quite clear that the report was a private document to be handed only to the convening authority after signature by each member. That case, therefore, I think affords strong support for the view that a tribunal which does not conduct its hearing in public does not necessarily fail to act in a manner similar to a court of justice.

D In general, no doubt, a tribunal having judicial functions to perform should deliberate in public. But there may be good reasons, either in particular cases or indeed in particular classes of cases, where justice demands that the hearing should be in private. The High Court sometimes hears cases in private, and examples have been given by both my Lords, which I need not repeat. In this case one can well understand the reason that may have actuated those responsible E for framing r. 21: justice to the solicitor against whom a complaint is made. One can well understand how serious it might be if a complaint had to be deliberated in public and then a period necessarily elapses while the tribunal has to put its findings into writing.

In my judgment, this tribunal is entitled to the benefit of the rule applicable to courts of law and may claim absolute privilege.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Charles Russell & Co.* (for the defendants).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

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(24) [1892] 1 Q.B. at p. 442. (25) Ante, p. 631, letter C. (26) [1905] 1 K.B. 504.
(27) (1873), L.R. 8 Q.B. 255; *affd.* H.L. (1875), L.R. 7 H.L. 744.

JEFFERY (INSPECTOR OF TAXES) *v.* ROLLS ROYCE, LTD. INLAND REVENUE COMMISSIONERS *v.* SAME.

[CHANCERY DIVISION (Pennycuick, J.), May 24, 25, 26, 27, 1960.]

Income Tax—Income—Payment of lump sums for imparting technical knowledge—Whether income or capital receipt—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *Sch.* D, *Case I.*

The taxpayers manufactured and sold motor cars and aircraft engines and for that purpose engaged in metallurgical research and the discovery and development of engineering techniques and secret processes, known as " know-how ", only a small part of which was capable of forming the subject-matter of patent rights. Between 1945 and 1953 they entered into agreements with governments and companies in China, France, the Argentine, the United States of America, Belgium, Australia and Sweden, in none of which countries were they shown to be carrying on a trade, under which they undertook to supply drawings and information necessary to enable the governments and companies to manufacture specified types of aircraft engines, in each case in return for a lump sum payment. They were assessed to income tax, profits tax, excess profits tax and excess profits levy for the relevant years on the basis that the sums received constituted part of the income of their trade of the manufacture and sale of motor cars and aircraft engines. There was no evidence that the taxpayers carried on any trade other than that of the manufacture and sale of aircraft engines and motor cars, such as that of a dealer in " know-how " or a trade of teaching others how to manufacture such engines.

Held: the sums were not assessable to tax, since they were not income of the taxpayers' trade in return for services rendered, or of a trade of exploiting the technical knowledge by teaching it to others, but were capital payments, each being the price of part of a capital asset comprising the value of the technical knowledge in the particular country lost by its communication notwithstanding the absence of previous exploitation there.

Moriarty v. *Evans Medical Supplies, Ltd.* ([1957] 3 All E.R. 718) followed.

Appeals dismissed.

[As to what constitutes trade receipts and income as opposed to capital for income tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 150, para. 263; and for cases on the subject, see 28 DIGEST (Repl.) 20-38, *78-173*, 50-58, *191-225*.]

Cases referred to:

British Dyestuffs Corpn. (*Blackley*), *Ltd.* v. *Inland Revenue Comrs.*, (1923), 129 L.T. 538; *affd.* (1924), 12 Tax Cas. 586; 28 Digest (Repl.) 25, *105*.

Butterworth v. *Page*, [1935] All E.R. Rep. 943; 153 L.T. 34; sub nom. *Handley Page* v. *Butterworth*, 19 Tax Cas. 328; 28 Digest (Repl.) 26, *111*.

Haig's (*Earl*) *Trustees* v. *Inland Revenue Comrs.*, (1939), 22 Tax Cas. 725; 1939 S.C. 676; 28 Digest (Repl.) 126, *373*.

Moriarty (*Inspector of Taxes*) v. *Evans Medical Supplies, Ltd. Evans Medical Supplies, Ltd.* v. *Moriarty* (*Inspector of Taxes*), [1957] 3 All E.R. 718; 37 Tax Cas. 540; [1958] 1 W.L.R. 66; *revsg.* sub nom. *Evans Medical Supplies, Ltd.* v. *Moriarty*, [1957] 1 All E.R. 336; *revsg.* [1956] 2 All E.R. 706; 28 Digest (Repl.) 26, *112*.

Rustproof Metal Window Co., Ltd. v. *Inland Revenue Comrs.*, [1947] 2 All E.R. 454; [1947] L.J.R. 1479; 177 L.T. 657; 29 Tax Cas. 243; 28 Digest (Repl.) 438, *1916*.

Cases Stated.

The taxpayers appealed to the Special Commissioners of Income Tax against assessments to income tax made on them under Sch. D to the Income Tax Act, 1952, in respect of their trade of manufacturers of motor cars and aero engines in the following sums: 1948-49 £1,300,000; 1949-50, £1,200,000; 1950-51, £1,800,000; 1951-52, £1,500,000; 1952-53, £2,300,000; 1953-54, £2,500,000; 1954-55, £4,800,000. The grounds of the appeal were that in computing the taxpayers' profits or gains for the relevant periods sums paid to and received by the taxpayers by virtue of certain licensing agreements had been included contrary to law, such lump sum payments being of a capital nature. The taxpayers also appealed on the same grounds against assessments to excess profits tax (1945 £66,667), the profits tax (1947-53, various sums), and excess profits levy (1952 £240,000 and 1953 £600,000). The commissioners allowed each of the four appeals. The Crown appealed by way of Case Stated to the High Court.

Roy Borneman, Q.C., and *A. S. Orr* for the Crown.

Heyworth Talbot, Q.C., and *C. N. Beattie* for the taxpayers.

Cur. adv. vult.

May 27. **PENNYCUICK, J.**, read the following judgment: The first case is an appeal by the Crown against a decision of the Special Commissioners on appeals by Rolls-Royce, Ltd., the taxpayers, against assessments under Case I of Sch. D for the years 1948-49 to 1954-55 inclusive. The ground of appeal was that, in computing the profits of the taxpayers for those years, there were included certain payments under a number of agreements with foreign governments or companies which the taxpayers contended were of a capital nature. The Special Commissioners allowed the appeals and adjusted the assessments accordingly.

The facts as found by the Special Commissioners may be summarised as follows. The taxpayer company was incorporated in 1906 and has ever since carried on the trade of manufacturing and selling motor cars. During the first world war the taxpayers began to manufacture aircraft engines, and the manufacture and sale of aircraft engines has become the larger part of the taxpayers' trade. For the purposes of their trade the taxpayers have been engaged in metallurgical research and in the discovery and development of engineering techniques and secret processes, and in the result have acquired a fund of technical knowledge of which only a comparatively small part is capable of forming the subject-matter of patent rights. This technical knowledge is commonly called " know-how ", and it will be observed that the commissioners use the expression " know-how " as covering secret processes. With one or two exceptions due to the exigencies of the period immediately before 1939, and to the second world war itself, the taxpayers did not, until after 1945, turn their " know-how " to account, except in their own manufacturing trade. During the period from 1946 to 1953, however, being the period to which the assessments under appeal relate, the taxpayers entered into a number of agreements with foreign governments and companies, the basic provision of which was that in consideration of a lump sum payment the taxpayers undertook to supply the other party with drawings and information necessary to enable that party to manufacture specified types of aircraft engines. The taxpayers did not initiate proposals for these agreements, which generally appear to have arisen from the policy of foreign governments that aircraft engines should be manufactured in their own territories.

Agreements of this character were made between the taxpayers and governments or companies in China, France, the Argentine, the United States of America, Belgium, Australia and Sweden. All of those agreements, in addition to one or two others not directly material, are summarised in the Case Stated. Each of the agreements contained a number of other provisions beyond the basic provision indicated above and they are by no means identical in their terms. In one agreement, e.g., that with Australia, the taxpayers received, in addition to the lump sum an annual payment described as a " technical liaison fee ". Neither party, however, has contended that for the present purposes any distinction falls to be made between payments in one or other of the agreements, and it would not therefore be useful for me to refer to all the agreements in detail. I will confine myself to reading certain of the provisions of the first agreement set out in the Case Stated, viz., that dated Feb. 13, 1946, with the Republic of China. That agreement, which begins on p. 8 of the Case Stated, contains a recital in the following terms:

> " Whereas [the taxpayers] are designers of aircraft engines (hereinafter defined in the schedule attached) and have agreed to license the commission to manufacture the same and to supply the drawings and information necessary therefor to the extent hereinafter stated upon the terms and conditions hereinafter provided."

And it provided, inter alia, as follows:—" Selection of type "—and then there is a provision under which the commission is to

> " select and designate the desired type of jet engine and notify [the taxpayers] of such selection . . . (2) [The taxpayers] will supply the commission with the complete drawings and manufacturing and engineering data and information adequate and reasonably necessary to enable the commission to manufacture said engine referred to in cl. 1 above. These engines will be the type numbered as set out in the schedule hereto which are the latest mark of the type referred to, of which the British government has allowed particulars to be given at this date. Improvements of the engine defined in cl. 1 will be supplied to the commission as they are released by the British government and shall be included and governed by this numbered clause and cl. 10."

Then follow provisions as to what the manufacturing data and information shall include. Then cl. 3:

> " The commission shall pay [the taxpayers] the following consideration for the rights granted hereunder:—A capital sum of £50,000 sterling to be paid as follows: (i) On the signing of the contract, £20,000 sterling. (ii) On June 30, 1946, £20,000 sterling. (iii) On the complete delivery of drawings, data, and information referred to in cl. 2, £10,000 sterling."

There follow several provisions, all of which are important in the construction of the agreement as a whole, but which it is not necessary to read in full in this judgment. Clause 5 provides for the form of drawing; cl. 6 for royalties; cl. 7 for the minimum royalty; and cl. 10 is in these terms:

> " [The taxpayers] will fully advise the commission from time to time as to improvements and modifications in the manufacture and design of the engine referred to in cl. 1, the subject of this licence as and when the British government permit [the taxpayers] so to do, provided always that this obligation shall be suspended if the royalties in any year are in arrears, but shall be revived when the royalty payments have been made up to the annual minimums referred to in the contract."

Then cl. 11 provides, in effect, that engines are only to be used in Chinese-owned or operated aircraft.

> " (12) The commission shall not use in engines other than engines referred to in cl. 1 any parts manufactured from the drawings to be supplied hereunder. (13) All drawings and information supplied hereunder shall be kept secret by the commission who shall not disclose the same or any part thereof to any other person or corporation, but this clause shall not prevent such disclosure as is necessary to enable the engines to be manufactured by the commission, or to enable them to be installed or repaired."

Clause 14 provides in some detail that the taxpayers

> " will receive into their works or plants personnel appointed by the

> commission with a view to instructing them in the construction of the engines . . . (20) All obligations of [the taxpayers] hereunder shall cease at the expiration of five years from the date hereof; provided that at the end of the first five years, the commission has the right to extend this contract for another period of five years if desired. During these two periods of five years each if the commission exercise the option to acquire additional licence for any newer type of Rolls-Royce engine the obligations of both parties will then be defined; but any royalty paid on the newer engine manufactured by the commission shall be counted together with the royalty on the type of engine referred to in cl. 1 being manufactured . . . (21) As from the date when the obligations of the commission cease hereunder as aforesaid, the commission shall be entitled to continue to construct the said type of engine without Rolls-Royce being paid royalty . . .",

and there follow certain provisions as to patents. Clause 22 is concerned with patents.

> " 23. If within five years from the signature of this contract [the taxpayers] put in series production a new type of gas turbine aircraft engine and the British government has authorised the manufacture of the engine in the conceded territory [the taxpayers] will not license anyone to manufacture the engine in the conceded territory without first giving the commission an option to acquire a licence to do so . . ."

The other agreements for the most part contain the same basic provisions, but the terms of them are widely different in certain respects. The question which has arisen on this appeal is whether the lump sums payable under cl. 3 of the Chinese agreement and the similar lump sums payable under the other agreements represent trade receipts of the taxpayers and as such must be brought into account in the computation of their profits.

The contentions of the parties before the commissioners are set out in the Case Stated as follows:

> " It was contended on behalf of the [taxpayers]: (i) that the trade carried on by the [taxpayers] was correctly described in the income tax assessment under appeal as that of ' manufacturers of motor cars and aero engines ', and that the sale of ' know-how ' formed no part of the [taxpayers'] trade; (ii) that the metallurgical engineering research upon which the [taxpayers] had throughout [their] life been engaged was at all times directed exclusively to the more efficient production of motor cars and aero engines and not at all to the earning of profits by selling or licensing the results of that research; (iii) that the lump sums paid to the [taxpayers] under the provisions of the licence agreements hereinbefore referred to related to the sale by the [taxpayers] to the licensees of a capital asset referred to throughout the case as ' know-how ', and accordingly such sums fell to be excluded from the computation of the profits and gains of the [taxpayers] for the periods relative to the assessments under appeal; (iv) that a multiplicity of sales of portions of a fixed capital asset could not of itself convert that asset or any part of it into a revenue or trading asset . . .
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> " It was contended on behalf of the [Crown] (i) that the whole of the sums received by the [taxpayers] under the licence agreements hereinbefore referred to were normal receipts of a revenue nature of the trade or business carried on by the [taxpayers] and accordingly fell to be included in computing the profits or gains of the [taxpayers] for the periods relative to the assessments under appeal . . ."

The commissioners gave their decision in writing on Oct. 24, 1956, in the following terms. After setting out the particulars of the assessments, they say:

> "The grounds of the appeal are that in computing the profits or gains of the [taxpayers] for the periods relative to the assessments under appeal, lump sums paid to and received by the [taxpayers] by virtue of certain licensing agreements (conveniently listed in exhibit T) have been included contrary to law, such lump sum payments being of a capital nature . . . 3. The case for the [Crown] is that at all material times [the taxpayers] carried on the trade of 'manufacturers of motor cars and aero engines', being properly so described in the notices of assessments relative to the appeal. In the course of [their] business [they] had acquired a vast store of knowledge and secret information relating to [their] secret processes of manufacture, referred to throughout the case as 'know-how', which represented a fixed capital asset of the [taxpayers'] trade, but it had never been any part of the policy of the [taxpayers] to make inventions and discover secret processes with a view to the earning of profits by realising [their] rights in those inventions and processes. On Feb. 13, 1946, the [taxpayers] entered into an agreement with the Government of China (hereinafter called 'the China agreement') whereby, inter alia, the latter was licensed to manufacture for itself certain of the [taxpayers'] aero engines. As a separate part of this agreement, the [taxpayers] undertook, inter alia, to make available to the Government of China [their] 'know-how' relating to the particular aero engines covered by the agreement, in consequence of which it was confidently expected that the time which must necessarily elapse before production by the Government of China became effective would be considerably reduced and the resulting product of higher quality than might otherwise have been the case. Provision was also made for the transfer of patents if necessary, though in fact the [taxpayers] had no Chinese patents. The consideration for the agreement took the form of a lump sum and royalties on the engines that were made abroad. The [taxpayers] concede that sums received by way of royalties under the agreement are taxable income in [their] hands, so also are any sums received for the sale of patent rights properly so-called by reason of the express provisions of the Finance Act, 1945, though it is generally agreed by both parties that only a very small value could be placed upon these patents. It was, however, contended for the [taxpayers] that the lump sum paid and received under the China agreement, apart from a small amount attributable as aforesaid to patent rights, represented a capital receipt in respect of 'know-how' which did not fall to be included in the profits or gains of the [taxpayers] for the periods relative to the assessments under appeal. In support of this contention, reliance was largely placed upon two cases cited to us, viz.:—*Butterworth* v. *Page* (1) and *Evans Medical Supplies, Ltd.* v. *Moriarty* (2)."

A B C D E F G

At that stage the *Evans Medical Supplies* case (2) had been heard before UPJOHN, J., but had not reached the Court of Appeal. H

> "It is further contended for the [taxpayers] that if the subject-matter with which we are concerned, i.e., 'know-how', is initially a fixed capital asset, then mere multiplicity of transactions in it does not convert it into a revenue or trading asset in the absence of other facts which suggest that there has been a conversion or that some new trade has been set up. It is said that there has been no such change of circumstances affecting the [taxpayers'] 'know-how' and therefore with regard to the remainder of the agreements entered into by the [taxpayers] for, generally speaking, licensing the manufacture of aero engines and the provision of 'know-how' in connexion therewith, the lump sums, by whatever name they are called, paid to and received by the [taxpayers] thereunder were also receipts of a capital nature.

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(1) [1935] All E.R. Rep. 943; 19 Tax Cas. 328.

(2) [1956] 2 All E.R. 706.

"5. The case for the Crown can be summarised as follows:—

"(1) It is not contended that a new trade was set up by the [taxpayers] between the years 1946 and 1954 which consisted of dealing in patents and secret processes, but it is said that it had become a part of the normal trade or business of the [taxpayers] in order fully to exploit the commercial possibilities of aero engines of [their] design in circumstances where [they] would otherwise be unable to sell them, to enter into agreements for the production of [their] engines by other persons under licence on payment of a lump sum or technical liaison fee and/or a royalty per engine manufactured.

"(2) That in order to permit the manufacture of engines so licensed to commence at the earliest possible moment and to earn the maximum amount in royalties it was the normal practice of the [taxpayers] to furnish the licensee on payment with the technical knowledge and information required to manufacture such engines, i.e. the 'know-how'.

"(3) It was also part of the normal trade or business of the [taxpayers] in association with the Ministry of Supply to exploit commercially and to the best advantage technical knowledge and manufacturing information acquired by the [taxpayers] in the process of research into the design and production of aero engines incorporating that technical knowledge and information for reward.

"(4) That on the facts of the case, it was also part of the normal trade or business of the [taxpayers], particularly when licensing the manufacture of one of the [taxpayers'] engines, to agree with the licensee to a mutual exchange of information obtained in the course of manufacturing the licensed engine; thus, the lump sums received by the [taxpayers] under the various agreements which are the subject-matter of this appeal were received by the [taxpayers] in the normal course of [their] trade or business and not merely for parting with a capital asset.

"(5) The agreements provide for the licensee to make engines and for the transfer to the licensee of technical knowledge and information to enable him to do so, but they also provide for the licensee to receive certain other benefits and advantages, e.g., some of his personnel to be trained by the [taxpayers], the [taxpayers'] engineers to assist in setting up the production in the country of the licensee, the [taxpayers] to act as agent in the purchase of raw materials and equipment for the job, the grant of an option for future engines: any part of the lump sums attributable to such services cannot be transfers of capital.

"(6) Further, in so far as the lump sum payments were received by the [taxpayers] in respect of the transfer of technical information or of manufacturing knowledge they did not arise from sales of property, but from the provision of a service.

"(7) When the whole of the transactions are looked at as a whole, each agreement is seen to be merely a trading convention between the [taxpayers] and the licensee, and the payments, whatever form they take, are profits arising from the trade or business between the [taxpayers] and the licensee which was to be regulated by that convention.

"6. Upon consideration of the evidence adduced and the arguments addressed to us on behalf of the parties we are of the opinion that the case for the [taxpayers] succeeds and the appeal must be allowed."

It will be observed that the commissioners' decision consists of a summary of the opposing contentions and that their own conclusion is contained in a single sentence. It falls to me to decide whether this conclusion is right. I think that it is clear that, while due weight should be given to the view of the commissioners, this is eminently the type of finding which is open to review by the court: see *Rustproof Metal Window Co., Ltd.* v. *Inland Revenue Comrs.* (3), per LORD GREENE, M.R., where he says (4):

> " It was argued by counsel on behalf of the Crown that the decision of the Special Commissioners on a question of this kind ought not to be disturbed unless it could be said that they had misdirected themselves in law. This, I think, is to put the matter too high. Great weight should, no doubt, be given to their view, but the courts have on many occasions acted on the principle that the decision of commissioners on the question whether a receipt is of a capital or an income nature is open to review and I propose so to treat it in this case. It is a question which is to be answered on a consideration of all the relevant facts."

The character of technical knowledge as an asset of a trader has been considered by the House of Lords in the recent case of *Evans Medical Supplies, Ltd.* v. *Moriarty* (5). I will read the headnote in that case (6):

> " Income Tax, Sch. D—Disclosure of secret processes and provision of other information in consideration of lump sum payment—Whether sum received capital or income. The appellant company, which manufactured pharmaceutical products and had a world-wide trade, carried on business in Burma through an agency. In 1953 the Burmese government wished itself to establish an industry there for the production of pharmaceutical and other products, and the company secured a contract, dated Oct. 20, 1953, from the Burmese government to assist in setting up this industry. The company undertook to disclose secret processes to the Burmese government and to provide other information in consideration of the payment of a ' capital sum of £100,000 '. The company also undertook to provide certain services and to manage the proposed factory in return for an annual fee, which was admitted to be subject to tax. No similar agreement had been entered into by the company with any other foreign government or any other party. The profits of the company's trade as wholesale druggists were assessed to income tax under Case I of Sch. D for the year 1954-55 on the footing that the sum of £100,000 should be included as a trading receipt. On appeal to the Special Commissioners the company contended that the sum of £100,000 was a capital sum received either for the sale of fixed capital or for the granting to the Burmese government of an exclusive licence, and that in any event it did not arise in the course of a trade. The Crown contended, inter alia, that on a true construction of the agreement the sum in question was, like the annual fee admitted to be subject to tax, received by the company for providing services in the course of a trade. The Special Commissioners held that the agreement should be read as a whole as one for the provision of services, and that the sum of £100,000 had been properly included in computing the company's profits for income tax purposes. The Chancery Division held that the sum in question was a capital payment. The Court of Appeal held unanimously (1) that there was evidence to support the Special Commissioners' finding that the sum of £100,000 arose to the company as a receipt of its trade; but (2) that the sum in question, to the extent that it was attributable to the disclosure of secret processes, was a capital receipt. The court ordered the case to be remitted to the commissioners to determine the part so attributable. The House of Lords, dismissing the Crown's appeal and allowing the company's cross-appeal, restored the order of the Chancery Division. LORDS SIMONDS, TUCKER and DENNING held that, the Case having been stated by the commissioners and the appeal argued throughout on the footing that the sum of £100,000

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(3) [1947] 2 All E.R. 454; 29 Tax Cas. 243.

(4) [1947] 2 All E.R. at p. 456; 29 Tax Cas. at p. 266.

(5) [1957] 3 All E.R. 718; 37 Tax Cas. 540.

(6) 37 Tax Cas. 540.

> was indivisible, it was not open to the Court of Appeal to direct apportionment between consideration for the disclosure of secret processes and consideration for other matters. Lords Simonds and Tucker were of opinion that the company had parted with a capital asset for a purchase price. Lord Denning considered that there was nothing wrong in the commissioners' finding that the amount in question was a payment for services, but that it was not received in the course of the company's existing trade of wholesale druggists, etc., and therefore could not be brought into the assessment of the company's existing trade for 1954-55. Lord Morton of Henryton, dissenting as to the cross-appeal, agreed with the judgments in the Court of Appeal. Lord Keith of Avonholm, dissenting, was of opinion that there was ample evidence that the company was trading in ' know-how ' and that it was no more than a legitimate extension of their existing trade."

It will be seen that in that case the consideration given by the company for the lump sum payment included alike the disclosure of secret processes and the provision of other information. Certainly three members of the House of Lords, Lord Simonds, Lord Morton of Henryton and Lord Tucker, in common with the Court of Appeal, and Upjohn, J., in the Chancery Division, held that secret processes should be regarded as capital assets of the appellant company. In the present case, too, the technical knowledge possessed by the taxpayers, and described by the Special Commissioners as " know-how ", comprised secret processes; and it is evident from the nature of the trade that such processes must be of great importance in it. There can thus be no doubt that the " know-how " possessed by the taxpayers represented at any rate in great part a capital asset.

Counsel for the Crown has pointed to certain apparent differences between the views expressed by the respective members of the House of Lords in the *Evans Medical* case (7) as to the precise ambit of the capital asset there in question, i.e., whether it should be regarded as confined to secret processes or comprising also knowledge outside of those processes. It might be necessary to explore this point further in the case where the secret processes were relatively unimportant or where there was an apportioning of consideration. But I do not think that it is of practical importance here.

Once it is accepted that a trader possesses a capital asset in the nature of technical knowledge, or " know-how ", it must be open to him to exploit it either by using it himself in the process of his own trade or by communicating it to others, and in the latter case the taxable character of the consideration received by him must depend on the particular circumstances. It may be possible for the trader to a limited extent to retain the asset intact and to exploit it by rendering services to others in the way of imparting information or rendering assistance to them. This was the view which Lord Keith of Avonholm took on the facts in the *Evans Medical* case (7). But, again, as pointed out in that case, it is in the nature of this particular asset to lose its value on communication, and in a normal case communication of the asset is likely to represent the disposition of part of the asset itself. I refer on this point to two statements in the speech of Viscount Simonds. He says (8):

> " It was, no doubt, the corollary of their view [i.e., the commissioners' view] that the agreement was one for the provision of services, that the commissioners should say that, in any event, the company had not ' sold or assigned any property ' to the government. Here, again, they fell into an error which vitiates their determination. For it is manifest that a secret process, whether in composition or methods of storing and packing, is something which can be disposed of for value, and that, by imparting the

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(7) [1957] 3 All E.R. 718; 37 Tax Cas. 540.
(8) [1957] 3 All E.R. at p. 725; 37 Tax Cas. at p. 578.

> secret to another, its owner does something which could not fairly be described as 'rendering a service'. I would not think that authority is needed for so obvious a proposition, but it may be found in *Butterworth* v. *Page* (9)."

He says further on (10):

> " A contention was put forward on behalf of the Crown that, even if the divulging of a secret process to the whole world could be regarded as parting with a capital asset, the same could not be said of divulging it to one other. This does not make sense. The whole value of the secret might conceivably not be lost at once to the original owner, but that its value must be greatly diminished is obvious; in the present case, it is doubtful whether, within a measurable time, it will have any value at all, at any rate so far as the Burmese market is concerned. I adopt with respect the apt words of LORD FLEMING in *Trustees of Earl Haig* v. *Inland Revenue Comrs.* (11): ' . . . the transaction here in question was not merely a use of the subject salva rei substantia but necessarily involved the realisation of a considerable part of its capital value.' "

In my judgment this was the nature of the transactions effected by the various agreements in the present case. In each case the taxpayers, having a capital asset consisting of technical knowledge, or " know-how ", communicated that asset to another party, with the natural consequence that at least as regards the territory of that party the asset must lose the whole or the greater part of its value. This seems to me to represent a disposition of part of the capital asset itself. It follows that the lump sum consideration paid in each case, being the price of a capital asset, represents the receipt of capital in the hands of the taxpayers and ought not to be brought into account in the computation of their revenue.

Counsel for the Crown contended that, even if the knowledge is to be treated as a capital asset, its communication should be treated, on the facts of this case, as in the nature of services rendered by the taxpayers. For the reasons given above, I do not think this is a proper view of this transaction. Counsel pointed out that in this case, unlike the *Evans Medical* case (12), there is no evidence that at the date of the agreements the taxpayers were trading in the territories affected. But I do not think the transaction was any less a disposition of part of a capital asset by reason of the fact that the taxpayers had not previously exploited this asset by way of manufacture in the particular territories.

Counsel for the Crown further pointed out that in the *Evans Medical* case (12) there was a single transaction, whereas in this case there were a number of transactions. This circumstance again seems to me to be irrelevant. A trader, having capital assets, may dispose of those assets by a single transaction or by a number of transactions and in either case the price received would be a receipt of capital.

The principal contention of counsel for the Crown, however, was that the trade of the taxpayers during the material years was, in his own words, " that of exploiting the commercial possibilities of the aero engine and its design ", and that the taxpayers carried on this trade in two ways: viz., (i) by the manufacture and sale of engines, and (ii) by teaching others how to manufacture engines. I find nothing in the Case Stated which justifies the view that the taxpayers have ever carried on any trade other than that of manufacturing and selling motor cars and aircraft engines. The trade imputed to the taxpayers by this contention appears to me to be something of a travesty of the facts. But, in any event, I do not see how this description of the trade advances the argument, since it does no more than raise—in a slightly different form—the question

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(9) [1935] All E.R. Rep. 943; 19 Tax Cas. 328.

(10) [1957] 3 All E.R. at p. 726; 37 Tax Cas. at p. 579.

(11) 22 Tax Cas. 725 at p. 735.

(12) [1957] 3 All E.R. 718; 37 Tax Cas. 540.

A whether in communicating information the taxpayers are parting with a capital asset or rendering a service. Perhaps conscious of this difficulty, counsel said that the taxpayers should include "know-how" in their accounts as their circulating capital, but this seems to me to postulate a different trade altogether, viz., that of a dealer in "know-how"; and indeed counsel contended as an alternative that the taxpayers carried on such a trade. No assessment on the B footing of this trade has been made on the taxpayers, and counsel expressly disclaimed the view that the taxpayers carried on more than one trade.

Counsel for the Crown during his argument placed great reliance on a sentence of Bankes, L.J., in *British Dyestuffs Corpn.* (*Blackley*), *Ltd.* v. *Inland Revenue Comrs.* (13) where he says this:

> C "The real question is, looking at this matter, is the transaction in substance a parting by the company with part of its property for a purchase price, or is it a method of trading by which it acquires this particular sum of money as part of the profits and gains of that trade? For that purpose one has to look at the nature and substance of the transaction and the agreement as a whole."

D For the reasons given above, I think that this should be answered in accordance with the first alternative.

The agreements here differ in an important respect from that in the *Evans Medical* case (14) in that there the agreement was divided into parts and the lump sum in question was allocated exclusively to the consideration specified in Part I of the agreement. Here there is no such division or allocation. Neither E party at any stage in the proceedings has, however, contended that on this or any other ground the lump sum should be apportioned so as to represent in part a capital and in part a revenue receipt. In view of the decision of the House of Lords as to apportionment in the *Evans Medical* case (14), it is clear that I should not be entitled to make any such apportionment even if I were otherwise minded to do so.

F For the reasons which I have endeavoured to express, I have come to the conclusion that the decision of the commissioners was right and I accordingly dismiss the appeal. The parties agree that the other three appeals raise identical points on assessments to excess profits tax, profits tax and excess profits levy respectively as the points raised in the first case, and no separate argument has been addressed to me on them. I accordingly dismiss these appeals also.

Appeals dismissed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Claremont, Haynes & Co.* (for the taxpayers).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

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(13) 12 Tax Cas. 586 at p. 596.

(14) [1957] 3 All E.R. 718; 37 Tax Cas. 540.

Re SCREMBY CORN RENTS. A

[Queen's Bench Division (Lord Parker, C.J., Byrne and Donovan, JJ.), May 27, 1960.]

Corn Rents—Assessment—Assessment based on price of wheat in 1799—*Periodical review of rents according to average price of wheat—" Price "—Whether price included payments under the Cereals (Deficiency Payments)* B *Order*, 1955 (*S.I.* 1955 *No.* 962), *reg.* 4 (1).

By an Act of 1801*, commissioners were required, for the purpose of fixing corn rents, to assess " the average price of good marketable wheat in the County of Lincoln during the term of twenty-one years, ending at Michaelmas . . . 1799 " and the corn rents payable were to be fixed by an award accordingly. The average price so determined was $5\frac{7}{10}$s. per Winchester C bushel. By the same Act, the rector, or his successors, was or were empowered to apply to quarter sessions to have commissioners appointed to assess " the average price of a Winchester bushel of good marketable wheat within the said County of Lincoln, for the twenty-one years then last past " and to report to the court of quarter sessions; and if the average price were more or less than the average price set forth in the original award by D more than a certain amount, the corn rents were to be increased or diminished as declared by the court. In 1959 the successors of the rector applied to quarter sessions in accordance with the Act and the commissioners appointed reported to the court that the average price of wheat during the twenty-one years ended on Mar. 5, 1959, was 10s. 1d. exclusive of the sum (namely, 11d. per Winchester bushel) which the grower received under the Cereals E Deficiency Payments Scheme (constituted by the Cereals (Deficiency Payments) Order, 1955†). Quarter sessions ordered that the corn rents be increased in the proportion that 10s. 1d. bore to $5\frac{7}{10}$s.

Held: the word " price " in the Act of 1801 meant the price obtainable by the grower from the purchaser and not the value or worth to the grower; it did not include payments received by the grower under the deficiency F payments scheme, and, therefore, the decision of quarter sessions was correct.

Appeal dismissed.

[As to corn rents, see 13 Halsbury's Laws (3rd Edn.) 459, 460, paras. 999-1001.]

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Case referred to:

Walsall Overseers v. *London & North Western Ry. Co.*, (1878), 4 App. Cas. 30; 48 L.J.M.C. 65; 39 L.T. 453; 43 J.P. 108; 16 Digest 186, *920*.

Case Stated.

This was a Case Stated by the County of Lincoln, Parts of Lindsey, Quarter Sessions for the opinion of the High Court regarding their decision on Sept. 15, H 1959, that the Scremby corn rents payable by virtue of an award made pursuant to an Act of Parliament of 1801 be increased in the proportion that 10s. 1d. bore to $5\frac{7}{10}$s. The question for the court was whether the decision was correct.

E. F. Jowitt for the appellants, the Church Commissioners.

There were no respondents to the appeal.

I

LORD PARKER, C.J.: This is an appeal by way of Case Stated by the General Quarter Sessions of the Peace for the County of Lincoln, Parts of Lindsey, who determined the corn rents to be paid for the future in the parish of Scremby. The appeal is by the Church Commissioners and as, by the very nature of the

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* A local Act entitled " An Act for dividing, allotting, and inclosing the open common fields, meadows, pastures, and other commonable lands and waste grounds, within the Parish of Scremby, in the County of Lincoln."

† The relevant regulations are printed at p. 653, letters F to I, post.

A proceedings, as I will show, there are no respondents, for myself I have had considerable doubt whether quarter sessions under the Act of 1801, to which I must refer, had power to state what is in effect a consultative Case for the opinion of the court. I say that because on one view of the matter quarter sessions were acting in an administrative capacity. They did not have to hear anybody and the matter was largely a matter of discretion. Although under the old B common law, which was dealt with by EARL CAIRNS, L.C., in his speech in the House of Lords in *Walsall Overseers* v. *London & North Western Ry. Co.* (1), quarter sessions always had the power to state a Case, I wondered whether acting in this special jurisdiction they were really acting judicially at all. However, I have come to the conclusion on the whole that they were, that Parliament by giving the duty to the court of quarter sessions showed clearly that they were C giving the decision not to an administrative tribunal, but to a court, and a court which then, as was well known, had powers of consulting the judges. Accordingly, I assume for the purposes of this judgment that quarter sessions had power to state the Case which they have done.

The matter concerns corn rents payable under an Act of 1801 passed in the 41st year of the reign of King George III, and entitled:

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> "An Act for dividing, allotting, and inclosing the open common fields, meadows, pastures, and other commonable lands and waste grounds, within the Parish of Scremby, in the County of Lincoln."

Under that old Act commissioners were appointed for a number of different duties as described in the title and, amongst other things that were provided E was the abolition of tithes from the lands in the parish. It was enacted:

> "That the said commissioners shall, and they are hereby required . . . to value all the residue of the said lands and grounds hereby directed to be divided and enclosed, and also all the old inclosed lands and other premises aforesaid within the said parish, which at the time of passing this Act are liable to the payment of tithes . . ."

F That was the first step the commissioners were to take. Then they were

> ". . . from the London Gazette, or by such other ways and means as they shall think proper, to inquire and ascertain what has been the average price of good marketable wheat in the County of Lincoln during the term of twenty-one years, ending at Michaelmas which was in the year of our Lord 1799 . . ."

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That was the second thing they had to do. Thirdly, they

> ". . . shall in and by their award or instrument hereinafter directed to be made, ascertain, and distinctly set forth what quantity of such wheat shall in their judgment (according to such average price as aforesaid) be equal in value to one-fifth part of the arable land, one-seventh part of the meadow H land, and one-ninth part of the pasture land within the said parish of Scremby . . ."

Then, when all that had been done as provided by the Act,

> "there shall be payable to the said rector and his successors, for the time being, out of the lands and estates of the several proprietors in the said I parish of Scremby, such sum and sums of money as shall be equal to the value of the quantity of wheat so to be ascertained by the said commissioners, and apportioned upon the respective estates of each proprietor, according to the average price aforesaid."

By their award the commissioners ascertained that the average price of good marketable wheat during the twenty-one years ending Michaelmas 1799 was 5-7/10ths shillings per Winchester bushel. The Act then provided:

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(1) (1878), 4 App. Cas. 30 at p. 39.

> "... it shall be lawful for the said rector or his successors for the time being, or the owner or proprietor, or owners or proprietors of the lands and hereditaments, out of which the said rents are to issue, or the greatest part in value, by writing under their respective hands, to apply at the first Quarter Sessions of the Peace to be held in and for the Parts of Lindsey in the said County of Lincoln ... after the expiration of twenty-one years after the execution of the said award or at some adjournment thereof ..."

There had to be notice of the intended application in the London Gazette, and the application was to take the form of having

> "three persons named or appointed by the justices then and there assembled, to be arbitrators or referees for inquiring into and ascertaining by, or from or by means of the London Gazette, or by such other ways or means as they shall think equitable or proper, the average price of a Winchester bushel of good marketable wheat within the said County of Lincoln, for the twenty-one years then last past, which said three arbitrators or referees, or the major part of them, shall, by their report to be made and delivered to the court of quarter sessions to be held in and for the said Parts of Lindsey ... set forth such average price; and in case it shall by such report appear that such average price of a bushel of such wheat is more or less than the average price thereof set forth in the said award by the value of three pence, the said respective yearly tithe rents shall be increased or diminished, as shall be declared by the order of the said court ..."

The Church Commissioners are the successors of the rector referred to in the Act. On Mar. 5, 1959, they duly applied to quarter sessions, after the necessary advertisement, to have arbitrators appointed, and three gentlemen were so appointed. In due course they made a report to quarter sessions, and the report, so far as it is material, is in these terms:

> "We find: 1. The average price of a Winchester bushel of good marketable wheat in the County of Lincoln during the twenty-one years ended on Mar. 5, 1959 (excluding the payments referred to in the next succeeding paragraph) to be the sum of 10s. 1d. 2. That in addition to the sum that the grower receives from the purchaser the grower receives deficiency payments under the Cereals Deficiency Payments Scheme, and that in the twenty-one years ended Mar. 5, 1959, these deficiency payments averaged 11d. per Winchester bushel."

They conclude:

> "We award and determine that the average price of a Winchester bushel of good marketable wheat in the County of Lincoln for the twenty-one years now last past the date of our appointment, namely, Thursday, Mar. 5, 1959, to be the sum of 11s."

11s. being the 10s. 1d. which they had found to be the average price between buyer and seller and the 11d. the average of the deficiency payments.

In due course quarter sessions considered that report, both on July 2, 1959, and on Sept. 15, 1959. On the latter date they decided and declared

> "that the Scremby corn rents be increased in the proportion that 10s. 1d. bears to $5\frac{7}{10}$ shillings. The question for the opinion of the Queen's Bench Division of Her Majesty's High Court of Justice is whether the said order and declaration of sessions is right."

In other words, quarter sessions took the view that the price which fell to be considered as the average price was the price between buyer and seller, which the arbitrators had found to be 10s. 1d., and that it did not include the average deficiency payment of 11d. The Case stated for the opinion of this court is whether in effect they were right in taking the 10s. 1d. or whether they should have taken 11s.

A A point was raised before the quarter sessions and, indeed, is referred to in the Case, whether quarter sessions were not bound to accept the award of the arbitrators, which was for 11s.; bound in this sense, that the arbitrators having reported, all the court had to do was in effect to give a rubber stamp. That point has been abandoned and, I think, quite rightly abandoned in this court, because it is clear from the passages in the Act which I have read that once the B report of the arbitrators is received, it is for the court to consider the matter and make their own order and, in doing so, they have a discretion, as it seems to me, whether they should award the full amount of the increase or not.

The main question, whether they were right in taking 10s. 1d. or ought to have taken 11s. is, I think, very much more difficult, and I confess that my mind has wavered from time to time on the matter. Quite shortly, the question is whether C "price" referred to in the Act of 1801 in this connexion means the price obtained by the grower from the purchaser, or whether it includes all that he obtains in relation to a Winchester bushel not merely from the purchaser but from the Minister under the deficiency scheme.

Before considering that, it is necessary to refresh one's memory what the scheme is. The Agriculture Act, 1947, s. 1 (1), provides:

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> "The following provisions of this Part of this Act shall have effect for the purpose of promoting and maintaining, by the provision of guaranteed prices and assured markets for the produce mentioned in Sch. 1 to this Act, a stable and efficient agricultural industry . . ."

By s. 4 (1) it is provided, so far as it is relevant, that the Minister may by order E provide:

> "(b) . . . for bringing into operation . . . such provisions as appear to him expedient for providing guaranteed prices or assured markets . . ."

Pursuant to those powers the Cereals (Deficiency Payments) Order, 1955 (S.I. 1955 No. 962) was made. That order deals with millable wheat, amongst other commodities, and it is apparently conceded that millable wheat as defined in F that order is equivalent to good marketable wheat as the term appears in the Act of 1801. By reg. 3 it is provided:

> "In respect of each year and in respect of each of the following cereals, that is to say, millable wheat, millable rye, oats and barley, the Ministers shall—(a) in the light of their conclusions from a review held under s. 2 of the G Agriculture Act, 1947, and with the approval of the Treasury, specify a standard price; and (b) determine, in such manner as appears to them proper in the respective circumstances, an average realised price . . ."

By reg. 4, para. 1 it is provided:

> "If in the case of any year the average realised price of millable wheat or, as the case may be, millable rye is less than the standard price thereof, H the appropriate Minister may, if he thinks fit, and subject to such conditions as he may from time to time with the approval of the Treasury prescribe, make a payment of an amount equal to the difference in respect of every hundredweight of millable wheat or, as the case may be, millable rye which is shown to his satisfaction to have been despatched or delivered during that year to, or in accordance with the instructions of, a purchaser I thereof."

It is to be observed, therefore, that under this scheme the Minister is not guaranteeing a standard price, but he is providing that for whatever price a farmer sells in the market he will get in addition the difference between the average realised price as determined and the standard price. Taking hypothetical figures it works out in this way—if the standard price fixed is 12s. and the average realised price is 10s., then the farmer will get from the Minister 2s. If, therefore, he has been lucky enough to get 11s., which is 1s. over the average realised price of 10s., he will get his 2s. and therefore get 13s. in all. On the other hand, if he has failed, perhaps because his wheat is not of high quality, to get more than 9s., which is less than the average price, he will still get 2s., and in that event get a total of 11s. That is the scheme, and the question is whether the payments that farmers get under that scheme are to be included in the price of a Winchester bushel of marketable wheat. The quarter sessions held that " price " did not include those sums, and in para. 10 of the Case they set out a number of their reasons. I do not propose to deal with those reasons seriatim. My approach to the matter is to consider, first of all, the ordinary meaning of the word " price " to be found in the Act of 1801. Prima facie, in 1801, at a time when of course there were no such things as deficiency payments, one would think that the word " price " had its ordinary meaning of being the price obtained as between buyer and seller.

The matter does not end there, because, as has been pointed out, a possible meaning and certainly a more possible meaning in 1801 than today is that " price " means " value " or " worth ", and that, read in that sense, it is said that " price " there really means the value which the farmer gets from one source or another for each Winchester bushel of wheat, viz., so much from the purchaser and so much under the deficiency scheme. It is also to be observed that in the first instance the corn rents are fixed in effect by what the land in question will produce. It is to be equal to the value of one-fifth of the arable land, one-seventh of the meadow land and one-ninth of the pasture land, and the value will depend on what those lands can produce. But the scheme here is a scheme for the future. It is a scheme under which the land is not going to be revalued from time to time, but it is a scheme under which whatever the value of the land becomes in the future, whatever it produces, whether it be still corn or still wheat or potatoes or tulips, or anything else, the rents once fixed in 1801 are to be paid subject to review every twenty-one years. In those circumstances, it certainly seems to me that there is no justification for departing from the ordinary meaning of the word " price ". Price was to be the yardstick for the future, whatever the value of the land was and however it was farmed. The yardstick was the price, which undoubtedly at that time could only mean the price between buyer and seller.

One further point influences me, and that is that on the figures I gave earlier it is quite clear that the deficiency payment in the illustration I gave of 2s. is in no sense an increment to the value of the wheat because it bears no relation thereto. The 2s. in the illustration I gave is a common increment whether the wheat be sold at 11s. or at 9s. Looked at in that way, it can well be said that the 2s., the deficiency payment, is much more in the nature of an encouragement to a farmer to grow wheat than in any sense to be an increment to the value of the wheat he has sold.

For these reasons I have come to the conclusion, though not without considerable hesitation, that quarter sessions was right, and that this appeal ought to be dismissed.

BYRNE, J.: I have shared the hesitation to which my Lord has referred, but I have come to the same conclusion and for the same reasons. In those circumstances, I do not desire to add anything.

DONOVAN, J.: I also confess that my mind has fluctuated in the course of this case. I was impressed by the phraseology of the Agriculture Act, 1947, which, in effect, describes the totality of what the farmer is to get as " the guaranteed price ". It may be that that is no more than convenient nomenclature. Again, it is not conclusive against the appellants that agricultural subsidies were unknown in 1801 because the language of a statute may be apt to apply not merely to the present, but future circumstances as well, however different they may be. It is clear, however, that the effect of the Act of 1801 may be, as LORD PARKER, C.J., has said, to require a landowner to pay rent to the rector even though the landowner may grow no wheat at all. In these circumstances there seems to me to be good reason for not extending the meaning of the word " price " beyond its ordinary natural meaning unless the language of the relevant enactments clearly requires that to be done. The ordinary and natural meaning of the word " price " is the consideration which the buyer agrees to give and the seller agrees to accept for his wheat. The ordinary and natural meaning would not include a subsidy which a third person may or may not in his discretion decide to pay after the transaction is concluded. This discretion, I think, is a legitimate consideration to take into account in determining the meaning of the word " price " in the Act of 1801, notwithstanding that the calculation is dependent on what has actually happened in the past. It is still, I think, a factor bearing on the true construction of the word because the question always is: When Parliament used the word " price " in 1801, did it really mean to cover this kind of discretionary payment by a third party? I do not think that the language of the Act of 1801 and the Act of 1947 requires an extended construction to be put on the word " price ", and in the end I have accordingly come to the same conclusion as that expressed by the other members of the court and also for the reasons contained in the judgment of LORD PARKER, C.J. I therefore agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Taylor, Jelf & Co.*, agents for *Danby, Eptons & Griffith*, Lincoln (for the appellants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

NOTE.

Re KENTWOOD CONSTRUCTIONS, LTD.

[CHANCERY DIVISION (Buckley, J.), April 4, 5, 1960.]

Company—Winding-up—Proof—Rejection—Appeal—Function of court.

[As to appeal from the decision of the liquidator in respect of proof of debts in a company's winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 671, para. 1330; and for cases on the subject, see 10 DIGEST (Repl.) 1038, 1039, *7178-7180*.]

Motion.

The applicants, Stoy, Hayward & Co., a firm of chartered accountants who claimed to be creditors of Kentwood Constructions, Ltd., in liquidation, sought an order discharging the order of the registrar made on Feb. 24, 1960, whereby the registrar dismissed, with costs, the summons of the applicants, dated Aug. 25, 1959. In their summons, the applicants asked that the decision of the liquidator of the company in rejecting the applicants' proof for £525 should be reversed, and that their proof should be ordered to be admitted in full.

On Apr. 24, 1958, a petition to wind-up the company was presented by a creditor and at about this time the applicants were employed to investigate the affairs of the company. The petition was adjourned on May 12, and on June 9, 1958, to allow the investigation to be completed and to enable an informal meeting of creditors to be held. The meeting was held on June 12, 1958, at which an informal committee of creditors was appointed which resolved that the business of the company should be carried on thereafter under the supervision of a partner in the applicants' firm. The business was so carried on and the partner from time to time held and reported to meetings of the informal committee of creditors. On Feb. 2, 1959, the winding-up order was made, and the liquidator was appointed. On Mar. 24, 1959, the applicants lodged a proof in the winding-up for " Professional services to the company during 1958, 1959,

£525 " being remuneration for the work done in the investigation and the supervision in carrying on the business of the company between the date of the presentation of the petition and the date of the winding-up order. At the hearing of the motion the question arose what was the function of the court on an appeal from the rejection of a proof by a liquidator.

M. Finer for the applicants, the creditors.
J. Bolland for the respondent, the liquidator.

BUCKLEY, J., said that counsel for the claimants submitted that in proceedings such as this, the court must decide what amount was proper to be paid on a quantum meruit basis in just the same way as it would in an ordinary action for remuneration based on a quantum meruit. Counsel admitted that the onus initially rested on him to establish that he had done work meriting the amount of remuneration which his clients claimed, but he contended that on the evidence he had discharged that onus, or that at any rate he had discharged it to a sufficient extent to shift the onus to the liquidator to show that the amount claimed was in fact excessive and unreasonable. He said that the case which he had come to meet was not that the claim was insufficiently substantiated by evidence but that the amount claimed was excessive, and he argued that the liquidator was not justified in rejecting a proof in whole merely on the ground that the claim was excessive, for, if the liquidator regarded the claim as excessive, he must, by implication at least, be bound to admit the claim in part, although he might be entitled to reject the proof because he had not been provided with sufficient evidence to quantify that part.

On the other hand it was argued, on behalf of the liquidator, that the question before the registrar was simply whether the liquidator was right or wrong, on the evidence available to him, in rejecting the proof. HIS LORDSHIP did not think that that was the function of the court on an appeal from a rejection of a proof. When an application was made to the court to reverse such a decision of a liquidator, evidence was filed which was commonly much fuller than the evidence available to the liquidator at the time when he decided to reject the proof, and the court was bound to decide the rights of the claimant in the light of the evidence which was before the court and not merely to express a view on whether the liquidator was right or wrong in rejecting the proof when he rejected it. It was perhaps significant that the Companies (Winding-up) Rules, 1949*, by r. 108, provided that, if a creditor or contributory were dissatisfied with the decision of the liquidator in respect of a proof, the court might, on the application of the creditor or contributory, reverse or vary the decision. It was not merely the function of the court to say that a decision was right or wrong; it might vary the decision in any way that it thought necessary in the light of the evidence before the court. The court must approach the question de novo and determine to what extent the creditor ought to be allowed to rank as a proving creditor. HIS LORDSHIP reviewed the evidence and found that the liquidator had not displaced the applicants' sworn statement, supported by reasonable indication of the work done, that £525 was a fair and reasonable fee for their work. HIS LORDSHIP discharged the registrar's order and directed that the applicants' proof be admitted in full.

Solicitors: *D. J. Freeman & Fraser* (for the applicants); *J. E. Baring & Co.* (for the respondent).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

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* S.I. 1949 No. 330.

CLOSE *v.* STEEL COMPANY OF WALES, LTD.

[COURT OF APPEAL (Lord Evershed, M.R., Ormerod, L.J., and Davies, J.), May 26, 27, June 2, 1960.]

Factory—Dangerous machinery—Duty to fence—Hand drill—Breaking of revolving bit—Fragments flying out and causing injury—Danger not foreseeable in ordinary course—Whether machinery dangerous—Whether duty to fence against fragments of broken machinery flying out—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 14 (1).

The plaintiff, while employed by the defendants, operated an electric drill for the purpose of drilling holes through a gear wheel. The bit shattered and a piece of the broken bit injured the plaintiff's eye. The plaintiff claimed damages for the defendants' breach of the duty to fence a dangerous part of machinery under the Factories Act, 1937, s. 14 (1)*. On the evidence it showed that the accident was not one which could or would be reasonably foreseeable in the ordinary course, but it was one which those responsible, if they had closely reflected on it, would have said could happen, although the chances of its happening were extremely remote†.

Held: the defendants were not in breach of their duty under s. 14 (1) because the relevant part of the machine was not " dangerous " within the subsection since the risk of injury being inflicted by it could not be fairly described as reasonably foreseeable in the ordinary course.

Dicta of WILLS, J., and WRIGHT, J., in *Hindle* v. *Birtwistle* ([1897] 1 Q.B. at p. 195 and p. 196 respectively), and of DU PARCQ, J., in *Walker* v. *Bletchley Flettons, Ltd.* ([1937] 1 All E.R. at p. 175) applied.

Nicholls v. *Austin* (*Leyton*), *Ltd.* ([1946] 2 All E.R. 92); dictum of LORD DU PARCQ in *Carroll* v. *Andrew Barclay & Sons, Ltd.* ([1948] 2 All E.R. at p. 391); and *Dickson* v. *Flack* ([1953] 2 All E.R. 840) considered.

Per CURIAM: the speeches of the noble Lords in *Nicholls* v. *Austin* (*Leyton*), *Ltd.*, supra, should be treated as qualified to the extent (a) that s. 14 of the Act of 1937 ought not now to be read as limited in scope solely to the prevention of a workman's getting into contact with moving parts of a machine, and (b) that the duty imposed by the section comprehends the duty to protect workmen from injury caused by ejected or flying pieces of the machine itself (as distinct from injury caused by flying or ejected pieces of the material on which the machine is working); but that liability in such latter event will not arise save in cases which would have fallen within the scope of the rationes of the judgments of WILLS, J., and WRIGHT, J., in *Hindle* v. *Birtwistle*, supra; in other words, that a part of a machine should not be regarded as " dangerous " within the language of the section unless the risk of injury can be fairly described as reasonably foreseeable in the ordinary course (see p. 667, letters E to G, post).

Appeal dismissed.

[As to the requirement of secure fencing of dangerous machinery, see 17 HALSBURY'S LAWS (3rd Edn.) 71, para. 123; and for cases on the subject, see 24 DIGEST (Repl.) 1049-1055, *177-218*.

For the Factories Act, 1937, s. 14 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 1009.]

Cases referred to:

Carroll v. *Andrew Barclay & Sons, Ltd.*, [1948] 2 All E.R. 386; [1948] A.C. 477; [1948] L.J.R. 1490; 24 Digest (Repl.) 1056, *221*.

Dickson v. *Flack*, [1953] 2 All E.R. 840; [1953] 2 Q.B. 464; 24 Digest (Repl.) 1051, *194*.

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* The terms of s. 14 (1) are printed at p. 658, letter H, post.

† This is the conclusion of fact found by the Court of Appeal to be the true conclusion (see p. 661, letter D, post).

Hindle v. *Birtwistle*, [1897] 1 Q.B. 192; 76 L.T. 159; 61 J.P. 70; sub nom. *Birtwistle* v. *Hindle*, 66 L.J.Q.B. 173; 24 Digest (Repl.) 1053, *207*.

Newnham v. *Taggart Morgan & Coles, Ltd.*, (July 19, 1956), unreported.

Nicholls v. *Austin (Leyton), Ltd.*, [1946] 2 All E.R. 92; [1946] A.C. 493; 115 L.J.K.B. 329; 175 L.T. 5; 24 Digest (Repl.) 1091, *419*.

Rutherford v. *R. E. Glanville & Sons (Bovey Tracey), Ltd.*, [1958] 1 All E.R. 532; [1958] 1 W.L.R. 415; 3rd Digest Supp.

Summers (John) & Sons, Ltd. v. *Frost*, [1955] 1 All E.R. 870; [1955] A.C. 740; [1955] 2 W.L.R. 825; 24 Digest (Repl.) 1055, *217*.

Walker v. *Bletchley Flettons, Ltd.*, [1937] 1 All E.R. 170; 24 Digest (Repl.) 1054, *212*.

Appeal.

This was an appeal of the plaintiff from an order of WINN, J., dated July 8, 1959, dismissing the plaintiff's action for damages for negligence and breach of the duty imposed by the Factories Act, 1937, s. 14 (1).

H. E. Hooson, Q.C., and *B. Griffiths* for the plaintiff.

A. T. Davies for the defendants.

Cur. adv. vult.

June 2. **LORD EVERSHED, M.R.**, read the following judgment of the court: The facts in this case may be shortly and simply stated. The plaintiff appellant, who is thirty-two years of age, was on Jan. 24, 1956, working at the Abbey Works, Margam, of the defendant company. He was operating an electric drill for the purpose of drilling 1/16th inch holes through a gear wheel. The drill, illustrated in a photograph which we have, was of the kind which we understand to be in common use and, when drilling, a bit, being a short piece of very hard steel of the requisite diameter is inserted into the base of the drill and the base is then lowered on to the object to be drilled. When thus lowered on to the object to be drilled, the current is turned on and the drill revolves at a high speed up to three thousand revolutions per minute and so drills the required bits.

On the occasion in question, the bit broke and shattered and a piece or pieces of the broken drill entered into and injured the plaintiff's left eye. In the present proceedings, he sued the defendants both on the ground of common law negligence and for breach of duty under s. 14 (1) of the Factories Act, 1937. The learned judge dismissed the action under both heads. There has been no appeal against the learned judge's dismissal of the claim at common law but the defendant has contended here that the case is, on its facts, within the scope of s. 14 (1) of the Act of 1937, and that we should hold the defendants liable accordingly for a breach of their duty under that subsection. Section 14 (1) of the Act is as follows, so far as relevant:

> "Every dangerous part of any machinery . . . shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced: Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part."

The sole question thus raised in the appeal is whether the defendants were in breach of the statutory duty imposed by s. 14 (1) of the Factories Act, 1937; for if they were, it is not in doubt that the plaintiff's accident was a direct consequence of the breach. The true question may indeed, in our judgment, be more concisely stated thus: on the facts of the case as found by the judge, was the part of the drilling machine into which the bit was inserted (or, possibly, was the bit itself) a "dangerous part" of the machine? On the evidence in the case it was found by the judge that the fracture or shattering of these bits in the ordinary course of

A the working of the machine was common enough. So much is not in dispute. Counsel for the defendants conceded that it could be taken as a weekly occurrence in the shop. It is at this point that, in our judgment, the crucial difficulty arises. It seems clear enough on the evidence that the result of the breakage of a bit is that its fractured parts are thrown outwards by the rapid revolutions of the instrument. The learned judge's findings on this vital matter of fact were as B follows:

> "Mr. Hewitt [an expert called in the case] did not know of any employer who fenced or covered any hand-drill as distinct from pillar drills, and he told me that no precautions were to his knowledge taken against the risk of eye injuries for shattered drill bits, which he regarded as a very small risk, albeit a risk of a grave injury. He agreed it was a frequent occurrence for a C bit to break, and that when it did break it usually shattered into fragments which fly about, though normally they fly only a couple of feet at the most, usually less, and only fly level or downwards."

Again, the learned judge said:

> "There is no evidence of known prior accidents caused by fragments D through a flying out, nor any evidence that the defendants or any responsible representative of theirs had knowledge of or any reason to foresee an injury from a breaking of any consequence at all. I do not exclude the distinct possibility that there might be superficial scratches or minor penetrating wounds, of the hands in particular."

Finally, he said:

E

> "Although it would be inaccurate to say that the bit of this drill was not a dangerous part of machinery within the test hitherto accepted and applied, it is not a part the dangerous character of which is in the same category of danger as the danger involved in spinning a carborundum wheel at four thousand revolutions, or in spinning the type of wood-cutting machinery F which is dealt with in the cases to which I shall be referring. The danger involved in the case of this type of 1/16 inch high speed carbon steel bit is a danger of the occurrence, or a risk of the occurrence, on not infrequent occasions of very slight and trivial injury; together with a remote (and in my judgment extremely remote) risk of the occurrence, in very exceptional conditions, of such a grave injury as most unfortunately was suffered by this G plaintiff on this occasion. I think that it is right, as Mr. Breuan Rees urged me to say, and I accept this from him, that it was foreseeable that such an injury to the eye of a drill operator would or might sooner or later—in the course of many hundreds of thousands of operations—occur. But it was not a risk which a reasonable man would have foreseen would occur in his factory within measurable time, within it might be the lifetime of any particular workman. The risk was as remote in my judgment as that."

H

It is never easy in a case of this kind—and in an extemporary judgment—to express a finding with the clarity and precision sufficient to satisfy the later discussion in the Court of Appeal; though we are very far from criticising in this respect the language used by the judge in his very careful judgment, and we were in the circumstances properly referred to the transcript of the evidence. I Counsel for the plaintiff suggested that the statement by the judge to the effect that the pieces would not fly out at an angle higher than the plane of the base of the instrument was not really justified; that a workman might well in any case bring his eye down to that level or very near it; and that if the entry of a fragment into the worker's eye was something foreseeable at all, then it was an accident which however improbable on any given day yet might happen tomorrow no less probably than thirty years ahead. On the other side it was said by counsel for the defendants that the ejection of a fragment in an upward direction was something that would not occur except in unusual circumstances not to be expected or readily explained; and that, though an accident such as occurred to the plaintiff was foreseeable in the sense that it could not be excluded from contemplation if one thought about it, still it was something the chances of the happening of which were so remote that it was only foreseeable in the sense that it was capable of rational imagination; but on the other hand could not be reasonably expected to happen in the ordinary course of working—a view supported by the evidence that, although the use of these drills was extremely well known, no similar had ever been recorded: in other words that it was foreseeable in the same way that you would describe as foreseeable the chance that a man walking along the pavement might be run down by a motor car which for some quite exceptional reason had mounted the kerb. It was further said by counsel for the defendants (and this was not, we think, in dispute) that the injuries which a man might in the ordinary course receive from flying pieces of bit (e.g., a slight scratch on the hand) were too trivial for notice since the pieces were not ejected, according to the evidence, more than about a couple of feet and could not be said to fly with any force. Finally counsel for the defendants drew attention to the circumstance (material in considering the question of danger) that the learned judge had rejected the suggestion that goggles ought to be provided (as the evidence showed that they never had been) and acquitted the defendants of any common law negligence—conclusions which counsel for the plaintiff did not challenge before us.

In the circumstances it may be useful to quote one or two passages from the evidence of the defendants' expert witness, Mr. Hewitt, which we regard as fairly representative. I take first a short passage in the examination-in-chief:

> " Q.—What do you say about the possibility of such an accident happening? A.—I should think it very remote indeed. I have broken many drills myself. I have no doubt it is a very common occurrence, a daily occurrence in industry; but I have never yet seen a driller wearing goggles at work, those people who do nothing else all day, every day, but drill holes."

In cross-examination, I find this question:

> " It follows, therefore, does it not, that upon such shattering the shattered pieces may fly out in all directions? A.—Not quite in all directions, they will fly, yes. Q.—And at quite some considerable speed? A.—Initially, yes. They will not fly very far. Q.—A few feet, would they not? A.—I doubt that. If, for instance, a drill broke in the middle of that table, you might expect the pieces to get to the edges, but I would not expect them to go very much further. Q.—They may go up and may go down? A.—No, they would go out in the play of the rotation. Q.—You cannot say that definitely, can you? A.—Well, clearly if your rotation is in that direction and your drill breaks your pieces would come out in that direction. They will only go outwards if your rotation is in that direction."

There comes this further passage in cross-examination:

> " Well, here we have a drill which is fixed in the stand with a bit that might shatter at any time. Do you think that some precautions ought to be taken by employers to protect their workmen against being injured by those shattered fragments? A.—No, because in my opinion the risk is so small. I would be quite happy to work that machine all day, every day, till further notice. Q.—The risk is small. Well now, first of all, let us examine that; this man has had a serious injury to his eye? A.—Yes. Q.—So at any rate there is a risk of serious injury? A.—Yes, that is the risk that exists, the risk possibly of eye injury alone, because these fragments will not penetrate clothing. Q.—There is risk of loss of an eye? A.—Yes. Q.—Do you not think that employers should take some precaution against the risk of loss of an eye? A.—Well, in so far as that is a question I am

> A entitled to answer I would say this, that an employer must have regard to the existence or the degree of risk in every such matter. Q.—Do you mean how many previous accidents there have been? A.—Yes, in the context of this factory and other factories. Q.—I see. You must have regard to the number of accidents that have gone before. Now one thing is clear in this case, and that is this, that the employers here took no precautions B at all against the risk of an injury such as the plaintiff sustained, did they? A.—No, and in that respect they were in exact alignment with every employer I have come into contact with. Q.—Were they, Mr. Hewitt? Are you saying that you have never seen a drill of this kind fenced? A.—Oh, no, I did not say that. Again I must go back to my original remarks. Making those remarks I was referring to the wearing of goggles, specifically. C Q.—But you have certainly seen drills like this fenced? A.—Not like this."

We add that the learned judge clearly accepted as entirely reliable Mr. Hewitt's testimony.

What then is the true conclusion? In our judgment, the findings of the learned judge should not be taken as intending a foreseeable risk greater than that formulated by counsel for the defendants. Put in its briefest form we think D that the plaintiff's accident was not one which could or would be reasonably foreseeable in the ordinary course, though it was one which those responsible, if they had closely reflected on it, would have said could happen though the chances were extremely remote. If this is the right conclusion of fact, then are the defendants liable? As we have earlier stated they are so liable if, but only if, the relevant part of the machine can fairly and sensibly in the circum- E stances be called a "dangerous" part; for unless that premise is satisfied there is nothing in the section to impose liability.

Unhappily the difficulties of the case do not end there, for it is apparent that where accidents have arisen from the ejection of pieces of the machine itself (broken or otherwise) there has been a difference of judicial opinion in the cases which extend to a divergence of opinion in the House of Lords itself.

F The first case is that of *Hindle* v. *Birtwistle* (1). That was a case where the workman had been injured in a cotton mill by a shuttle, part of a cotton weaving machine, which flew off the machine as (according to the evidence) was a most uncommon experience with such machines. The case fell to be decided under s. 5 of the Factory and Workshop Act, 1878, and s. 6 of the Act of 1891 which correspond in terms with s. 14 (1) of the Act of 1937 save for the absence of the G proviso to the modern subsection. The learned judges, WILLS, J., and WRIGHT, J., thought the obligation to fence had arisen. WILLS, J., said (2):

> "It seems to me that machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection. No doubt it would be H impossible to say that because an accident had happened once therefore the machinery was dangerous. On the other hand, it is equally out of the question to say that machinery cannot be dangerous unless it is so in the case of careful working. In considering whether machinery is dangerous, the contingency of carelessness on the part of the workman in charge of it, and the frequency with which that contingency is likely to arise, are matters I that must be taken into consideration. It is entirely a question of degree.

Then WRIGHT, J., in his judgment said (3):

> "The mere fact that the shuttle will sometimes fly out, and that when it flies out it is dangerous, is not enough. It is a question of degree and of fact in all cases whether the tendency to fly out is a tendency to fly out often enough to satisfy a reasonable interpretation of the words 'dangerous'."

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(1) [1897] 1 Q.B. 192.

(2) [1897] 1 Q.B. at p. 195.

(3) [1897] 1 Q.B. at p. 196.

The case was followed by later decisions including that of du Parcq, J., in *Walker* v. *Bletchley Flettons, Ltd.* (4), to which counsel for the plaintiff particularly referred and which related to injury inflicted in analogous circumstances by part of a mechanical excavator. The relevant section (in that case) of the Act of 1901 like its predecessor contained no such proviso as is to be found in s. 14 (1) of the Act of 1937, and du Parcq, J., regarded as dangerous a part of a machine which might be (4)

> " a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur."

It is true, as Winn, J., pointed out, that in *John Summers & Sons, Ltd.* v. *Frost* (5), Lord Reid somewhat criticised the use by du Parcq, J., of the words " possible cause " and would have preferred to substitute " reasonably foreseeable cause "; but we do not think that for present purposes the criticism is material. We feel little doubt that, prior to the decision of *Nicholls* v. *Austin* (*Leyton*), *Ltd.* (6) in 1946 and the possible effect of the addition of the proviso to s. 14 (1) of the consolidating Act of 1937, the law was that for the purposes of the factory legislation a part of a machine was regarded as dangerous if there was a reasonable likelihood (to use for present purposes no more precise a formula) of injurious parts of the mechanism flying off the machine in the ordinary course of its operation.

We come then to *Nicholls* v. *Austin* (*Leyton*), *Ltd.* (6). In that case the workman had been injured by a piece of wood ejected by a circular saw in the course of its operation—not, be it observed, by a fractured piece of the machine itself but by a piece of the material on which the machine was operating. The House held that there was no breach of s. 14 (1) of the Factories Act, 1937, since (quoting from a headnote (7))

> " the obligation to fence imposed by s. 14 (1), was an obligation to guard against contact with any dangerous part of a machine and not to guard against dangerous materials ejected from it . . ."

Since the decision, if rightly summarised in the headnote would ex facie be decisive against the plaintiff in the present case, it is, we think, necessary to cite at some length from the speeches of the noble Lords. Thus Lord Thankerton said (8):

> " At the trial, the first point argued before the judge was whether the obligation to fence imposed by s. 14 (1) is an obligation not only to protect against direct injury by contact with the machine, but also against indirect injury from something that flies off from the machine . . . My Lords, on consideration of the terms of s. 14, I am of opinion that there is a simpler answer to the contention of the appellant, namely, that the obligation to fence imposed by sub-s. (1) is an obligation to provide a guard against contact with any dangerous part of the machine, and that it does not impose any obligation to guard against dangerous materials or articles ejected from the machine in motion, that matter depending solely on the making of regulations by the Secretary of State under the discretionary power conferred on him by the last paragraph of the section. This view appears to be amply confirmed by the language used. In the first place, sub-s. (1) is dealing with fencing of dangerous parts of any machine, and not with dangerous machines, whereas the dangerous materials or articles do not necessarily emanate from a dangerous part of a machine; further, the reference to the

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(4) [1937] 1 All E.R. 170 at p. 175.

(5) [1955] 1 All E.R. at p. 883; [1955] A.C. at p. 766.

(6) [1946] 2 All E.R. 92; [1946] A.C. 493.

(7) [1946] A.C. at p. 494; cf. [1946] 2 All E.R. at p. 93.

(8) [1946] 2 All E.R. at pp. 94, 95; [1946] A.C. at p. 498.

A exception where the position or construction is such that it is as safe to every person employed or working on the premises as it would be if securely fenced suggests safety from contact with the dangerous part, and this is stated in terms at the end of the proviso to sub-s. (1)."

LORD MACMILLAN said (9):

B "The obligation under s. 14 to fence the dangerous part of a machine, as I read it, is an obligation so to screen or shield the dangerous part as to prevent the body of the operator from coming into contact with it, and this obligation was in the present instance amply fulfilled."

LORD SIMONDS said (10):

"I find nothing in this language to suggest that the section aims at C protecting the worker from any indirect danger arising out of the functional operation of the machine. If there was any ambiguity, it would be set at rest by the proviso, which provides that '. . . in so far as the safety of a dangerous part cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically D prevents the operator from coming into contact with that part.' These last six words make it clear that the security at which the substantive part of the subsection aims is security from unintentional, or, I suppose, even intentional, contact with a dangerous part. The fence is intended to keep the worker out, not to keep the machine or its product in."

E Finally, we cite from the opinion of LORD UTHWATT (11):

"Section 14 (1) applies to 'every dangerous part of any machinery other than prime movers and transmission machinery.' That dangerous part is to be securely fenced unless it—i.e., the dangerous part—is in such a position or of such construction as to be safe. The proviso to the subsection is of assistance. Where a fixed guard is not practicable as respects a dangerous F part, the provision of a device which prevents contact between the operator and that part is to satisfy the obligation contained in the leading provision of the subsection. The prevention of contact between the worker and the dangerous part is to be sufficient."

As we have said, *Nicholls* v. *Austin* (12) if it had stood unqualified would have been, in our view, decisive against the present plaintiff; for although the G case before the House was one where the injury had been caused by a flying piece of the material on which the machine was working and not by a flying piece of the machine itself, still the language which I have cited seems to us clearly to show that the conclusion was reached on the basis that s. 14 (1) of the Act of 1937 should be construed as intended to limit the duty thereby imposed to a duty to guard against contact with the machine. In reaching their con- H clusion of construction the noble Lords were plainly influenced by the terms of the proviso to the subsection introduced for the first time in the Act of 1937. On this last point, we cannot refrain from observing that (as counsel for the plaintiff submitted to us) the Act of 1937 is expressed in its heading as a consolidating Act; that, accordingly s. 14 (1) ought prima facie not to be construed as substantially altering the law; and that it is, at least, a legitimate interpre- I tation of the terms of the proviso to treat it as meaning no more than it strictly says, viz., that if the premise of its opening words is satisfied then compliance with the requirement of what follows will be a satisfaction of the obligation of the subsection even though the "danger" contemplated by the earlier part of the subsection is not thereby effectively guarded against—an argument on the construction of the subsection and its proviso not apparently noticed in the speeches or the arguments.

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(9) [1946] 2 All E.R. at p. 96; [1946] A.C. at p. 501.
(10) [1946] 2 All E.R. at p. 98; [1946] A.C. at p. 504.
(11) [1946] 2 All E.R. at p. 99; [1946] A.C. at p. 506.
(12) [1946] 2 All E.R. 92; [1946] A.C. 493.

Two years later there came before the House *Carroll* v. *Andrew Barclay & Sons, Ltd.* (13). In that case the workman had been injured by a belt which had for some reason broken and had lashed out on the workman. The employers were held not liable; but since the belt was part of the transmission machinery, the case fell to be determined under s. 13 and not s. 14 of the Act. The headnote contains the sentence (14):

> " Quaere whether, in the case of a machine which in working might be expected to throw off loose or broken parts, there might be an obligation to fence it for the purpose of protecting the workman against that danger."

The justification for this last sentence is mainly found in the speeches of Lord Jowitt, L.C., and Lord du Parcq. The last sentence of the short speech of the former is (15):

> " At the same time I should desire to leave open for further consideration the question which Lord du Parcq raises in his opinion."

Lord du Parcq said (16):

> " I wish to add, however, that, while I agree with Lord Normand that the words ' securely fenced ' must be given the same meaning in each of the three sections (s. 12, s. 13, and s. 14), I think that they may well mean ' so fenced as to give security from such dangers as may be reasonably expected.' If machines exist, or are hereafter invented and used, which are dangerous because fragments or loose parts of the machinery are sometimes ejected from them, then I am not prepared to say that s. 14 does not require such machines to be fenced for the purpose of protecting workmen against that danger. If the dictum of my noble and learned friend Lord Simonds in *Nicholls* v. *Austin* (*Leyton*), *Ltd.* (17) is to be understood as meaning that such a machine need not be fenced, I respectfully doubt its accuracy, and must reserve my opinion on it."

There is as we read them no such clear reservation in the speeches of Lord Porter and Lord Normand—though the former says (18):

> " Even in the case of the flying spindle it was not a breaking of a part of the machine, but an accident which might have been anticipated from its ordinary working which had to be guarded against ",

and Lord Normand says (19):

> " It is possible, therefore, that, if a machine may be expected to throw off detachable or broken parts in working, these parts may fall to be treated as dangerous and subject to the requirements of secure fencing."

Lord Normand nevertheless at the end of his speech expressly adopts as correct the language of Lord Simonds in *Nicholls* v. *Austin* (17) which, in the view of Lord du Parcq, might require qualification. There are also other passages in the speeches of Lord Porter and Lord Normand which we do not take time to quote but which seem to us to lend support to the view summarised in the headnote to *Nicholls* v. *Austin* (20). We do not find anything in the speech of Lord Morton of Henryton which assists the matter either way.

In that state of the law *Dickson* v. *Flack* (21) came in 1953 before this court

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(13) [1948] 2 All E.R. 386; [1948] A.C. 477.

(14) [1948] A.C. 477; the essential passage is quoted in the " per curiam " [1948] 2 All E.R. at p. 387.

(15) [1948] 2 All E.R. at p. 387; [1948] A.C. at p. 482.

(16) [1948] 2 All E.R. at p. 391; [1948] A.C. at p. 486.

(17) [1946] 2 All E.R. at p. 98; [1946] A.C. at p. 505.

(18) [1948] 2 All E.R. at p. 390; [1948] A.C. at p. 485.

(19) [1948] 2 All E.R. at p. 393; [1948] A.C. at p. 490.

(20) [1946] 2 All E.R. 92; [1946] A.C. 493.

(21) [1953] 2 All E.R. 840; [1953] 2 Q.B. 464.

A consisting of SINGLETON, L.J., DENNING, L.J., and MORRIS, L.J. The injury suffered in that case arose from a cutter which flew off a spindle in a woodworking machine. That such an occurrence might well happen in the course of the operation of the machine is clearly shown by two paragraphs of the report which read (22):

> "During the six-day hearing before HAVERS, J., evidence was given by B expert witnesses which showed that the danger of some part being thrown from such a machine moving at such a high speed had been recognised for many years by those in the trade and those responsible for safety precautions in woodworking shops. In particular, two pamphlets were before the court. The first, published by the Home Office in 1928 . . . warned that 'the vertical spindle moulder or shaping machine is one of the most dangerous tools in C common use. It causes a large number of accidents yearly.' It emphasised the danger from contact with the cutters, and continued: 'The fatal accidents are caused by cutters breaking off or coming loose, and being hurled away with great velocity, due to the centrifugal force developed by their exceptionally high speed . . .' and concluded: 'It is therefore of prime importance that suitable safeguards should be chosen for each operation D and that cutters should be set with scrupulous care.' The second pamphlet, first published in 1935 and reprinted for the factory department of the Ministry of Labour and National Service in 1947 . . . while stressing the danger from flying cutters, gave diagrams of guards which could be used for this type of work and (at p. 14) stated: 'The danger to workers at neighbouring machines or benches can be minimised by the provision of E guards and screens which will intercept a flying cutter.'"

Liability was alleged to arise both or alternatively under reg. 17 of the Woodworking Machinery Regulations, 1922, and under s. 14 (1) of the Act of 1937. It is true that MORRIS, L.J., founded his conclusion in favour of the workman on the regulation, and that SINGLETON, L.J., founded himself primarily on the regulation. SINGLETON, L.J., however, added this at the end of his judgment (23):

> F "If it can be said that reg. 17 does not go so far, I would be prepared to hold that there was a breach of s. 14 (1) with the like result, though I prefer to base my judgment on reg. 17."

DENNING, L.J., said (24):

> "It is said that the decision of the House of Lords in *Carroll's* case (25) G binds us to hold that the Factories Act, 1937, does not protect workmen from pieces which fly out of machines. That case does not warrant any such proposition. The decision turned on the fact that the belt was in such a position as to be as safe as it would be if it was securely fenced. That is one of the exceptions in the Act. It has no place in the case before us. The House of Lords distinctly kept open the case of a machine which H 'may be expected to throw off detachable or broken parts in working.' LORD NORMAND said that 'these parts may fall to be treated as dangerous and subject to the requirements of secure fencing.' This, in my opinion, is such a case. I am of opinion that any part which may be expected to throw off a loose part is itself a dangerous part and ought to be securely fenced under s. 14 (1)."

I WINN, J., in his judgment in the present case appears to have thought that these views of DENNING, L.J., were not necessary for his conclusion; but with all respect to the learned judge we are unable to agree. It seems to us clear that DENNING, L.J., founded himself primarily on his view of liability under s. 14 and no less clear that SINGLETON, L.J., and DENNING, L.J., answered the question expressly left open by Lord du Parcq in *Carroll's* case (26), when applied to the facts in *Dickson* v. *Flack* (27) in a sense favourable to the workman—the sense for which counsel for the workman had contended in his argument.

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(22) [1953] 2 Q.B. at p. 467.
(23) [1953] 2 All E.R. at p. 848; [1953] 2 Q.B. at p. 477.
(24) [1953] 2 All E.R. at p. 849; [1953] 2 Q.B. at p. 478.
(25) [1948] 2 All E.R. 386; [1948] A.C. 477.

The question of liability for injury from flying parts of a machine came before this court again, Lord Goddard, C.J., presiding, in *Rutherford* v. *R. E. Glanville & Sons* (*Bovey Tracey*), *Ltd.* (28). It is true, as Winn, J., observed, that the decision may be said primarily to have rested on the view that, the necessity of a fence having been conceded, the fence used was shown not to have been " secure ". Lord Goddard, C.J., however, seems to have accepted the view, whether conceded or not, that a known risk of injury through flying bits of the machine involved a duty to guard it under s. 14. He said (29):

> " This machine had to be fenced because there is a risk of the carborundum wheel disintegrating and thereby causing injury."

We were finally referred to a third case before this court, consisting of Lord Goddard, C.J., Denning and Birkett, L.JJ., *Newnham* v. *Taggart Morgan & Coles, Ltd.* (30). The judgments are dated July 19, 1956. The case was not cited to Winn, J. It is not reported and the court is indebted to Davies, J., for drawing our attention to it. In that case a band saw broke and the plaintiff was injured by a piece of broken saw which flew out and struck him. As the case is not reported it will be convenient if we make substantial citations from the transcript in the Bar Library both because the precise facts are thereby made plain and also by reason of the statements of the law which they contain.

Lord Goddard, C.J., said:

> " If it is a dangerous piece of machinery, by reason of s. 14 of the Factories Act, it should be fenced. But we have had the advantage now of considering the cases which have been decided in this court and in the House of Lords. I need only mention a few of them: *Nicholls* v. *Austin* (*Leyton*), *Ltd.* (31); *Carroll* v. *Andrew Barclay & Sons, Ltd.* (26); and *Dickson* v. *Flack* (27). Those cases lay down that the obligation which is imposed by s. 14 prima facie is to prevent the person of the operator coming into contact with a dangerous machine. That is the prima facie object of the section; it is not to keep in pieces either of the material or of the machine should it break. None the less it is quite clear from those cases that the law now requires fencing of a machine which it is known may cause danger to operators by reason of its breaking if that breaking is a risk which is, as I would put it, inherent or likely to occur in the working of the machine. Perhaps the commonest case which the decisions show may be anticipated is in cotton mills because there it is a not uncommon experience that shuttles fly out, and if they fly out, of course, they may cause danger to the operator. Therefore the cases show that precautions in the way of fencing must be taken for the purpose not only of preventing the operators coming into contact with high speed machinery but for preventing the shuttles flying out and causing danger to the operator. In the particular case of this saw it is conceded that as in the case of all mechanical saws there is a risk of the saw breaking. Apparently it is very seldom that the saw breaks, but it is known to happen. So far as is known those breaks have occurred when machines have been under load, that is to say, when timber was being fed to the saw. Such an accident as that with which we are concerned has apparently never happened before in the history of the machine, though there have been an infinitesimal number of cases, compared with the number of machines that there are and the years that they have been working, of a band breaking when the

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(26) [1948] 2 All E.R. 386; [1948] A.C. 477.

(27) [1953] 2 All E.R. 840; [1953] 2 Q.B. 464.

(28) [1958] 1 All E.R. 532.

(29) [1958] 1 All E.R. at p. 533.

(30) (July 19, 1956), unreported.

(31) [1946] 2 All E.R. 92; [1946] A.C. 493.

> machine has not been under load—three or four cases at the outside . . . But the evidence in this case shows that there never has been known a case in which the mere fracture of the band has ever caused injury to an operative."

Similarly DENNING, L.J., said:

> " Now it has been held by the House of Lords that the object of s. 14 is to save a man from coming into contact with the machine, and not to save him from pieces of material flying out, see *Nicholls* v. *Austin* (32), *Carroll* v. *Barclay* (33): but this must be taken subject to this qualification that, if it is known—or might reasonably be anticipated—that parts of the machine might fly out or break off and do injury, then those parts are dangerous and must be fenced, see *Dickson* v. *Flack* (34)."

Finally BIRKETT, L.J., said:

> " So what the learned judge did—and it is conceded that he did so—was to state the law quite accurately to himself and then apply the facts. As DENNING, L.J., said, ultimately this is a question of fact. The learned judge, with the evidence of the experts before him, and with what I will call the evidence of the history of this machine also before him, came to that clear conclusion; it never having happened before in all that long history he came to the conclusion that it was not reasonably foreseeable, and on that ground he said that, most reluctantly, he was compelled to find for the defendants. I do not think that that judgment can be quarrelled with, and I agree with the judgment of my Lords, LORD GODDARD, C.J., and DENNING, L.J., that this appeal should be dismissed."

What is the conclusion of these cases on which this court should act? It is in our judgment this: that by decisions of the court which it is our duty to follow, the speeches of the noble Lords in *Nicholls* v. *Austin* (32) should be treated as qualified to the extent (a) that s. 14 of the Act of 1937 ought not now to be read as limited in scope solely to the prevention of a workman's getting into contact with moving parts of a machine and (b) that the duty imposed by the section comprehends the duty to protect workmen from injury caused by ejected or flying pieces of the machine itself (as distinct from injury caused by flying or ejected pieces of the material on which the machine is working); but that liability in such latter event will not arise save in cases which would have fallen within the scope of the rationes of the judgments of WILLS, J., and WRIGHT, J., in *Hindle* v. *Birtwistle* (35); in other words, that a part of a machine should not be regarded as " dangerous " within the language of the section unless the risk of injury can be fairly described as reasonably foreseeable in the ordinary course. After all, the word " dangerous " is an ordinary English word; and the question is, in our judgment, this, in the end of all: could one fairly and sensibly describe the relevant part of this machine as " dangerous " in the circumstances of the present case, that is, because the chances of the plaintiff's injury could be " foreseen "; but only foreseen in the very limited sense which we have tried to formulate? In our judgment, if we have properly posed the question, the answer here is in the negative; and we conclude, therefore, with WINN, J. (though our reasons may not be entirely the same as his) that the plaintiff's claim should fail.

We would add in conclusion the hope that, on some occasion, the matter should be further considered in the House of Lords. The House alone can determine for the future guidance of the courts the extent to which (if at all) the speeches in *Nicholls* v. *Austin* (32) ought now to be regarded as qualified.

We venture also to add this: that if a part of a machine can properly be said to be dangerous within the meaning of s. 14 (1) of the Factories Act, 1937, by reason of its liability to eject injurious fragments when in operation (as would at any rate appear to be in accordance with common sense) then there would appear to be no logic (or common sense) in a statutory duty of protection confined to the case where the ejected fragments are part of the machine and excluding the case where the ejected fragment (no less injurious) happens to come from the object on which the machine is working.

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(32) [1946] 2 All E.R. 92; [1946] A.C. 493.
(33) [1948] 2 All E.R. 386; [1948] A.C. 477.
(34) [1953] 2 All E.R. 840; [1953] 2 Q.B. 464.
(35) [1897] 1 Q.B. 192.

For the reasons which we have stated we would dismiss this appeal.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Evill & Coleman* (for the plaintiff); *Kenneth Brown, Baker, Baker* (for the defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

IVEAGH (EARL) *v.* MARTIN AND ANOTHER.

[QUEEN'S BENCH DIVISION (Paull, J.), May 9, 10, 11, 12, 13, 16, 17, 26, 1960.]

Real Property—Tenure—Ancient demesne—Tolls—Privileges of tenants in manor of ancient demesne—Exemption from toll for use of quay—Limits of privileges—Manor of Bosham—Who was entiled to privileges—Whether tenant of manor entitled to use quay and foreshore free of charge either for private purposes or in the course of his business of repairing boats.

Water and Watercourses—Navigation—Public right to navigate tidal waters—Quay on foreshore—Quay within port—Right of public to use quay for purposes incidental to navigation on payment of reasonable charge—Whether defendant, as member of public, entitled to use quay for repairing boats on payment of reasonable charge.

Licence—Licence to use quay for business of repairing boats—Whether seven days' notice to terminate use unreasonably short.

A tenant in ancient demesne is not privileged from paying toll where he trades as a common merchant (see p. 679, letter H, post); nor, where such a tenant is privileged from paying tolls for a particular ancient use of land, is there exemption in the lord of the manor entitling him to exact them (see p. 682, letter H, post).

Ward v. *Knight* ((1591), Cro. Eliz. 227) applied.

Truro Corpn. v. *Reynalds* ((1832), 8 Bing. 275) distinguished.

The plaintiff was lord of the manor of Bosham, a manor of ancient demesne. As lord of the manor he owned the foreshore adjoining the manor. On the foreshore there was a quay and parallel to the quay some piles were driven into the foreshore. Both the quay at Bosham and the piles were the property of the lord of the manor. Adjacent to the quay and running along the foreshore was a public road to which there was free access from the quay. Bosham and the sea channel on which it was situated lay within the port of Chichester; at all tides the channel was navigable beyond Bosham. The first defendant, who was born outside the limits of the manor of Bosham, carried on in Bosham the business of repairing and fitting out yachts and since he had no yard of his own, he repaired and fitted the yachts while they were moored to Bosham quay. In 1952 he formed a company (the second defendants) to carry on the business. From 1949 to 1954 he and his family lived on a motor boat which was moored to the piles. It was not known where he lived from 1954 to 1958 but, in March, 1958, he leased from the plaintiff a house situated within the manor of Bosham and he then became a tenant of the lord of the manor. From 1949 to 1954 the first defendant had paid the dues demanded of him for mooring his motor boat to the piles, but in 1954, when the plaintiff asked

A the defendants to pay £100 per annum for their use of the quay for commercial purposes, the defendants refused to pay this sum or any further sum for using the quay, which they continued to use. By letter dated Aug. 31, 1956, the plaintiff gave notice that unless the first and second defendants ceased using the quay or piles for any purpose within seven days of receiving the letter proceedings would be taken against them. By writ dated Nov. B 9, 1956, the plaintiff claimed from both defendants fees for the period Sept. 29, 1953, to Aug. 31, 1956, when the first defendant was not a tenant of the lord of the manor, in respect of using the quay and piles for tying up certain boats owned by the first defendant, hoisting on to the quay a yacht for repair, bringing a motor car on to the quay and using a mud berth on the foreshore for the first defendant's motor boat. C The plaintiff also claimed an injunction restraining the defendants from using the quay or piles in any way for any purpose. The first defendant contended that at common law or by custom he was a man of Bosham and as such was entitled to moor at the quay or piles, free of charge, any boat owned by him and, on payment of a reasonable charge, to use the quay for business purposes; alternatively, both defendants contended that D as members of the public they could use the quay and piles on payment of a reasonable fee. They further contended that the notice dated Aug. 31, 1956, was unreasonably short.

The phrase " men and tenants " of the lord of the manor of Bosham appeared in many old documents from a Close Roll of 1388 onwards to the charter of Bosham, 1607. In those documents the phrase was used to desE cribe those who were exempt from payment of, among other things, " toll ", and " passage " on their goods and property throughout the realm.

Held: the plaintiff was entitled to the fees claimed for 1953-56, for the following reasons—

(a) the first defendant was not at the relevant time (1953-56) entitled to the privileges of a " man of Bosham ", namely, those of the " men and tenants " F of the manor of Bosham that were recognised in the Close Roll of 1388 (and subsequent old documents), because, that manor being a manor of ancient demesne, the phrase " men and tenants " in the Close Roll referred to villein socmen and free tenants of the manor, who, not the inhabitants of Bosham, were the persons entitled to the privileges; therefore, in modern times, the " men of Bosham " entitled to the privileges were those only who G held land directly from the lord of the manor (see p. 677, letter B, post), and a lost grant conferring the privileges on a wider class of inhabitants would not be assumed (see p. 683, letter D, post).

Dictum of SHUTE, J., in *The Case of the Town of Leicester for Toll* ((1585), 2 Leo. at p. 191) not followed.

(b) the public right, as part of the rights of navigation in tidal waters, H to use the quay on payment of a reasonable fee, extended only to use in the course of embarking or disembarking or loading or unloading a vessel, or in the course of carrying out repairs to a vessel, if she had arrived in the ordinary course of navigation and if her repairing was necessary or desirable before she could resume her voyage (see p. 685, letter I, post); this public right did not extend to the use that the defendants actually made of the I quay, which was used for the purposes of a place of business, viz., repairing boats (see p. 686, letter B, post); moreover, as the quay was not such as gave the plaintiff a monopoly over the loading or unloading of goods at the port of Chichester, the tolls which the plaintiff might require were not limited by law to such a figure as the law might fix as being reasonable, but were such as the plaintiff might agree for the use of the quay (see p. 686, letter I, post).

Marshall v. *Ulleswater Steam Navigation Co., Ltd.* ((1871), L.R. 7 Q.B. 166) considered.

Eastern Counties Ry. Co. v. *Dorking* ((1859), 5 C.B.N.S. 821) and *Allnutt* A
v. *Inglis* ((1810), 12 East 527) applied.

(c) the length of notice (one week) given by the plaintiff to terminate the defendants' use of the quay and piles for their repairing business was reasonable, there being no evidence of any current contracts by the defendants for repairing boats (see p. 687, letter B, post).

(ii) the case was not one in which an injunction would be granted, but B
the court would be prepared to make a declaration (see p. 687, letter C, post).

(iii) as against the lord of the manor, the common law rights of a "man of Bosham" were permanently to moor his boat (or to have a mud berth) on the foreshore free of charge, if the boat were used primarily for the purpose of his own fishing, and to use the quay without payment for the
purpose only of embarking on to and disembarking from the boat or of un- C
loading fish from, or of placing fishing tackle on board, the boat, together with a right of mooring to the quay for reasonably short periods (see p. 683, letter A, post); these privileges did not extend to the use that the defendants made of the quay and piles, so that, even after the first defendant had become tenant of the lord of the manor (and, thus, a "man of Bosham")
in 1958, he was not entitled to free use of the quay or piles for the business D
purposes for which he actually used them.

[As to manors of ancient demesne, see 8 HALSBURY'S LAWS (3rd Edn.) 307, para. 550.

As to the right of anchoring and loading etc. as part of the public right of navigation, see 33 HALSBURY'S LAWS (2nd Edn.) 567, paras. 967, 968; and E
for cases on the subject, see 44 DIGEST 108, 109, *865-876*.]

Cases referred to:

Allnutt v. *Inglis*, (1810), 12 East, 527; 104 E.R. 206; 39 Digest 229, *80*.

A.-G. v. *Wright*, [1897] 2 Q.B. 318; 66 L.J.Q.B. 834; 77 L.T. 295; 8 Asp. M.L.C. 320; 17 Digest (Repl.) 8, *49*.

Case of the Town of Leicester for Toll, The, (1585), 2 Leo. 190. F

Crew v. *Vernon*, (1611), Moore, K.B. 818.

Denaby & Cadeby Main Collieries, Ltd. v. *Anson*, [1911] 1 K.B. 171; 80 L.J.K.B. 320; 103 L.T. 349; 11 Asp. M.L.C. 471; 44 Digest 106, *843*.

Eastern Counties Ry. Co. v. *Dorling*, (1859), 5 C.B.N.S. 821; 28 L.J.C.P. 202; 23 J.P. 470; 141 E.R. 329; 44 Digest 102, *816*. G

Gann v. *Whitstable (Free Fishers)*, (1865), 11 H.L. Cas. 192; 35 L.J.C.P. 29; 12 L.T. 150; 29 J.P. 243; 11 E.R. 1305; 13 Digest (Repl.) 21, *219*.

Goodson v. *Duffield*, (1612), Cro. Jac. 313; Moore, K.B. 830; 79 E.R. 268; 16 Digest 197, *1024*.

Marshall v. *Ulleswater Steam Navigation Co., Ltd.*, (1863), 3 B. & S. 732;
32 L.J.Q.B. 139; 8 L.T. 416; 27 J.P. 516; 122 E.R. 274; *on appeal*, H
(1865), 6 B. & S. 570, Ex. Ch.; *subsequent proceedings*, (1871), L.R. 7 Q.B. 166; 44 Digest 95, *756*.

Merttens v. *Hill*, [1901] 1 Ch. 842; 70 L.J.Ch. 489; sub nom. *Marttens* v. *Hill*, 84 L.T. 260; 65 J.P. 312; 13 Digest (Repl.) 5, *12*.

Minister of Health v. *Bellotti*, [1944] 1 All E.R. 238; [1944] K.B. 298; 113
L.J.K.B. 436; 170 L.T. 146; 30 Digest (Repl.) 540, *1747*. I

Truro Corpn. v. *Reynalds, Truro Corpn.* v. *Bastian*, (1832), 8 Bing. 275; 1 Moo. & S. 272; 1 L.J.C.P. 62; 131 E.R. 407; 33 Digest 45, *260*.

Ward v. *Knight*, (1591), Cro. Eliz. 227; 78 E.R. 483; 33 Digest 547, *295*.

Warn v. *Prideaux & Barton*, (1673), 3 Keb. 275; 84 E.R. 718; sub nom. *Warren* v. *Prideaux*, 1 Mod. Rep. 105; sub nom. *Prideaux* v. *Warne*, 1 Freem. K.B. 355; 2 Lev. 96; T. Raym. 232; 13 Digest (Repl.) 21, *213*.

A *Winter Garden Theatre (London), Ltd.* v. *Millenium Productions, Ltd.*, [1947] 2 All E.R. 331; [1948] A.C. 173; [1947] L.J.R. 1422; 177 L.T. 349; 2nd Digest Supp.

Action.

In this action the plaintiff, the Right Honourable Rupert Edward Cecil Lee, B Earl of Iveagh, the lord of the Manor of Bosham in the county of Sussex, claimed from the defendants, E. C. Martin, and Pedlar Garage, Ltd., the shares in which were owned by Martin and his family, fees which the plaintiff alleged were due from the defendants in respect of the mooring of boats to the plaintiff's quay at Bosham Harbour and to the adjacent piles and of the parking of motor cars on the quay from Sept. 29, 1953 to Aug. 31, 1956. The plaintiff also claimed an C injunction to restrain the defendants from mooring or tying up or causing to be moored or tied up, boats to the plaintiff's quay at Bosham Harbour and from parking motor cars or walking on the quay or permitting any other act of trespass on the quay or the piles and from making any use whatever of the quay or piles. The defendants were marine engineers whose main work was the fitting out and repairing of yachts. Bosham quay is built on the foreshore D alongside which runs the Manor of Bosham. The defendant Martin contended that at common law he was a man of Bosham and therefore entitled to moor boats and use the quay free of all charge; alternatively, that he and the defendant company were entitled as members of the public to use the quay and piles on payment of a reasonable fee. Both defendants further contended that a notice from the plaintiff dated Aug. 31, 1956, requiring the defendants within E seven days to cease using the quay and piles, failing which proceedings would be commenced for an injunction and fees due, was unreasonably short. The facts are fully set out in the judgment of PAULL, J.

R. E. Megarry, Q.C., *Anthony Harmsworth* and *T. S. Legg* for the plaintiff.
J. D. May for the defendants.

Cur. adv. vult.

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May 26. **PAULL, J.**, read the following judgment: The plaintiff is the lord of the Manor of Bosham. The Manor of Bosham is a manor of ancient demesne; that is, a manor which at the date of the death of Edward the Confessor was a royal manor. As is shown by the Quo Warranto Rolls of 1279 (7 Edw. I) and by the Close Roll of 1386 (9 Ric. II) the lord of the Manor of G Bosham enjoyed the liberty of the wreck of the sea. That liberty carried with it ownership of the foreshore since without that ownership the liberty could not be enjoyed. It follows that today the lord of Bosham Manor owns the foreshore alongside which his manor runs.

The defendant, Mr. Martin, belongs to an old Bosham family. Before the war he was a skipper of a private yacht, but since the war he has been a marine H engineer whose main work is the fitting out and repairing of yachts. He has no yard and has been accustomed to do his work on yachts while they have been moored to a quay (known as Bosham Quay) owned by the plaintiff as lord of the manor, or sometimes the yachts are beached on a hard constructed by the plaintiff on the foreshore at the end of a lane known as Bosham Lane, which runs down to the foreshore a short distance away from the quay. At all material I times the defendant owned a cabined motor boat called the Invader. The Invader is over sixty feet in length and from 1949 until 1954 the defendant lived in her with his family. Between 1954 and 1958 I do not know where the defendant lived, but on Mar. 7, 1958, he moved to a house called Canute House, Fishbourne, which house is on the Manor of Bosham. He took a lease from and became a tenant of the plaintiff as lord of the manor. The Invader was at all material times usually moored to certain piles driven into the foreshore and running roughly parallel to Bosham Quay at such a distance from it that a plank could be used to go from the Invader to an ex-torpedo boat which belonged to a sailing club and lay alongside the quay. The quay, the piles and the boats can be seen in a photograph which was exhibited. The piles are the property of the plaintiff, having been driven into the foreshore by himself or by a previous lord of the manor.

On Aug. 28, 1952, the defendant company was formed. Before that date the defendant had been in partnership with a Mr. Hutchinson, and during that time, and also in the early days of the company, the Invader, according to the defendant, had been lent to the partnership or to the company for the purpose of doing certain towing work. During that period the defendant paid the dues demanded of him for the right of mooring at the piles. According to the defendant, he paid those dues as he looked on the Invader as being, if not actual partnership or company property, property used by the partnership or the company. In 1953 such user ceased. Mr. Hutchinson left and the company became a family company, the shares being owned by the defendant and his wife. The Invader was then used solely for private purposes and principally as living accommodation. I am very doubtful whether the reason given by the defendant for paying dues is the true reason. I am inclined to think that up to 1954 it never struck the defendant that he had any right to refuse to pay dues. That fact does not affect his right to refuse, if he has that right. In 1954 the plaintiff considered that the defendant and his company ought to pay a reasonable sum in respect of the defendant's use of the quay for commercial purposes and proposed a payment of £100 per annum. Not only did the defendant object to this suggestion, but he then took up the position that he would pay nothing, either for the mooring of the Invader or for mooring any boat to the quay or for any other use of the quay, for example, for bringing lorries and cars on to the quay. He said proudly: "I am a man of Bosham, and men of Bosham have the right to moor and use the quay free of all charge." The result of this attitude on the part of the defendant was that ultimately, on Aug. 31, 1956, the plaintiff's solicitors wrote a letter to the defendants stating that unless the defendants refrained from making any use of the plaintiff's quay or piles at Bosham in the future, and gave a suitable undertaking in that respect within seven days, proceedings for an injunction would be issued, as well as for the amount alleged to be due from both defendants. In other words, the plaintiff gave seven days' notice to cease using the quay and the piles. The writ in this action was issued on Nov. 9, 1956.

The apparently simple claim by the defendant, Mr. Martin, that he claimed rights as a man of Bosham has resulted in a trial of eight days' duration, the great majority of that time being occupied in trying to ascertain what is a man of Bosham (if he exists) and what are his rights (if any). In addition, the question of public rights in relation to the quay and foreshore have had to be argued, and also the question whether the notice was a reasonable one. There is no suggestion that the defendant company can be a "man of Bosham", but both defendants claim that in any event they cannot be prevented from mooring vessels to the quay or foreshore, or otherwise using the quay, on payment of reasonable sums in respect of such use. On all these questions no less than forty-three text-books, cases and other authorities were examined during the hearing. I am greatly indebted to counsel for their learned and careful arguments.

I start with a short description of the geographical features which have a bearing on the case. Bosham is situated on Bosham Channel. Bosham Channel is an arm of the sea running off from Chichester Channel, which in its turn is an arm of the sea which, together with Emsworth Channel, enters from the sea through a comparatively narrow channel bounded by Black Point and East Head. These channels (together with Thorney Channel, which also runs inland off Chichester Channel) form a large area of almost locked water, the whole area being known as Chichester Harbour. Chichester Harbour is one of the ports of England and is officially known as the port of Chichester. Bosham and Bosham Channel are, therefore, within the port of Chichester. Bosham Channel at Bosham itself almost dries out at low water, uncovering a very considerable area of foreshore. It is, however, agreed that the channel is navigable to a point past Bosham at all states of the tide. It is admitted by the plaintiff that both Bosham Quay and the hard have been built on this foreshore. The quay is built more or less alongside a very narrow branch of the small permanent channel. The shape of the quay and the way it runs can be seen in two exhibits, the latter exhibit showing that if anyone walks or motors across the bridge at one end of the quay he at once and without let or hindrance comes on to a road built on the foreshore and known as Shore Road. Although this road is on the foreshore and covered at high tide, it is agreed that the road is a public road. Bosham Lane runs down towards this road. The hard, to which I have referred, has been built between Shore Road and where Bosham Lane ends at the foreshore. I mention Shore Road as an argument was adduced by counsel for the defendants founded on the fact that a public road runs to the beginning of the quay. Running parallel with Shore Road, but of course off the foreshore, is a row of cottages known as Mariners Cottages. These cottages are some way to the east of Bosham Lane. The defendant was born at No. 10. No. 10 is not now, and at no material time has been, a part of Bosham Manor. In one of the exhibits, an old map of the manor dated 1801, Mariners Cottages are on the land marked " Glebe Land " just below the two " ns " of the word " Bennett ", and No. 10 is about four hundred feet from the nearest land of the manor. Any claim by the defendant based on his being born on the manor would, therefore, fail.

For how long the quay or a quay has stood on the present site is quite unknown. The present steward of the manor described the quay as being modern, having been re-surfaced and re-sided. An old building known as the Rap Tackle on the quay is at any rate one hundred years old, and the old map of the manor shows the channel running to where the quay stands marked " Dock and Quay ". There is also on that map a little to the north of that channel an outline partly dotted jutting over the foreshore called " Old Quay ". That some form of landing place existed either at or quite close to the site of the present quay from a very early date I should think is almost certain. In so far as it is for the plaintiff to show (1) that there was no quay, or a landing place the equivalent of a quay, there in A.D. 1189, he has failed to prove that fact.

The claim by the plaintiff is twofold: first, a claim for £48 19s. for fees incurred by or due from the defendants; and second, a claim for an injunction against both defendants restraining them from using the quay or the piles in any way for any purpose. It is necessary to analyse to some extent the money claim, although I am not required to analyse the amount of each fee. I should state, therefore, that the fees can be divided into the following categories: (1) fees claimed in respect of boats (the Invader, a motor tender and a dinghy) owned by the defendant and tied up to the piles or the quay; (2) fees claimed for the use of the quay by hoisting a yacht, not belonging to the defendant or his company, on to the quay itself for the purpose of repair (this is claimed against both defendants, in the sense that the plaintiff says one or other is liable); (3) fees claimed for the use of the pier by a motor car and possibly a lorry brought on to the pier (whether the motor car was used in the business or as the personal car of the defendant, I do not know); and (4) a charge of one shilling for a " mud berth " on the foreshore used at some time by the Invader. So far as (1) and (4) are concerned, the defendant claims that he is under no liability to pay anything, as he has the right of free mooring; and so far as (2) and (3) are concerned, the defendants say that they have the right so to use the quay on payment of a reasonable sum.

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(1) Prescription at common law is based on presumed grant which the law may assume to have been made prior to the first year of the reign of Richard I (i.e., A.D. 1189); see 12 HALSBURY'S LAWS (3rd Edn.) 546.

I start by considering the phrase " a man of Bosham ". First, is there such a person as a man of Bosham at common law? If so, who is he and what are his rights?

When the Chichester Corporation Act, 1938, was before the House of Lords as a bill a petition was presented against the bill. One of the petitioners, who is now dead, was the quaymaster of Bosham Quay. Clause 9 of the petition states that the petitioners are fishermen and that they represent a number of persons and families most of whom have resided for generations in the ancient community of Bosham and whose livelihood has been earned in Chichester Harbour. Clause 10 states:

> " Your petitioners and in many cases their forefathers have been accustomed to place in Bosham Channel a number of moorings consisting of anchors, cables and floats for the purposes of mooring their vessels. Your petitioners have never paid for mooring charges for their vessels and they claim that they have acquired or have had handed down to them hereditary or prescriptive rights of free mooring."

I need not, I think, refer to any other part of the petition, except to say that the petitioners in effect petitioned the House to secure the recognition of their rights (inter alia) to free mooring.

The phrase " men of Bosham " does not appear in the petition, but, no doubt as a result of what happened on the petition being heard, in s. 28 of the Act of 1938, a man of Bosham is defined, and that person is given certain rights as against the Chichester Corporation. During the argument in this case the convenient phrase " a statutory man of Bosham " has been used with reference to such an individual. A man of Bosham is defined in the Act as a person who supplies the corporation with a certificate from two justices of the peace that he has established that he was born at Bosham and prior to Dec. 1, 1937, earned a livelihood in fishing, yachting or boating in Chichester Harbour or is a person who proves that he is a lineal descendant of such a person. A person, however, only remains a man of Bosham for the purposes of the Act so long as he earns a livelihood by fishing, yachting or boating in the harbour of Chichester and resides in Bosham. The last subsection [(5)] of s. 28 enacts that nothing in the Act affects prejudicially any right, privilege or exemption of any man of Bosham conferred under and by virtue of certain letters patent granted in the fourth year of the reign of King James I. This document is the Bosham Charter, to which I shall refer later. Section 27 of the Act expressly enacted that nothing in the Act should adversely affect any rights of the lord of the Manor of Bosham in respect of the foreshore, the quay or the harbour.

I have no hesitation in saying that the phrase " a man of Bosham " has been known for many centuries as a phrase used to cover persons who enjoyed particular rights not enjoyed by those who did not come within that phrase; but, quite apart from the matter of a certificate, I have no hesitation in saying that the definition of the statutory man of Bosham is not a definition which can be attached to the title at common law.

As long ago as 1388 there is a reference to the men of Bosham. In the Close Roll of that year (11 Ric. II) there appears this entry:

> " Order to suffer all the men and tenants of Margaret Mareschall Countess of Norfolk of the manor of Bosham County of Sussex . . . to be quit of payment of toll and other customs upon their goods, properties and wares as they ought to be and they and their ancestors used ever heretofore to be for time out of mind; as the said men etc. ought to be quit of toll, stallage, cheminage, portage, pavage, murage and passage throughout the realm."

From then onwards the phrase " men and tenants " appears in many documents (see Close Roll 1 Henry IV; Close Roll 2 Henry IV; Bosham Writ of the latter half of the sixteenth century; and the Charter of Bosham of 1607). I shall refer to these documents collectively as the old documents.

Counsel for the defendants has submitted that the word " men " used in these old documents must be interpreted as " inhabitants ". He has referred me to *The Case of the Town of Leicester for Toll* (2), decided in 1585. In the course of that case Shute, J., expressed the opinion (3) that " an inhabitant within ancient demesne, although he be not tenant shall have the privileges ". For that proposition Shute, J., relied on a statement in Fitzherbert's The New Natura Brevium, Vol. 2, at p. 228 B. But there Fitzherbert is only pointing out that the writ of quit of toll can be sued by each one personally as opposed to the writ of monstraverunt which must be taken out by all the tenants collectively. On p. 228 A of Fitzherbert, however, are set out the forms of certain writs of quit of toll. In the first form it is stated:

> " . . . we command you, that you by no means distrain the men of our manor of S. (if that manor be of the ancient demesne of the crown of England) to yield toll to you . . ."

In the second form the words are:

> " . . . whereas according to the custom of our realm hitherto, etc. obtained and approved, the men and tenants of the ancient demesne of the crown of England are and ought to be quit of yielding toll throughout our whole realm; nevertheless, you grievously distrain the men and tenants of the manor of S. which is of the ancient demesne of the crown of England . . ."

Counsel for the defendants has urged that Shute, J.'s words show that at any rate in the reign of Queen Elizabeth I it was recognised that the men of Bosham included at least all the inhabitants of the manor, and that the defendant, Mr. Martin, was at all material times within that category, even when he occupied the Invader which was attached to the piles belonging to the lord of the manor. Counsel also relied on a history of the Manor of Bosham written by one John Smyth, the steward of the manor in 1637. On p. 16 of that history Mr. Smyth says:

> " Also the inhabitants within this manor are free from the payment of any manner of tolls, passages, and carriages throughout England."

It is clear, however, that he is relying on the Close Roll of 1388 (11 Ric. II), to which I have already referred, and one must see what the expression " men and tenants " meant in that document at that time.

I reject the argument that the meaning in that document can be enlarged because later it was interpreted as covering a class who were not covered at the time the document came into existence although that class was in existence. The analogy used by counsel for the defendants of the word " carriage " used in an old statute being enlarged to cover a motor car is, in my judgment, a false analogy, since motor cars were not in existence when the word " carriage " was used, and the question, therefore, there, is whether the new type of vehicle is a carriage. The true analogy would be that at the time of the enactment " carriage " did not cover " cart ". If that were so, " carriage " could never cover " cart ".

I cannot give the word " men " the meaning contended for by counsel for the defendants. One starts from the fact that the occupiers of land of a manor normally fell into two classes. The freemen of the manor held by free tenure; they were the " freeholders ". The villeins held by unfree tenure. The villeins later became the copyholders. Coke Upon Littleton (Vol. 1), ch. 9, at p. 58a says:

> " There is no tenant in the law that holdeth by copie, but only this kind of customary tenant."

Later in the chapter he says:

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(2) (1585), 2 Leo. 190.

(3) (1585), 2 Leo. at p. 191.

> " Copyholders are but villeins who by long encroachment on the lord have established a customary right to the estate." A

Both before and immediately after the Norman Conquest freemen and villeins both held by virtue of having to render services, but although the services required from the villein might in certain circumstances be of the same nature as the services required from the freeman, the villein's land still remained " parcel of the manor ". B The legal conception of villeinage has its roots not in the connexion of the villein with the soil but in his personal dependence on the lord (VINOGRADOFF, VILLAINAGE IN ENGLAND (1892), at p. 44). The villein was subject to the law of the lord of the manor, his court being presided over by the lord or the lord's steward who dispensed justice according to the custom of the manor, whereas the freemen had the right to have the King's law, that is, the common law, applied. C As it is said in HOLDSWORTH'S A HISTORY OF ENGLISH LAW (Vol. 3), at p. 30:

> " . . . in later law [i.e., at about the end of the thirteenth century] so soon as it was admitted that the services were villein services, the courts of common law would have inquired no further."

In the Year Book 20/21 Edw. I, p. 41, it is stated that a villein holding is land D held at the will of the lord, without any certainty as to title or term of enjoyment, as to kind or amount of services (4). And VINOGRADOFF says (5) there can be no question of his having any legal " ascription " to the soil (that is being irremovable by the lord).

All this leads one to the conclusion that the use of the word " tenant " in the Close Roll of 1388, of Richard II covered only the free men holding by free E tenure. The use of the word " men " was necessary to cover some other class. To discover what other class it is necessary to consider the way in which a manor of ancient demesne differed from an ordinary manor.

In a manor of ancient demesne (and only in such a manor) there were not only two kinds of tenure. There was a third kind of tenure held by a class of persons known as villein socmen. F Although villein socmen were villeins, they had many of the rights of a freeholder, including the right of appealing to the common law administered by the King's court if the customary law as administered by the lord of the manor or his steward was thought to disregard their title or their rights or privileges. Although this is so, yet in many ways they still remained villeins with only the villein's rights. The villein socmen are described by BRACTON as being privileged villeins because their services were certain and they G were protected not by the usual remedies at common law but by peculiar writs which enforced the custom of the manor. If a freeman was wrongly deprived of his holding he had the Great Writ of Right Patent. The villein socman in such circumstances had the Little Writ of Right Close. Further, if there was any attempt to infringe the rights or increase the duties of the villein socmen of a manor of ancient demesne they had the right (collectively in the first place) to a H writ of monstraverunt, which was a complaint to the King that their rights had been infringed. Nevertheless, as COZENS-HARDY, J., said in *Merttens* v. *Hill* (6):

> " . . . copyholders in an ancient demesne manor, like other copyholders, are merely to be considered as occupying a part of the lord's demesne, and do not hold of the manor."

I

In my judgment, it is this class, the villein socmen, who are covered by the word " men " in the phrase " men and tenants ". At p. 112 of his book VILLAINAGE IN ENGLAND (1892) VINOGRADOFF says:

> " Blackstone speaks of privileged copyhold as descended from privileged villeinage; and as to the condition in the thirteenth century of those

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(4) See VINOGRADOFF, VILLAINAGE IN ENGLAND (1892), p. 77, footnote 2.

(5) Ibid., at p. 47.

(6) [1901] 1 Ch. at p. 583.

> 'men' or 'tenants in ancient demesne' of whom we have been speaking, there can be no doubt."

VINOGRADOFF also says (at p. 112) that BRACTON lays down that their tenure is villeinage, though privileged villeinage. The men of ancient demesne, says BRACTON, are men of free blood holding in villeinage. BRACTON'S words are: "Liberi de condicione . . . tenantes villenagium". In my judgment, men and tenants in the Close Roll of Richard II, as in the form of the writs set out at p. 228 A of Vol. 2 of FITZHERBERT'S THE NEW NATURA BREVIUM, meant villein socmen as well as freeholders. No doubt once the early Norman and Plantagenet times had passed the distinction between these two classes, and indeed the distinction between these two classes and the copyholders, largely disappeared, although the phrase "men and tenants" persisted. In my judgment, it was then used to cover the tenants of the manor generally. I see no reason to suppose that the phrase achieved in the common law any wider meaning.

"The men of Bosham" is a phrase which has been handed down from generation to generation with some pride. I limit its common law meaning as including only those who hold land directly from the lord of the manor. It follows that, with regard to the period in respect of which money payments are sued for by the plaintiff, the defendant was not a man of Bosham. But as he is now a man of Bosham (7), and an injunction is sought against him, it is necessary to consider his rights now as a man of Bosham. Indeed, I have been expressly asked to do so by both parties.

One has, therefore, to consider what if any are the present-day rights of a man of Bosham. By the Charter of Bosham of 1607 it was declared:

> "To all and singular sheriffs, mayors, bailiffs, constables, officers and all other faithful subjects as well within or without our liberties to whom these present letters shall have come, greeting. Whereas according to the custom of our realm of England hitherto held and approved men and tenants of the ancient demesne of the Crown of England are and ought to be free of toll, panage, murage, carriage and passage throughout our realm of England . . . and because the manor of Bosham with its appurtenances in the County of Sussex is of the ancient demesne of our Crown . . . we enjoin and command you one and all that you permit all and singular the men and tenants of the manor of Bosham aforesaid to be exempt from such toll, passage, murage, carriage, passage of goods or his effects warranted throughout our whole realm aforesaid."

This Charter is the last of the old documents (8). The earlier documents were worded very much the same, although the rights declared are not precisely the same rights as were declared in the Charter: compare the wording of the first of them, the Close Roll of Richard II, which I have already read (9). Each of the old documents is declaratory of existing rights and, in so far as the Charter purports to declare rights which are narrower than the rights declared in any earlier document, or narrower than rights which existed apart from the documents, it is clear that the Charter does not put any limitation on those wider rights: see *Crew* v. *Vernon* (10) which decided among other matters that prescription was not determined by a new grant, but the new grant acts as a confirmation and so the right and title by prescription always remains; see also *Goodson* v. *Duffield* (11). One has therefore to see what rights attached to the men and tenants of ancient demesne in the days even earlier than Richard II.

It is interesting to see the way in which the ancient rights of a manor of ancient demesne are put by Coke in his Institutes. At p. 542 of Vol. 2 of the second part of Coke's Institutes it says as follows:

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(7) The defendant, Mr. Martin, became a man of Bosham on Mar. 7, 1958, when he became the tenant of the plaintiff as lord of the Manor of Bosham; see p. 671, letter I, ante.

(8) The documents referred to as the "old documents" are stated at p. 674, letter I, ante.

(9) See p. 674, letter I, ante.

(10) (1611), Moore, K.B. 818.

(11) (1612), Moore, K.B. 830.

> " . . . it shall not be impertinent nor unnecessary to learn from antiquity, how, and in what sort the King's household was in those days provided of victuals: certain it is, that as well before as after the conquest, the King upon his ancient demesnes of the crown of England, had houses of husbandry, and stocks for the furnishing of necessary provisions for his household; and the tenants of those manors did by their tenures manure, till etc. and reap the corn upon the King's demesnes, mowed his meadows, etc. repaired the fences, and performed all necessary things belonging to husbandry upon the King's demesnes: in respect of which services, and to the end they might apply the same the better [—I stress these words—] they had many liberties and privileges . . ."

Among the liberties and privileges stated by Coke (ibid.) are that they should not pay any toll etc., and then Coke continues (on p. 542),

> " which liberties and immunities continue to this day, albeit the original cause thereof is ceased."

A great deal of discussion and argument took place before me with regard to the meaning of the word " toll ". Counsel for the plaintiff insisted that in early medieval times the word covered only the right to take money in respect of things bought and sold in markets and fairs. In Termes de la Ley (1721), at p. 561, toll is described as payment used in cities, towns, markets or fairs for goods and cattle bought thither to be bought and sold. Counsel for the defendants contended for a much wider meaning.

Clearly the men and tenants of Bosham were quit of many payments in addition to payments at markets and fairs. The word " passage " which occurs in the old documents means strictly passage over water, " way " being passage over land (see Tomlin's Law Dictionary of the British Law (3rd Edn.), Vol. 2). Lords of manors had a prescriptive right to exact a toll in respect of goods which were brought over the water and landed on a quay which was repaired and kept by the lord of the manor. The headnote in *Prideaux* v. *Warne* (12) states:

> " Prescription to repair a quay, and to have toll of all goods brought within the river, naught; aliter of all goods landed within the manor."

The claim in that case was that the plaintiff having from time out of mind had and repaired a quay within the manor on the river of Padstowe had the right to levy toll on all goods brought into the river. It was adjudged that he had the right of toll for all goods landed within the manor even though they were not landed at the wharf, but no right to levy toll unless the goods were so landed. In the course of his judgment Hale, C.J., said (13):

> " If a man will prescribe for a toll upon the sea he must allege a good consideration."

When one considers that the manor of Bosham was by the sea, and fish were no doubt part of the provisions the men and tenants were expected to provide when the manor was a royal manor, it is difficult to see why the words used in the old documents are not wide enough to cover freedom from toll when bringing boats alongside any quay and landing fish and goods, in so far at least as the goods might have helped, when the manor was a royal manor, to achieve the object set out by Coke. A number of authorities (14) were quoted to me to show that the word " toll " was used in medieval times sometimes narrowly, sometimes widely. I can find nothing in them to suggest that the proper interpretation of " toll " in this particular case is narrower than that which I have indicated.

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(12) (1673), 2 Lev. 96. (13) Sub nom. *Warren* v. *Prideaux*, 1 Mod. Rep. 105.

(14) See *Brett* v. *Beales* (1829), Mood. & M. 416; *Middleton (Lord)* v. *Lambert* (1834), 1 Ad. & El. 401; *Hill* v. *Priow* (1679), 2 Show. 34; and *Wood* v. *Hawkshead* (1602), Yelv. 14.

I have not got to decide how far any right may extend today throughout the kingdom, although clearly where any such right comes into conflict with the right to charge granted by an Act of Parliament the right given by the Act would prevail over any ancient right not to pay dues; but there are, in my judgment, at common law, as evidenced by the old documents, some rights attached to the tenants of the Manor of Bosham in connexion with bringing boats into some harbours and landing on some quays without paying toll. Some of the witnesses called before me on behalf of the defendants claimed that it was the right to land any goods in any dock or quay throughout the kingdom without charge. One of them stated that this right was recognised, for instance, at Littlehampton. Another of the witnesses went so far as to say that, even if he became very wealthy and bought a large yacht, or if he ran a large ship or ships as a business, he could still claim the right. The extent of the right is far less than the witnesses supposed.

In order to understand why this is so it is necessary to consider two matters. The first is that the whole conception of the right of freedom from toll is based on the provision of victuals for the King's household by individual men. In so far as fish was concerned, they would be expected to have and use some form of fishing boat. It seems to me that in the same way as the right to be free from market tolls seems to have arisen from the sale of produce for the purchase of manure or in some other way to enable the men of royal manors the better to cultivate the land which was used to grow victuals for the King's household, so would the right to bring their boats into quays and shores be connected with the need to catch and supply fish for the royal household.

When in the middle ages commerce in the modern sense of the word started to be more common questions arose how far tenants of ancient demesne were quit of toll when they came into the market to buy and sell commercially, whether they were free for all goods bought and sold by way of merchandise or only for the buying and selling of such produce and things as concerned his land held in the manor. Fitzherbert took the view that the tenants were entitled to be quit of toll for all goods and chattels which they merchandised with others (see Fitzherbert's The New Natura Brevium (Vol. 2), at p. 228, A). Coke, on the other hand, says:

> " Tenants in ancient demesne, for things coming of those lands shall pay no toll, because at the beginning by their tenure they applied themselves to the manurance and husbandry of the King's demesnes, and therefore for those lands so holden, and for all that came or renewed thereupon they had the said privilege: but if such a tenant be a common merchant for buying and selling of wares or merchandises, that rise not upon the manurance or husbandry of those lands, he shall not have the privilege for them, because they are out of the reason of the privilege of ancient demesne, and the tenant in ancient demesne ought rather to be a husbandman than a merchant by his tenure, and so are the books to be intended."

Coke then sets out an ancient record which, he says, supports his statement (see Coke's Institutes, Vol. I of the Second Part at p. 221). *Ward* v. *Knight* (15) supports Coke. The headnote is:

> " A tenant in ancient demesne shall not be privileged from paying toll where he trades as a common merchant."

The court apparently in that case gave no public reason but privately agreed among themselves that that was the law. I follow Coke. One has, of course, to apply to this case an analogy from the position with regard to produce from land. Applying that analogy, in my judgment, the common law limits any right of a tenant of the Manor of Bosham to be quit of passage and toll to the right in respect of a boat owned by himself and used primarily by him for the purpose of his fishing. This view seems to be borne out by the evidence before me. The oldest of the witnesses for the defendants, indeed, the only witness over sixty years of age called by the defendants, said that it was those who lived in Bosham and went fishing who tied up for nothing; and when that witness said

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(15) (1591), Cro. Eliz. 227.

> " We had free mooring down the harbour and sometimes left the boat at the quay or the piles for the night without paying ",

he was clearly referring to the boat which was owned by his grandfather when he, the witness, was young and which was used for fishing by his grandfather.

Bosham Quay is no longer used commercially, but it was so used up to quite recent times. In 1851 the lord of the manor, Rear-Admiral Berkeley, leased the tolls and fees payable in respect of the quay to a Mr. Martin. There is a schedule to that lease setting out the quay regulations to be observed by all masters of vessels whatever trading (I stress the word " trading ") to the quay of Bosham. There is no exception in favour of any man of Bosham, except that one of the items reads: " Manure (except to the tenants of Maurice Frederick Fitzharding Berkeley) ". That exception may be based on an Act affecting tolls for manure, but it is interesting to notice that only manure for the tenants of the lord of the manor was excepted. There were apparently no tolls other than for trading. Counsel for the plaintiff has drawn my attention to the fact that the regulations state: " Great damage having been done by light vessels lying alongside the wharf, all vessels lying there light or coming alongside for repair are to pay weekly one penny per ton ". That, however, I think must be read subjectam materiam as being intended to refer to trading vessels.

I also have before me " A table of Harbour dues payable to the lord of the manor of Bosham on ships and vessels using the quay mooring and foreshore and on all goods and merchandise landed in or exported from the said manor ". The date of that document is 1900. In that document, under " tonnage dues ", all vessels except Bosham fishing craft using the quay to discharge cargo have to pay one penny per ton. All light vessels except Bosham fishing craft moored at the quay are to pay one penny per ton per week. There is a similar exception with regard to vessels using the foreshore for repairs. Bosham fishing craft using the foreshore are to pay one penny per year as an acknowledgment of the right of the lord of the manor of Bosham, and Bosham fishing craft using the quay are to pay one penny per ton per three weeks. From my point of view, I do not think that this document helps very much. There is no definition of " Bosham fishing craft ". The defendant, Mr. Martin, can use it as showing that there was at least an exception for Bosham fishing craft using the foreshore, while the plaintiff can use it by showing that there appears to be no special exemption for a man of Bosham as opposed to fishing craft being used at Bosham.

There is, I think, no doubt but that in the course of centuries the whole question of the rights of a man of Bosham have become confused, but, as I see it, that is no reason why a man of Bosham should not demand such rights as he has. In the case of the Manor of Brimsgreen and Norton, referred to in Coke's Institutes, Vol. 2 of the Second part, at p. 654, toll had wrongfully been taken from the men of Brimsgreen and Norton " time out of mind ", indeed, from before the Norman Conquest, but nevertheless the men of Brimsgreen and Norton succeeded in their action to resist the toll. As the sidenote says: " Note. A possession [of toll] beyond time of memory shall not stand, but give place to law."

Counsel for the plaintiff then takes the point that, in any event, the rights declared in the old documents could not be rights against a man's own lord of the manor. He points out that the lord of the manor, as is shown by the Close Roll of 9 Richard II, enjoyed the same liberties and quittances as his men and tenants with regard to toll. He argued that the writ of quit of toll would never lie against a man's own lord of the manor, and the writ of monstraverunt was a writ only available if the lord exacted more services than he was entitled to exact. Counsel for the plaintiff argued that this latter writ had nothing to do with whether or not the lord of the manor exacted tolls from his men and tenants. I do not think that this argument can prevail. It is quite true that the writ of monstraverunt was a writ which was restricted in its use. It was restricted to the exaction of increased services and change of customs (see VINOGRADOFF, VILLAINAGE IN ENGLAND (1892), p. 101). VINOGRADOFF quotes (16) from the Stoneleigh Register, wherein it is written (I translate from the Latin):

> "If a lord exacts from his socmen tenants other customs than were wont to be done when the manor was in the hands of the ancestors of the King . . . the tenants have the right to recover against the lord by a writ of the King which is called monstraverunt."

I should have thought that it was reasonably clear that when the Manor of Bosham was a royal manor and the villein socmen were using their boats to provide the royal household with fish they would certainly not have toll taken of them for permanently keeping their fishing boats on the demesne, that is, on the foreshore of the manor, or for bringing their catch to the customary landing place, or loading their tackle from the landing place or leaving their boats for a short time at the landing place.

There is no suggestion in any of the documents that I have seen that the right to be quit of toll had an exception in favour of the lord of the manor, and I should have thought it clear that if a lord of the manor attempted to alter the custom of the manor by trying to make the men and tenants pay for landing at the landing place, even if he built a quay, or keeping their boats on the foreshore, it would be a clear case where the villein socmen would have the right to a writ of monstraverunt. VINOGRADOFF in discussing the position of the villein socmen says (VILLAINAGE IN ENGLAND, pp. 92, 93, 94):

> "They are free from toll in all markets and customhouses . . . On the other hand, they are liable to be tallaged by the King without consent of Parliament, by virtue of his private right as opposed to his political right . . . when ancient demesne land had passed from the crown to a subject [the] rule was, that the new lord could not tallage his tenants unless in consequence of a royal writ . . . This was an important limitation of the lord's power, and a consequence of the wish to guard against encroachments and arbitrary acts . . . The King does not want his land and his men to be subjected to any vexatious burdens which would lessen their power of yielding income . . ."

It must always be remembered that the King might re-possess himself of a manor of ancient demesne and therefore took care to see that if he did so the estate would not be in any way diminished in value (17).

"Tallage" is defined in COKE'S INSTITUTES, Vol. 2 of the Second Part at p. 532, as follows:

> ". . . to share or cut out a part, and metaphorically is taken when the King or any other have a share or part of the value of a man's goods or chattels . . . or puts any charge or burden upon another."

In TOMLIN'S LAW DICTIONARY OF THE BRITISH LAW (3rd Edn.), Vol. 2, it is stated:

> "Tallage, Is metaphorically used for a part or a share of a man's substance carved out of the whole, paid by way of tribute, toll or tax."

I see no reason why it should not be applied to tolls generally, and if that be so, it would require a royal writ (of which there is no evidence) before toll could be exacted by the lord of the manor from his men and tenants.

In POLLOCK AND MAITLAND'S HISTORY OF ENGLISH LAW (2nd Edn.), Vol. 1, at p. 388 it is stated that the writ of monstraverunt

> "begins with the word 'Monstraverunt'. The King addresses the lord:—

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(16) See VILLAINAGE IN ENGLAND (1892), p. 101, footnote 2. (17) Ibid., at p. 107.

> A, B and C men of your manor of X, which is of the ancient demesne of the crown of England, have shown us that you exact from them other customs and services than those which they owe, and which their ancestors did in the time when that manor was in the hands of our predecessors, kings of England."

As Pollock and Maitland also say (18):

> " . . . the transfer of a lordship . . . should not affect the position of the tenants; . . . as regards them, their rights and duties, the manor is still conceived as part of the royal demesne."

Counsel for the plaintiff referred me to *Truro Corpn.* v. *Reynalds* (19). The material part of the headnote of that case reads as follows:

> " The Corporation of [Truro] having proved a prescriptive right to tolls, . . . Held, that this exemption applied to the tolls of all other places (except London) but not to the tolls of [Truro]."

Truro was not a manor of ancient demesne. The inhabitants of the Borough of Truro claimed exemption from tolls levied by the Corporation of Truro under a charter of Queen Elizabeth I. That charter stated that the men of Truro had endeavoured to preserve the port of Falmouth and granted to the inhabitants to be incorporated by the name of the Mayor and Burgesses of the Borough of Truro; it also stated that the burgesses and inhabitants of the borough and their survivors should be free of tollnet, passage, pontage, murage (and a number of other tolls) throughout the whole kingdom of England except the City of London. It was in those circumstances that the court held that the exemption from toll did not apply to tolls of the borough itself. It was pointed out by Tindal, C.J. (20), that if that was the meaning of the charter, then who was to repair the bridges and the walls of the town? He said (20):

> " . . . upon looking at the words accurately, it is plain they cannot relate to duties within the Borough of Truro. ' Shall be free of tollnet, passage '—that must mean passage over the lands of others, for it is not probable they should have paid toll for passing over their own lands."

Park, J., said (21):

> " I agree in the correctness of the construction put by the chief justice on the general clause of exemption in the charter. It would be absurd to suppose the inhabitants exempted from duties which must have been granted to the corporation to enable them to keep up the necessary repairs of the town."

The case of a manor of ancient demesne is quite different. The lord of the manor in endeavouring to levy toll would be exacting something which he had no right to exact unless either the King had exacted it when it was a royal manor or he had a royal writ to warrant him doing so. Further, the exemption from toll came before the grant of the manor to the lord. I can find no satisfactory reason why an attempt to exact tolls should not have been restrained by a writ of monstraverunt, and that being so, I see no satisfactory reason for thinking that there was an exemption in favour of the lord of the manor with regard to the levying of tolls against the men and tenants of the manor.

To sum up this part of my judgment: doing the best I can to translate the rights of the common law man of Bosham, that is, the tenant of the lord of the manor of Bosham, into modern day form, and bearing in mind not only the documents which I have seen and the law of medieval times, but also the evidence which I have heard on what has been the practice heretofore, I hold that his rights, so far as the lord of the manor is concerned, are that he has the right permanently to moor a boat owned by himself and used primarily for the purpose of his fishing on the foreshore (or to have what I believe is called a mud berth) free of charge, and to use the quay without payment for the purpose, and only for the purpose, of embarking on to and disembarking from such boat or of unloading fish from such boat and of placing fishing tackle on board such boat. He further has the right to keep such boat moored to the quay for reasonably short periods, but not longer than a reasonable period between two consecutive tides if he decides to fish on each of such tides.

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(18) See History of English Law (2nd Edn.), Vol. 1 at p. 397.

(19) (1832), 8 Bing. 275.

(20) (1832), 8 Bing. at p. 282.

(21) (1832), 8 Bing. at p. 284.

Counsel for the defendants endeavoured to widen the meaning of the phrase " men of Bosham " by saying that there was, so to speak, a customary man of Bosham in addition to a common law man of Bosham, and that the evidence which he has called showed that an inhabitant of Bosham who earns his livelihood in connexion with boats afloat in Chichester Harbour and whose father and paternal grandfather were also inhabitants of Bosham and earned their livelihood in the same manner had the rights which I have so far limited to the tenants of the manor. I think there is a very short answer to that contention. Even if his evidence prima facie shows such a custom going back for a considerable period in favour of some defined wider class of person (and I do not think that he has shown this) nevertheless it is necessary before custom is proved to assume a lost grant to that effect in existence in A.D. 1189, (22). Here there can be no such assumption. We know from the old documents that any rights in 1189 were the rights of what I have termed the common law man of Bosham. I refuse to assume, with that knowledge, that there was a further grant giving to some other class of inhabitants these rights as well as to the men and tenants. I have already rejected the argument that the word " men " means inhabitants. I think that this mistaken interpretation of the word " men " has been the cause of much of the confusion which has arisen locally.

I now come to quite a different part of the case. Counsel for the defendants contends that, quite apart from any special rights, both the defendant and his company have the right as members of the public to use the quay and the piles on payment of a reasonable fee. Counsel says that the quay is a quay built, and the piles are piles driven in, on the foreshore in the port of Chichester. That being so, says counsel, the public have the right to use the quay and the piles for all purposes incidental to navigation. That includes the right to tie up for the purpose of having repairs done and the right for any person to use the quay for the purpose of effecting repairs. The owners of the boats being repaired by the defendants, says counsel, tie up for repairs and the defendants use the quay to enable them to effect those repairs. Quite apart from that, says counsel, if any person chooses to own a wharf in a port there is a right by the public reasonably to use that wharf on payment of a reasonable fee.

I start this part of the matter by considering the position without reference to the fact that Bosham is in the port of Chichester. There is a right to navigation over all tidal waters, even where at certain states of the tide the water may disappear from the particular place where the navigation is taking place. This right includes all rights necessary for the full enjoyment and exercise of the rights of convenient passage, including to anchor, to remain for a convenient time for the purpose of loading and unloading or completing repairs or of waiting until the wind and weather permits the ship to leave. Because of this right of navigation, no tolls may be taken by the owner of the bed of the sea or the foreshore for anchoring save in a port or harbour (*Gann* v. *Whitstable* (*Free Fishers*) (23)).

So far as these rights are concerned, it must always be remembered that they are rights attached to navigation and that the rights of navigation are analogous to the rights of the public on a highway on land; that is to say, the right of coming and going and doing those things incidental thereto. On a highway I may stand still for a reasonably short time, but I must not put my bed on the highway and permanently occupy a portion of it. I may stoop to tie up my shoelace, but I may not occupy a pitch and invite people to come on it and have their hair cut. I may let my van stand still long enough to deliver and load goods, but I must not turn my van into a permanent stall. In the same way, so far as navigation is concerned, I may have to wait for a favourable wind; I may have to load or discharge cargo, and I may have to do repairs necessary or desirable before again setting out to sea, but I may not permanently occupy a part of the water over a foreshore even if I am doing something which incidentally assists the navigation of others (*Denaby & Cadeby Main Collieries, Ltd.* v. *Anson* (24) where the claim was to moor a hulk in a public harbour for the supplying of coals to vessels). The right to have a permanent mooring is doubtful. Lord Esher, M.R., and A. L. Smith, L.J., in *A.-G.* v. *Wright* (25) seem to say there is the right (although it may be that the judgments are based on a custom proved in the case), while Fletcher Moulton, L.J., in the *Denaby* case (24) and Blackburn, J., in *Marshall* v. *Ulleswater Steam Navigation Co., Ltd.* (26) (to which I shall refer later) strongly indicate the contrary. I should have thought that the latter was the right view. As was said many years ago: " A man may not use the highway to stable his horse ".

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(22) See p. 673, footnote (1), ante.

(23) (1865), 11 H.L. Cas. 192.

These being the rights of those who navigate vessels, one next has to consider the position if the owner of the foreshore erects on the foreshore, and therefore at a place where there would otherwise be navigable water at certain states of the tide, a permanent building such as a quay. It seems to me that the rights of navigation which the public possess result in their having two rights in relation to such a quay. In the first place, in a proper case they may have the right in an action properly constituted to obtain a mandatory injunction ordering the owner of the quay to remove the quay on the ground that it seriously interferes with their rights of navigation. I add that I can see no evidence to suggest that in this case such a cause of action exists. With regard to the second right, one has, I think, to consider the land which lies beyond the quay. A part of the rights of navigation is, in my judgment, the right to land on or embark from any part of the land adjoining the foreshore, but only if there is the right to go on that land. If the quay on the foreshore obstructs that being done, then there is the right to go on the quay on payment of a reasonable toll in order to reach that land or reach the vessel.

Counsel for the defendants strongly relied on *Marshall* v. *Ulleswater Steam Navigation Co.* (26). In that case the facts are lengthy, but it is important to understand them in order to understand the judgment. One A. who owned land adjoining Ulleswater Lake entered into an agreement with the defendants granting them a right of way through one of his fields between a public road and pier which A. built. Later A. granted to the defendants a lease of the ground adjoining the latter. The pier was constructed by A. and paid for by the defendants, but part of the pier was constructed on the bed of the lake and that bed was part of the freehold of the plaintiff. The plaintiff brought an action of trespass, alleging that the defendants caused persons to pass and re-pass over the pier and therefore trespassed on the soil of the bed of the lake which was his property. The vessels in question also loaded and unloaded on water which was over the soil which belonged to the plaintiff. One of the facts found was that the waters of the lake were so shallow where they adjoined the land leased to the defendants that the defendants could not bring their steamboats near enough to embark or disembark their passengers directly on their land. The action failed. Blackburn, J., based his judgment on the fact that the public had the right of highway over the lake and stated (27) that it was well established law that where there is a public highway the owners of land adjoining thereto have a right to go on the highway from any spot on their own land. Consequently, said the learned judge, every person in the vicinity of Ulleswater whose land abuts on the edge of the lake has the right to come down to the brink of the water for the purpose of exercising the public right of navigation. If the water is too shallow to bring his vessel to the point where he can step on it from the land, he has the right to pass over or through any part of the water which lies between his land and his vessel even if the ownership of the bed of the water is in another. The learned judge says (28):

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(24) [1911] 1 K.B. 171; 11 Asp. M.L.C. 471.

(25) [1897] 2 Q.B. 318; 8 Asp. M.L.C. 320.

(26) (1871), L.R. 7 Q.B. 166.

(27) (1871), L.R. 7 Q.B. at p. 172.

> " . . . therefore, the rule of law is, that the owner of the adjoining land, and those whom he permits to go thereon, have a right to cross to and from their vessels by either wading or walking over a plank, but that they have no right to disturb the soil covered with water, as by permanently fixing anchors."

BLACKBURN, J., then comes to the conclusion that the pier having been built by the defendants wrongfully on the plaintiff's soil the plaintiff might possibly have succeeded in having it removed, but that while it was there it was in effect the equivalent of a plank. The case certainly did not establish that anyone could use the pier for any purpose even if they had no right to go on the land adjoining the lake.

Eastern Counties Ry. Co. v. *Dorling* (29), referred to in *Marshall* v. *Ulleswater Steam Navigation Co.* (30) is, I think, of assistance. In that case the plaintiffs owned a pontoon which they attached to a wharf in such a position that those who desired to go on the wharf had to pass over the pontoon. The defendant broke and entered on this pontoon in order to get to the wharf and embarked and disembarked passengers across the pontoon from the wharf. The defendant pleaded that he had a right to embark and disembark on the wharf and that the pontoon was an obstruction to his right. On demurrer on that part of the case, WILLES, J., said (31):

> "Upon the demurrer we think judgment ought to be entered for the defendant. The plea in effect states that the defendant had a right to land at a quay upon the bank of a public navigable river, and that the plaintiffs permanently moored their dummy [that is, pontoon] so as to obstruct and prevent the defendant's approach to the quay . . . The plaintiffs, therefore, are alleged by the plea or have prevented the defendant's approach to his quay over the river, which was a public highway, by substituting for the part of the river which the dummy occupied the dummy itself, and making it, instead of the river, the means and the only means of passing over that space . . . the defendant had a right to use the river as a highway until he got near enough to the quay to exercise his right of landing upon it . . . [the dummy] interfered with the right of the defendant to pass over the place as a way . . ."

Still leaving out any effect there may be due to Bosham being in the port of Chichester, it seems to me that the question whether the defendants have the right to use the quay in this case must depend on whether they use it as being the only reasonable way in which to get from a vessel which is in the course of being navigated to land on which they are entitled to go or to get from that land on to the vessel. If that be so, then on payment of a reasonable fee the defendants have the right to use the quay, in the course of and only in the course of embarking or disembarking or loading or unloading that vessel or indeed in the course of carrying out repairs to the vessel, provided the vessel has arrived in the ordinary course of navigation and that repairs are necessary or desirable before she can resume her voyage.

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(28) (1871), L.R. 7 Q.B. at p. 172.

(29) (1859), 5 C.B.N.S. 821.

(30) (1871), L.R. 7 Q.B. 166.

(31) (1859), 5 C.B.N.S. at p. 837.

What the defendants are endeavouring to do is something quite different from this. They are endeavouring to use the quay as a place of business. The boats that come to the quay to be repaired are not boats which have arrived in the ordinary course of navigation and require repairs before they can set off again. They are boats which arrive under a contract with, or at the express invitation of, the defendants for the purpose and only for the purpose of being repaired by the defendants in the course of their carrying on their business of repairing. I can find nothing in the authorities to suggest that such a course of business comes within the usual incidents of navigation and I see no right whatsoever to use the quay against the will of the plaintiff except for the limited purposes which I have indicated. I should add that there was no evidence that any lorry or car was being used for any of these limited purposes.

The rights of the defendants are not increased because Bosham Quay is within the confines of a port. The law has always recognised that the provisions of a safe anchorage in a port or a harbour carries with it the right to exact a toll from those who use such anchorage; but even those who pay such toll have normally no rights beyond those of navigation. The provision of a wharf does not ipso facto give any right to use that wharf. If counsel for the defendants' argument were right, strange consequences could follow. A wharf built for the purpose of landing oil could be cluttered up against the will of the proprietor with vessels discharging wheat or being repaired.

The true proposition of law is laid down by Lord Ellenborough, C.J., in *Allnutt* v. *Inglis* (32) where he refers to a judgment of Lord Hale and says:

> " . . . wherever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port, as where he is the owner of the only wharf authorised to receive goods which happens to be built in a port newly erected, he is confined to take reasonable compensation only for the use of the wharf . . . ' because there is no other wharf in that port, as it may fall out: in that case, [Lord Hale says] there cannot be taken arbitrary and excessive duties for cranage, wharfage etc. . . . for now the wharf and crane and other conveniences are affected with a public interest, and they cease to be juris privati only '."

This principle has later been applied in cases where, for instance, there is only one wharf certified for importers to lodge and secure wines without paying duties for them in the first instance.

Apart from this exception, the law is well laid down in Gunning's Law of Tolls, at p. 123:

> " As to the amount which the owner of the wharf may demand as a remuneration for the use of it, it is said that a man may for his own private advantage in a port town set up a wharf or crane, and take whatever rates he and his customers can agree for wharfage, cranage etc.; for he does no more than what it is lawful for every man to do, viz. make the most of his own; and such are the coal, wood and timber wharfs in the Port of London and some other ports."

Gunning goes on (at p. 123) to point out that the duties payable may of course be fixed by prescription or by grant or by Act of Parliament. There is no question in this case of the quay of Bosham having any monopoly in the port of Chichester, and there is no suggestion, let alone evidence, that duties have been fixed by prescription, grant or Act of Parliament. The argument of counsel for the defendants based on Bosham being in the port of Chichester fails.

The final point raised by counsel for the defendants is on the length of the notice given by the plaintiff to terminate the use by the defendants of the quay for the purpose of their repairing business. Counsel for the defendants argues that if the notice be unreasonably short the fact that proceedings were not issued for a further two months cannot avail the plaintiff. He urges that *Minister of Health* v. *Bellotti* (33) can no longer stand in the light of the speeches of the majority of the law lords in *Winter Garden Theatre (London), Ltd.* v. *Millenium Productions, Ltd.* (34). With regard to the length of the notice, counsel for the defendants points out that the length was a week, whereas the notice contemplated in the proposed agreement for £100 p.a. was three months.

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(32) (1810), 12 East, 527 at p. 538.

It is for the defendants to prove that the notice was unreasonably short. They have failed to do so. I have had no evidence to show that the defendants were put in any difficulty by the shortness of the notice, or that they were repairing any boats at the time, or were under any contract to repair any boats. Apart from such evidence, I hold that a week is ample notice.

It follows from my decisions that the plaintiff is entitled to judgment on the amount claimed. So far as the claim for an injunction is concerned, it clearly fails in the form claimed. I do not think in all the circumstances of the case that I should grant an injunction in any terms. I have deliberately laid down the parties' rights in some detail. This is probably sufficient; but if the plaintiff desires a declaration that the defendants have no rights save those which I have laid down, I shall not enter formal judgment until the parties have had an opportunity of considering the form such a declaration should take and until the plaintiff has had an opportunity of making an application for leave to amend by adding a claim for a declaration.

[Counsel for the plaintiff then said that he was instructed to ask for costs against the defendant but that whether the plaintiff would enforce any order for costs was another matter. HIS LORDSHIP pointed out that the plaintiff had failed to get an injunction in the terms claimed and that HIS LORDSHIP was not disposed to grant an injunction in any other terms. In these circumstances he proposed to grant the plaintiff only half of his taxed costs, and, counsel for the plaintiff and for the defendants not objecting, so decided.

On May 30 formal judgment was entered for the plaintiff.]

Judgment for the plaintiff for £48 19s.

Solicitors: *Robins, Hay & Waters*, agents for *Raper & Co.* Chichester (for the plaintiff); *Mackrell & Co.* (for the defendants).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

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(33) [1944] 1 All E.R. 238; [1944] K.B. 298.
(34) [1947] 2 All E.R. 331; [1948] A.C. 173.

Re BUXTON AND ANOTHER *v.* JAYNE AND OTHERS (Intended Action).

[COURT OF APPEAL (Ormerod and Devlin, L.JJ.), April 27, 28, May 19, 1960.]

Person of Unsound Mind —Action—Application for leave to bring action against duly authorised officer—Removal to mental hospital—Whether reasonable ground for believing that person was of unsound mind—Lunacy Act, 1890 (53 *&* 54 *Vict. c.* 5), *s.* 14 (1), *s.* 20 (*as amended by the National Health Service Act,* 1946 (9 *&* 10 *Geo.* 6 *c.* 81), *s.* 50, *and Sch.* 9, *Part* 1), *s.* 330 (2) (*as amended by the Mental Treatment Act,* 1930 (20 *&* 21 *Geo.* 5 *c.* 23), *s.* 16 (1)).

Owing to family troubles Mrs. B. became emotionally upset and her doctor called in J., who was employed by the local health authority as a duly authorised officer under the Lunacy and Mental Treatment Acts, 1890 to 1930. J. tried to persuade Mrs. B. to go voluntarily to a hospital for treatment, but she refused to do so. Purporting to act under s. 20* of the Lunacy Act, 1890, as amended by the National Health Service Act, 1946, J. had Mrs. B. removed to a mental hospital. Section 20 did not apply unless J. brought himself within s. 14 (1)† of the Act of 1890 (as substituted by the Act of 1946) as satisfying the condition that he had " reasonable ground for believing " Mrs. B. " to be a person of unsound mind and a proper person to be sent to a mental hospital ". After four days Mrs. B. was discharged from the hospital, as the magistrate refused to make a reception order. Mrs. B. and her husband applied for leave, under s. 330 (2)‡ of the Act of 1890, as amended by s. 16 (1) of the Mental Treatment Act, 1930, to institute proceedings against J. in respect of her removal and detention, on the ground that he had acted without reasonable care. By s. 330 (2) the court could not give leave unless satisfied that there was substantial ground for this contention. The application was opposed by J. Affidavits filed on the application showed a conflict of evidence, but neither J. nor the doctor deposed that he believed Mrs. B. to be of unsound mind. Leave to institute proceedings was given by the judge in chambers. On appeal by J.,

Held: leave to bring proceedings against J. was rightly given because—(i) before J. could lawfully act under s. 20 of the Lunacy Act, 1890, and remove Mrs. B. to hospital he must, by reason of s. 14, have reasonable ground for believing that she was a person of unsound mind and a proper person to be removed to a mental hospital, and (ii) nowhere in the affidavit evidence before the court was there any evidence that J. had satisfied himself that Mrs. B. was of unsound mind, and accordingly there was substantial ground for contending that J. had acted without reasonable care (see p. 692, letter F, p. 696, letter D, and p. 698, letters A and B, post).

Harward v. *Hackney Union & Frost* ((1898), 14 T.L.R. 306) distinguished.

Observations on the meaning of the words " of unsound mind " (see p. 692, letters D and E, and p. 697, letters E to G, post).

Appeal dismissed.

[**Editorial Note.** The Lunacy Act, 1890, is prospectively repealed by the Mental Health Act, 1959, which has not yet, however, been brought into force in regard to any enactments of the Act of 1890 considered in the present case. The phrase, person of " unsound mind " is not adopted in the Act of 1959, it being superseded generally by reference to " mental disorder " which is defined and classified in s. 4 (1) of the Act of 1959.

As to leave to take proceedings against persons acting under the Lunacy and Mental Treatment Acts, see 21 HALSBURY'S LAWS (2nd Edn.) 509, para. 923; and for cases on the subject, see 33 DIGEST 271, 272, *1893-1896*.

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* The section, as amended, is printed at p. 689, letter I, post.

† The subsection, as amended, is printed at p. 690, letter C, post.

‡ The subsection, as amended, is printed at p. 690, letter G, post.

A For the Lunacy Act, 1890, s. 14, s. 20, and s. 330 (as amended), see 17 HALSBURY'S STATUTES (2nd Edn.) 1067, 1069, and 1155.]

Cases referred to:

Harward v. *Hackney Union & Frost*, (1898), 14 T.L.R. 306; 33 Digest 268, *1864*.

Richardson v. *London C.C.*, [1957] 2 All E.R. 330; 121 J.P. 355; [1957] 1 W.L.R. 751; 3rd Digest Supp.

B **Interlocutory Appeal.**

This was an appeal from an order made in chambers by THESIGER, J., on Jan. 21, 1960, giving leave to the applicants, Henry Buxton and his wife, Annie Buxton, under s. 330 (2) of the Lunacy Act, 1890 (as amended by the Mental Treatment Act, 1930, s. 16 (1)), to institute proceedings for damages against C Eric M. Jayne and the South West Middlesex Hospital Management Committee. Mrs. Buxton's intended claim was for damages for, among other things, false imprisonment, in that she was wrongfully removed to the West Middlesex Hospital on Jan. 10, 1959, and detained there until Jan. 14, 1959. Mr. Buxton's intended claim was in respect of, among other things, special damage incurred by him in visiting his wife in hospital and in respect of the loss of her consortium D while she was there detained. Leave to take proceedings against the hospital management committee was limited to detention beyond the period in respect of which the person in charge of the hospital was under the statutory obligation created by s. 20 of the Lunacy Act, 1890 (as substituted by the National Health Service Act, 1946). There was no appeal by the hospital management committee, the appeal being only by Mr. Jayne, who was, at the material time, employed by E Middlesex County Council as a duly authorised officer under the Lunacy and Mental Treatment Acts, 1890 to 1930.

The facts are stated in the judgments.

J. G. Wilmers for Eric M. Jayne, the duly authorised officer (the first proposed defendant).

D. P. Croom-Johnson, Q.C., and *G. Hardy* for Henry Buxton and Annie F Buxton, the applicants.

Cur. adv. vult.

May 19. The following judgments were read.

ORMEROD, L.J.: This is an appeal by Eric M. Jayne against an order of THESIGER, J., made on Jan. 21, 1960, whereby he gave leave, under s. 330 (2) of the Lunacy Act, 1890, as substituted by s. 16 (1) of the Mental Treatment Act, G 1930, to the applicants to institute an action against Mr. Jayne and against the South West Middlesex Hospital Management Committee. There is no appeal by the hospital management committee.

The complaint against Mr. Jayne relates to his conduct in removing the second applicant, Mrs. Annie Buxton, to a mental hospital in purported pursuance of the provisions of s. 20 of the Lunacy Act, 1890, as substituted by the H National Health Service Act, 1946, s. 50, and Sch. 9, Part 1, Mr. Jayne being at the time a duly authorised officer of the local health authority. Section 20 (as amended) reads:

> " If a duly authorised officer of the local health authority or any constable is satisfied that it is necessary for the public safety or the welfare of a person I alleged to be of unsound mind with regard to whom it is his duty to take any proceedings under this Act, that the said person should, before any such proceedings are taken, be placed under care and control, the officer or constable may remove the said person to any hospital or part of a hospital vested in the Minister (whether a mental hospital or not) which is designated by the Minister for the purposes of this section, and the person in charge of the said hospital or part shall receive and detain the said person therein, but no person shall be detained under this section for more than three days."

It is to be observed that, before the duly authorised officer can act, there must be a person alleged to be of unsound mind with regard to whom it is his duty to take any proceedings under the Act and the officer must be satisfied that it is necessary for the public safety or the welfare of that person that such person should be placed under immediate care and control. In considering who is a person with regard to whom it is the duty of the officer to take proceedings under the Act, regard must be had to s. 14 and s. 15 of the Act of 1890, as substituted by s. 50 of and Sch. 9, Part 1, to the Act of 1946. It is unnecessary to consider s. 15 here as it deals with matters outside the scope of this appeal. Section 14 (1) is as follows:

> "If a duly authorised officer of the local health authority—(a) has reasonable ground for believing that a person in the area of the authority is a person of unsound mind and a proper person to be sent to a mental hospital; and (b) is satisfied that he is not under proper care and control, or that there are no relatives or friends who intend and are able to take proceedings by petition for a reception order under the foregoing provisions of this Act; he shall, within three days, give notice thereof to a justice having jurisdiction in the place where the said person is."

It follows, therefore, that, before the provisions of s. 20 can come into operation, the duly authorised officer must (i) have reasonable ground for believing that a person is of unsound mind and a proper person to be sent to a mental hospital, and (ii) be satisfied that he is not under proper care and control.

Section 330 of the Lunacy Act, 1890, as amended by s. 16 (1) of the Mental Treatment Act, 1930, is as follows:

> "Protection to persons putting the Act in force.—(1) Where a person has presented a petition for a reception order, or signed or carried out, or done any act with a view to signing or carrying out, an order purporting to be a reception order or any report, application, recommendation, or certificate purporting to be a report, application, recommendation, or certificate under this Act, or any Act amending this Act, or has done anything in pursuance of this Act, or any Act amending this Act, he shall not be liable to any civil or criminal proceedings whether on the ground of want of jurisdiction or on any other ground unless he has acted in bad faith or without reasonable care.
>
> "(2) No proceedings, civil or criminal, shall be brought against any person in any court in respect of any such matter as is mentioned in the last preceding subsection, without the leave of the High Court, and leave shall not be given unless the court is satisfied that there is substantial ground for the contention that the person, against whom it is sought to bring the proceedings, has acted in bad faith or without reasonable care."

It will be seen that leave will not be given unless the court is satisfied that there is substantial ground for the contention that the person against whom it is sought to bring the proceedings, in this case the duly authorised officer, has acted in bad faith or without reasonable care. There is no suggestion here of bad faith, and the question, therefore, which the learned judge had to decide, and which he decided in the affirmative, was whether there was substantial ground for the contention that Mr. Jayne had acted without reasonable care.

It is clear from the authorities that, under s. 20, it is only necessary that the duly authorised officer should be honestly satisfied that it was necessary for the public safety or the person's welfare that the person should be removed to a place of safety. It is not necessary that there should be reasonable grounds for his opinion: see *Harward* v. *Hackney Union & Frost* (1). But that is not the position under s. 14. Under that section the officer must have reasonable ground for believing that the person is of unsound mind, and, therefore, the question has to be considered whether he acted with reasonable care.

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(1) (1898), 14 T.L.R. 306.

A It was contended on behalf of Mrs. Buxton that there could be no reasonable ground, on the evidence before the court, for belief that she was of unsound mind, and in these circumstances there was substantial ground for the contention that Mr. Jayne had acted without reasonable care. The evidence before the court was contained in a number of affidavits, sworn by the applicants, Mr. and Mrs. Buxton, and their daughter and by Mr. Jayne and Dr. Singer and his wife. B Dr. Singer was, at the relevant time, the medical attendant to the applicants. It appeared from the affidavits that Mrs. Buxton was a woman of fifty-seven years of age, living with her husband and family at 21, Glamis Crescent, Hayes. It is clear that at the end of 1958 there were unfortunate differences between Mrs. Buxton and her son. The son was determined to marry a girl regarded by Mrs. Buxton as unsuitable. As a result of these differences of opinion and C consequent arguments, there is no doubt that Mrs. Buxton became emotionally upset, and on Tuesday, Jan. 6, 1959, Mr. Buxton called in Dr. Singer, who examined Mrs. Buxton and prescribed rest in bed and sleeping tablets. It appears from the affidavits that the sleeping tablets were not very effective and on the following nights Mrs. Buxton slept restlessly. Matters came to a head on the following Saturday morning (Jan. 10), when, according to the evidence of Mrs. D Buxton, after a perfectly normal night she had a further dispute with her son at about 8.30 a.m. As a result she was very much upset, and she cried for a time and felt faint, so that her son telephoned for Dr. Singer to come. He was unable to come at once, but at about 11 a.m. Mr. Jayne arrived and according to Mrs. Buxton produced " some kind of warrant card " and insisted that she should go to hospital. She protested that she did not want to go, and eventually Mr. E Jayne left the house to return at about 12.15 p.m. with Dr. Singer. There were further protests, but eventually three ambulance men entered the room and she allowed herself to be led outside the house where she was put into an ambulance and taken to the West Middlesex Hospital, Isleworth, and placed in an observation ward. This account, as given by Mrs. Buxton, is substantially confirmed by her husband and daughter. Mr. Jayne in his affidavit gave his version of F what happened that morning. He said that, when he went into the room where Mrs. Buxton was, she was

> ". . . shouting and screaming to such an extent that it was quite impossible to carry on any normal conversation with her. She was very obviously greatly disturbed and acting in a quite abnormal manner and was highly excited."

G Later, speaking of her removal to hospital, he said:

> " It was quite clear to me that for her own protection this was the only sensible and proper step as Mrs. Buxton could there be looked after, whereas at home she clearly could no longer be looked after properly. I thought that she was in real danger unless she were removed to somewhere where proper care could be given to her . . ."

H There were a number of matters in the affidavits of Mr. Jayne and Dr. Singer which were disputed by Mr. Buxton. Mr. Jayne said that he explained the procedure to Mr. Buxton who was quite satisfied that the course being taken was the right one. He also said that Mr. Buxton told him that the trouble had been going on since 2 a.m. These matters were denied by Mr. Buxton, who said that I he had had little or no conversation with either Mr. Jayne or Dr. Singer. Dr. Singer, in his affidavit, said that he saw Mr. Buxton on the Friday (Jan. 9) and explained to him the necessity of calling in the duly authorised officer, but this Mr. Buxton denied.

The learned judge formed the view that on the affidavits, without coming to any conclusion as to the truth of the matters in dispute, there was substantial ground for the contention that Mr. Jayne had acted without reasonable care. I have come to the same conclusion. Mr. Jayne did, I think, establish in his affidavit that he was satisfied that it was necessary for the welfare of Mrs.

Buxton that she should be placed under immediate care, but there is nowhere in his affidavit any evidence that she was alleged to have been of unsound mind. Further, although he described her condition as "greatly disturbed" and "highly excited", he does not say that he had reasonable ground for believing that Mrs. Buxton was of unsound mind or that in fact he did so believe. It is to be noted that, although the doctor was present when Mrs. Buxton was taken away, he does not appear to have expressed the view to Mr. Jayne or to any one else that she was of unsound mind, and in his affidavit he goes no further than to say:

> "I formed the clear opinion that Mrs. Buxton required observation and psychiatric treatment and skilled attention which clearly she could not get if she remained at home."

Counsel for Mr. Jayne argued that, as Mr. Jayne was called in to see Mrs. Buxton, he was entitled to assume that she was alleged to be of unsound mind, and that he must be taken in the circumstances to have had reasonable grounds for belief that she was of unsound mind at the time. Whether Mr. Jayne acted without reasonable care is a matter to be decided at the trial of the action. But it does not appear necessarily to follow that, because a person is in a highly excited condition, or in a condition of considerable emotional upset, such person is of unsound mind. There is no definition in the Mental Treatment Act, 1930, of the term "of unsound mind", but it is to be noted that s. 20 (5) provides that the word "lunatic" shall cease to be used in relation to persons of unsound mind, and that expressions such as "person of unsound mind", "patient of unsound mind", or other similar expressions, should be used. It would appear, therefore, that the term "of unsound mind" is now used in the Acts in reference to persons in regard to whom the word "lunatic" would hitherto have been used. I have come to the conclusion that the appeal should be dismissed. There is, in my judgment, substantial ground for the contention that Mr. Jayne acted without reasonable care. There are disputes on questions of fact which cannot be satisfactorily resolved by evidence on affidavit, and there is, above all, the question whether Mr. Jayne had reasonable ground for the belief that Mrs. Buxton was of unsound mind, or, indeed, whether he ever directed his mind to the question. These questions are substantial ones which can be determined satisfactorily only by hearing the evidence, and I am satisfied that this is a case where leave to proceed should be given.

DEVLIN, L.J.: The matter before us is an application by Mr. and Mrs. Buxton under s. 330 (2) of the Lunacy Act, 1890, as substituted by s. 16 (1) of the Mental Treatment Act, 1930, for leave to bring proceedings against Mr. Jayne, who was at the material time the duly authorised officer employed by the Middlesex County Council under the Lunacy and Mental Treatment Acts, 1890 to 1930. They complain of the act of Mr. Jayne on Jan. 10, 1959, in causing Mrs. Buxton to be removed against her will to the West Middlesex Hospital, Isleworth, which is an institution for persons of unsound mind.

It appears that in January, 1959, there were troubles in the Buxton family to which it is unnecessary to give any further publicity. They were such as might cause a woman of no more than average sensibility to be deeply distressed, and Mrs. Buxton, I should judge, is more prone to emotional upsets than most women. It is clear that she made herself ill over the whole affair. She was seen by her doctor, Dr. Singer, on Jan. 6, and he prescribed a nerve tonic and sedative tablets. There is a conflict of evidence as to what happened after that. According to Dr. Singer, on the evening of Jan. 9, Mr. Buxton came to see him and said that his wife was exhibiting persistently violent behaviour and that his (Mr. Buxton's) health had suffered owing to lack of sleep. Mr. Buxton denies that there was any conversation of this sort. It is at any rate clear that Dr. Singer decided on Jan. 9 that it would be best to send Mrs. Buxton into hospital for observation and treatment. It is clear that by hospital he meant a mental hospital; and it is clear also that he decided to call in the duly authorised officer.

Entry into a mental hospital can be obtained in one of two ways. Any person who is desirous of submitting himself to treatment for mental illness and who makes a written application for the purpose may be received as a voluntary patient under the Mental Treatment Act, 1930, s. 1. A person who is not so willing and who is not merely suffering from mental illness but is also of unsound mind may have made against him a reception order under the Lunacy Act, 1890. A reception order may be made by a justice of the peace under s. 16 of the Act of 1890 after the person alleged to be of unsound mind has been brought before him and after he has taken the steps and made the inquiries prescribed by the section. One of the ways in which a person alleged to be of unsound mind can be brought before the justice for this purpose is by the action of a duly authorised officer under s. 14 of the Act, as amended by the National Health Service Act, 1946, s. 50, and Sch. 1, Part 1.

Section 14 (1) plays an important part in the argument and I therefore set it out in full:

> "If a duly authorised officer of the local health authority—(a) has reasonable ground for believing that a person in the area of the authority is a person of unsound mind and a proper person to be sent to a mental hospital; and (b) is satisfied that he is not under proper care and control, or that there are no relatives or friends who intend and are able to take proceedings by petition for a reception order under the foregoing provisions of this Act; he shall, within three days, give notice thereof to a justice having jurisdiction in the place where the said person is."

It will be seen that under this section there may be a short delay in bringing the patient before a justice; and there is, therefore, another section, s. 20, which is of equal importance in this case, and which provides for urgent cases. Section 20, as amended by the National Health Service Act, 1946, s. 50, and Sch. 9, Part 1, reads:

> "Removal of person of unsound mind in urgent cases.—If a duly authorised officer of the local health authority or any constable is satisfied that it is necessary for the public safety or the welfare of a person alleged to be of unsound mind with regard to whom it is his duty to take any proceedings under this Act, that the said person should, before any such proceedings are taken, be placed under care and control, the officer or constable may remove the said person to any hospital or part of a hospital vested in the Minister (whether a mental hospital or not) which is designated by the Minister for the purposes of this section, and the person in charge of the said hospital or part shall receive and detain the said person therein, but no person shall be detained under this section for more than three days."

Thus the duly authorised officer is a person who is authorised to initiate proceedings which can lead to the making of a compulsory order. Whether he has any part to play in the case of a voluntary patient does not appear from the affidavits; he has no statutory duty, but it may be that in practice he is the person who makes the necessary arrangements. It would be surprising if, before seeing his patient again, Dr. Singer had made up his mind that a compulsory order was necessary; but, on the material which we have, I do not think that it is possible to say whether or not he intended the duly authorised officer to act compulsorily.

What is certain is that, on the morning of Jan. 10, Mr. Jayne, as the duly authorised officer, went to the applicants' house. He had, at that time, no information from the doctor except a message that the doctor wanted him to visit Mrs. Buxton as soon as possible. Earlier that morning Mrs. Buxton had had a conversation with her son which had upset her considerably. According to her account, which is generally supported by other members of the family, she was, when Mr. Jayne arrived, in a distressed condition, sitting in an armchair in the sitting room and being comforted by her husband. According to Mr. Jayne's affidavit, her husband appeared to be holding her down in the chair and she was shouting and screaming to such an extent that normal conversation was impossible. He said further, which is denied, that Mr. Buxton told him that this sort of behaviour had been going on since 2 a.m. After about half an hour during which, Mr. Jayne says, Mrs. Buxton remained in the same state, Dr. Singer arrived. The doctor told Mr. Jayne that he had already seen Mrs. Buxton on Jan. 6, when he found her greatly depressed and subject to emotional outbursts. Mrs. Buxton was asked to sign the application form as a voluntary patient and refused to do so. With Dr. Singer's agreement, Mr. Jayne summoned an ambulance and had her removed to hospital. She remained there until Jan. 14, when she was discharged because the magistrate refused to make a reception order.

This is a very cursory account of what took place on the morning of Jan. 10 and omits many matters about which there is a conflict of evidence. But it is sufficient to indicate the nature of the question which the learned judge at chambers had to consider when he was invited to grant leave to the applicants to proceed against Mr. Jayne. He granted leave and it is from this order that Mr. Jayne appeals.

The effect of s. 330 of the Lunacy Act, 1890, on Mrs. Buxton's right of action is twofold. But for that section, she could initiate proceedings in the form of a simple claim for false imprisonment, leaving it to Mr. Jayne to set up the defence of statutory authority. Section 330 protects in two ways a person who " has done anything in pursuance of " the statute. First, as a matter of substance, it requires that the plaintiff should prove that the defendant was not merely acting without authority, which would ordinarily be enough for the action of false imprisonment, but was also acting in bad faith or without reasonable care. Secondly, as a matter of procedure, the proposed plaintiff may not begin the action at all unless he can satisfy a judge that there is substantial ground for the contention that the proposed defendant was acting in bad faith or without reasonable care. It may not be easy for a plaintiff to discharge this burden before he knows on what parts of the statute the defendant is going to rely. But that difficulty is usually avoided, as in this case, by the defendant giving the necessary particulars. In this case we know that Mr. Jayne intends to defend the action by relying on s. 20 and on that alone. As the action has not yet been begun, there is not as yet any statement of claim; but we know also, because we have been told by counsel, that the applicants do not intend to allege bad faith. Accordingly, the act which is done pursuant to the statute and which gives rise to the cause of action is the act of Mr. Jayne in removing Mrs. Buxton to hospital, and the question will be whether, in so doing, he acted without reasonable care. It will be alleged against him that in removing Mrs. Buxton he exceeded the jurisdiction given to him by s. 20 and that he was negligent in not taking proper steps to make sure that Mrs. Buxton was a person who fell within the section.

It is convenient, therefore, to begin by ascertaining what are the conditions laid down by s. 20 as those under which Mr. Jayne has power to act. They fall under two heads. First, Mrs. Buxton must be

> ". . . a person alleged to be of unsound mind with regard to whom it is his duty to take any proceedings under this Act . . ."

Secondly, Mr. Jayne must be satisfied that it was necessary for the public safety or the welfare of Mrs. Buxton that she should be placed under care and control. The first requirement postulates two things about Mrs. Buxton. The first of them is that she should be alleged to be of unsound mind; for reasons which I shall give later, I think that that is of little importance in this case. The second, the important one, is that she should be a person with regard to whom it was his duty to take proceedings under this Act. Mr. Jayne will, therefore, have to show a duty of the sort described; and we have been informed by his counsel that he will seek to do so only under s. 14. Thus, to summarise the matter, Mrs. Buxton

A must be a person who comes within the requirements of s. 14, which enables the duly authorised officer to initiate proceedings; and also comes within the special requirements of s. 20, which enables him to detain Mrs. Buxton while proceedings are being instituted on the ground that it is necessary in the public safety or for her own welfare.

The fulfilment of the special requirements of s. 20 is not an issue in this case. B In *Harward* v. *Hackney Union & Frost* (2), this court held that the word " satisfied " in s. 20 meant no more than that the officer should be honestly satisfied and did not import any need for reasonable grounds for his opinion. Since the plaintiff is not alleging bad faith, she will be bound to concede that, if she is a person within s. 14, then a good defence can be made out under s. 20.

It may be observed that in *Harward* v. *Hackney Union & Frost* (2) no question C arose under s. 14 and the only matter which the jury was invited to consider was whether the defendant was honestly satisfied that it was necessary for the public safety or the plaintiff's welfare that he should be removed to the infirmary. The court held that there was no evidence to support a finding that the defendant was not honestly satisfied and, accordingly, the jury's verdict for the plaintiff was set aside. At one time counsel for Mr. Jayne appeared to be arguing that the D applicants in this case could not succeed at all in the absence of an allegation of bad faith. In his reply, however, he conceded that *Harward* v. *Hackney Union & Frost* (2) has only a limited effect on the issues in this case and, in particular, does not touch the question which arises under s. 14. Notwithstanding this concession, it is, I think, desirable that I should indicate why *Harward* v. *Hackney Union & Frost* (2) has this limited effect. It is because at the time of that case, and until E the amendment was made by the National Health Service Act, 1946, s. 14 was in a different form from that which it now has. As originally enacted, s. 14 (1) did not require the duly authorised officer to hold any belief about a plaintiff or to be satisfied that he was not under proper care and control. It required simply that he should have

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> ". . . knowledge that a pauper resident within the district of the officer is or is deemed to be a lunatic and a proper person to be sent to an asylum . . ."

In *Harward's* case (2) it was not disputed that the officer knew the plaintiff as a person who was deemed to be a lunatic.

The only help, therefore, which *Harward* v. *Hackney Union & Frost* (2) brings to the question under s. 14 is on the construction of the word " satisfied ", which G is used in s. 14 (1) (b). Counsel for the applicants did not make any express concession about this, but I assume that he would not argue that, in the absence of an allegation of bad faith, he can succeed under s. 14 (1) (b). Thus the crucial question in this case arises under s. 14 (1) (a) and is whether Mr. Jayne believed and had reasonable ground for believing that Mrs. Buxton was a person of unsound mind and a proper person to be sent to a mental hospital. I put the H question as a double one because I think that it is implicit in the language of s. 14 that the duly authorised officer must, in fact, hold the belief for which he is required to have reasonable grounds.

I have already noted that the person who is to be removed under s. 20 must be " alleged to be of unsound mind " as well as within s. 14. But I do not think that the section contemplates any formal allegation; and since the amended I s. 14 requires the officer to believe on reasonable grounds that the person is of unsound mind, it would be pedantic to investigate as a distinct matter whether the person was alleged to be in that condition. That is why I have said that the crucial question arises under s. 14.

At this stage of the matter it is not for Mr. Jayne to satisfy us on this issue. It is for the applicants to satisfy us that there is substantial ground for their contention that Mr. Jayne either did not hold the requisite belief, or, if he did, had no reasonable grounds for it. But there are limits to which the applicants can be expected to prove a negative. They cannot give evidence about what was in Mr. Jayne's mind. All that they can do is to depose to circumstances which give substantial ground for thinking either that Mr. Jayne never applied his mind to the question whether Mrs. Buxton was of unsound mind or, if he did, that he came to an unjustifiable conclusion. If a case of this sort is made out and left unanswered on some material point, the applicants should succeed in this application. If the case is answered, then the question is whether the proposed defendant's evidence robs the applicants' contention of substantial ground.

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(2) (1898), 14 T.L.R. 306.

I have no doubt that the evidence filed on behalf of the applicants gives substantial ground for thinking, unless explained or contradicted, that Mr. Jayne either did not think or could not reasonably have thought Mrs. Buxton to be a person of unsound mind. It is not now suggested that she was in fact of unsound mind at the time when Mr. Jayne caused her to be removed. I do not think that it is seriously suggested that, on the material contained in the applicants' affidavits, Mrs. Buxton exhibited any symptoms of unsoundness of mind which would justify Mr. Jayne in the course which he took.

The affidavits filed on behalf of Mr. Jayne set up a very different story and contain the matter on which Mr. Jayne relied as justifying him in the course which he took. But they are subject to one extraordinary omission. Nowhere does Mr. Jayne state—nor, indeed, does the doctor or anyone else—that he believed Mrs. Buxton to be of unsound mind. We have listened to a great deal of discussion about whether Mr. Jayne might have had reasonable ground for thinking Mrs. Buxton to be a person of unsound mind; and to much argument whether for this purpose, there being a conflict of evidence, we should have regard to the version given by the applicants or the version given by Mr. Jayne and his witnesses or to an amalgam of both. But it seems to me to be fruitless to argue about whether Mr. Jayne might reasonably have believed Mrs. Buxton to be a person of unsound mind if he himself does not assert that he did.

Counsel for Mr. Jayne has put up for our consideration a number of ways in which Mr. Jayne's omission to state in terms that he believed Mrs. Buxton to be of unsound mind might be accounted for. They are all different ways of saying much the same thing, which is that Mr. Jayne's belief, though not put into words, emerges clearly from his affidavit. First, counsel says that Mr. Jayne must have believed Mrs. Buxton to be of unsound mind because he must be presumed to be aware of the limitation on his powers and he would not, therefore, have caused Mrs. Buxton to be removed unless he thought that she was of unsound mind. This is to apply to the section the principle omnia praesumuntur rite esse acta. In a matter which touches the liberty of the subject, this is not permissible. Moreover, the argument is open to the obvious rejoinder that, if Mr. Jayne was, when he acted, clearly aware of the limitations on his powers, he must have been even more clearly aware of them when he made his affidavit; this makes it difficult to account for the omission except on the hypothesis that it was deliberate. Secondly, counsel suggests that, from the fact that Dr. Singer asked Mr. Jayne to visit the applicants' house, Mr. Jayne would have inferred that the doctor intended him to act under s. 20, and, therefore, would properly presume that the doctor had come to the conclusion that Mrs. Buxton was of unsound mind. This suggestion requires us to assume that all general practitioners—for there is no evidence that Dr. Singer was exceptionally well informed in this respect—are familiar with the sections of the Lunacy Act, 1890, which authorise the making of compulsory orders. I do not think that there is any ground for this. If a doctor thinks that his patient needs hospital treatment, his natural anxiety is to get him there; it is the business of the duly authorised officer, rather than that of the doctor, to see that statutory powers are not used for the purpose unless the circumstances warrant it. The argument requires us also to assume that the duly authorised officer has no

A function in this type of case except to act compulsorily, and that that fact was known to the doctor. If this were so, it is surprising, as I have already commented, that Dr. Singer should have made up his mind about the case without seeing the patient again; and the fact that Mr. Jayne tried to get Mrs. Buxton to enter as a voluntary patient suggests that he was not merely equipped to act compulsorily. On any view, I do not see how it can be said B that the doctor's supposed views must have been so obvious to Mr. Jayne and his reliance on them so complete that it did not occur to him even to ask Dr. Singer, when he came to the house, whether he considered his patient to be of unsound mind. According to Mr. Jayne, the only information which Dr. Singer, when he arrived at the house, gave him about her condition was that, when he had seen her on Jan. 6, he had found her greatly depressed and subject C to emotional outbursts. Mr. Jayne does not say that he asked for any further statement. But if he had, he would not have got much more, for the only opinion that Dr. Singer expresses in his affidavit is that Mrs. Buxton "was suffering from a prolonged and serious emotional disturbance" and that she

> "... required observation and psychiatric treatment and skilled attention which clearly she could not get if she remained at home."

D Thirdly, counsel for Mr. Jayne argues that what Mr. Jayne says in his affidavit is tantamount to saying that Mrs. Buxton was of unsound mind, and that he does not use that expression because it is not one which is in common use in the medical profession. While it is much better that the witness should testify, if he can, in the terms of the Act itself, I agree that it is sufficient, at any rate at E this stage, for him to use any language that amounts to the same thing. I am not going to attempt a definition of just what is meant by unsound mind, an expression which the Act itself leaves undefined, nor am I going to search for equivalent language. It is enough to say that unsoundness of mind is plainly something more radical than an emotional disturbance requiring psychiatric treatment. The unsoundness of mind, whose presence is essential to justify F a compulsory order, manifestly means something more than mental illness which qualifies a person to be a voluntary patient. No doubt, the phrase "unsound mind" is not one which is in ordinary use; in ordinary language "certifiable" is perhaps more likely to be used to express the same idea. The word originally used in the Lunacy Act, 1890, was "lunatic". The Mental Treatment Act, 1930, s. 20 (5), required the use of that word to be discontinued G and substituted for it "person of unsound mind". The language of s. 20 does not suggest an intent to alter the sense of the Lunacy Act, 1890, but rather to substitute a word with less disagreeable associations.

The only passage in his affidavit in which Mr. Jayne expresses his own opinion about Mrs. Buxton's condition is in para. 6. He there says that it was clear to him that Mrs. Buxton held very strong views about the family troubles and H he adds:

> "The strength of these views was such that I formed the impression that she had become emotionally unstable and unbalanced."

For a person to be of unsound mind there must, I think, be some impairment of some faculty. "Unbalanced" is the nearest that Mr. Jayne comes to suggesting that. I do not think that any court which has a duty, as we have, to see I that the requirements of a statute granting power to detain an individual against his will are strictly complied with, ought to treat the word "unbalanced", in the context in which I have quoted it, as expressing a belief in unsoundness of mind.

The last point taken by counsel for Mr. Jayne is a variant of the one which I have just considered. He submits that the circumstances set out in Mr. Jayne's affidavit show clearly that Mrs. Buxton was behaving as if she were of unsound mind, and, since Mr. Jayne set out the circumstances in his affidavit, it is unnecessary that he should go on and state his conclusion about them. If Mr. Jayne's evidence is to be believed, Mrs. Buxton was certainly exhibiting some symptoms of mental derangement. But, where the deponent fails to express his own opinion about it, an assumption about what his opinion was can safely be made only if the facts permit of no alternative view; and, even accepting all the facts stated by Mr. Jayne, that would be putting it much too high.

The result is that the inferences which should properly be drawn from the applicants' evidence have, in one vital particular at least, not been displaced. It is hardly a question whether there are substantial grounds for the applicants' contention. The blunt fact is that, unless at the trial Mr. Jayne can make good or explain away the gap in his affidavit, the applicants' contention is bound to succeed. In saying this I am not pre-judging the ultimate issue. Mr. Jayne may convince the court that he was omitting only what he thought to be obvious; or he may defeat a charge of negligence on the lines acceptable in *Richardson* v. *London C.C.* (3). Since there is going to be a trial, it would not be helpful if I were to explore these or any other possibilities any further. Many things may take on a different appearance after they have been dealt with in viva voce evidence. But we have to act on the material which we have got and from that I think that only one conclusion can be drawn, and that is that there is substantial ground for thinking that Mr. Jayne was lacking in care in that he failed to apply his mind properly to the requirement of the section.

In the course of his argument counsel for Mr. Jayne applied for leave to file a further affidavit from him to make good the defect in the one which he had made. In my judgment this application should be refused. No reasons such as are ordinarily required for the admission of fresh evidence in this court were advanced in support of it. Further, I do not think that an affidavit by Mr. Jayne at this stage would by itself be worth much unless it were accompanied by an explanation of how the omission occurred. The applicants might properly wish to test that explanation and the proper time for that is in cross-examination at the trial.

Finally, counsel for Mr. Jayne submitted that the leave granted under s. 330 should be limited to a claim for damages in respect of three days' detention. The basis for this submission is that under s. 20 a person should not be detained for more than three days, and, accordingly, any detention after that was not Mr. Jayne's responsibility. The submission shows a misapprehension of the court's task under s. 330 (2). The court has there to inquire in respect of a particular act—in this case, the act of Mr. Jayne in ordering the removal of Mrs. Buxton on the morning of Jan. 10—whether there is substantial ground for the contention that the proposed defendant acted in bad faith or without reasonable care. The court is not concerned with the consequences of the act. Where the act in question is detention over a period, different considerations may apply to different parts of the period; in respect of one part a defendant may have acted without due care and in respect of another with due care. It might then be proper to give leave to proceed in respect of a part only of the period of detention. But in the present case the act in question is not the act of detention but the act of removal. What damages flow from that act, if it is proved to be wrongful, will be a question of causation to be dealt with on ordinary principles; the procedure under s. 330 is not concerned with it. For these reasons I think that the learned judge came to the right conclusion and that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Solicitor, Middlesex County Council* (for the proposed defendant); *Brecher & Co.*, Hayes (for the applicants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(3) [1957] 2 All E.R. 330.

SCOTT *v.* SCOTT (QUINE cited).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), May 12, 13, 1960.]

Divorce—Adultery—Condonation—Revival of adultery—Whether adultery disclosed in evidence but not pleaded revived condoned adultery which had been pleaded—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 4.

A husband and wife parted in March, 1954. On Aug. 26, 1957, the wife petitioned for divorce on the ground of desertion and asked for the court's discretion in respect of her own admitted adultery before and after the parting. On May 2, 1958, the husband filed an answer denying desertion and cross-charging the wife with desertion and adultery with the party cited in August, 1953, which he had condoned but alleged had been revived by the wife's subsequent desertion. He also asked for the court's discretion in his favour. In the course of the wife's evidence it was disclosed that she had committed adultery with a man other than the party cited in 1956 and 1957, which facts were unknown to the husband. The pleadings were not amended and it was argued on the husband's behalf that this subsequent adultery had in law revived the condoned adultery of 1953 and that the court was bound under s. 4 of the Matrimonial Causes Act, 1950* to take that matter into consideration.

Held: under s. 4 of the Act of 1950 it was the duty of the court to ascertain whether adultery which had been condoned was still condoned at the time of the hearing and in the present case the adultery which had been proved and which had been condoned had subsequently been revived by the adultery of 1956 and 1957.

[As to revival of condonation by subsequent offence, see 12 HALSBURY'S LAWS (3rd Edn.) 306, para. 608; and for cases on the subject, see 27 DIGEST (Repl.) 410, *3385*, *3386*, *3388*.

For the Matrimonial Causes Act, 1950, s. 4, see 29 HALSBURY'S STATUTES (2nd Edn.) 394.]

Petition.

The parties married on Dec. 24, 1947, and there were three children of the marriage. By petition dated Aug. 26, 1957, the wife, Olive Jean Scott, petitioned for the dissolution of her marriage with the husband, Bernard William Scott, on the ground of his desertion from the middle of March, 1954, and at the same time asked for the court's discretion in her favour in respect of her own admitted adultery before and since the parting. The husband by answer dated May 2, 1958, denied desertion, though he admitted that he and the wife parted in March, 1954, and alleged desertion by the wife on the ground that the parting was due to the wife's conduct, she having used expulsive words of a gross nature. He also charged the wife with adultery, inter alia, with the party cited, George Quine, from June, 1953, onwards. He admitted that he condoned the wife's adultery with the party cited by taking her back in 1953, but alleged that that adultery had been revived. He cross-prayed for the exercise of discretion in his favour and for dissolution. The husband first contended at the hearing that the adultery had been revived and that the condonation had been dispelled by the wife's desertion. The husband asked for the court's discretion in his favour in respect of two acts of adultery committed subsequent to the parting in March, 1954. At the hearing it appeared in the course of evidence given by the wife that she had committed adultery with a man, not the party cited, in 1956 and 1957. The case is reported solely on the question whether adultery disclosed in a discretion statement revived the adultery alleged in the pleadings which had been condoned.

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* The material part of s. 4 of the Matrimonial Causes Act, 1950, is set out at p. 700, letter E, post.

A. C. Goodall for the wife.
Miss Elaine Jones for the husband.
The party cited appeared in person.

KARMINSKI, J., having stated the facts summarised above, continued: In the course of the hearing it became apparent on the wife's sworn evidence that she had committed adultery long after the husband left, with a man, not the party cited, over a period of months between October, 1956 and 1957, in Wales. The husband had no knowledge of that adultery and has not charged it; but it is said, I think with force, by counsel for the husband, that looking at the condonation problem in this case I have to have regard to the fact that after she had been forgiven by her husband and after they had parted, whatever the merits or de-merits of the parting, she destroyed the condonation by committing adultery over a period with this other man. With all deference to what counsel for the wife said, I think counsel for the husband's argument on that is well founded because under s. 4 of the Matrimonial Causes Act, 1950, it is the duty of the court to inquire into the facts and to ascertain whether there has been any condonation on the part of the petitioner. The petitioner for the purpose of this case means the husband who seeks relief on the ground of adultery. Section 4 (2), so far as material, states:

> " If the court is satisfied on the evidence that—(a) the case for the petition has been proved; and (b) where the ground of the petition is adultery, and the petitioner has not in any manner been accessory to, or connived at, or condoned, the adultery . . . the court shall pronounce a decree of divorce, but if . . . not satisfied . . . it shall dismiss the petition."

The section then goes on to deal, among other matters, with the discretionary powers of the court.

I am bound to say that the duty of the court, as set out in s. 4, makes it imperative to ascertain whether or not at the time of the hearing the adultery, which was admittedly at one time condoned, is or is not still condoned at the time of the hearing. Although I appreciate that the adultery of 1956-57 with another man in Cardiff has not been pleaded, I cannot ignore it when determining aye or no, has the wife's adultery in this case been condoned? On the facts before me the adultery took place and I hold as a matter of law that it has not been condoned although it was for a period condoned but subsequently revived.

[HIS LORDSHIP then found that the husband had deserted the wife in March, 1954, and that his desertion had been the primary cause of the break up of the marriage, and that the court would not, therefore, exercise its discretion in his favour, but would grant a decree of divorce to the wife on the ground of the husband's desertion, exercising its discretion in her favour.]

Decree nisi on the petition. Cross-prayer in the answer dismissed.

Solicitors: *Weigall & Inch*, Margate (for the wife); *H. H. H. Wiggett*, the Law Society Divorce Department (for the husband).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

ONIONS *v.* ONIONS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood, J.), May 31, 1960.]

Divorce—Practice—Amendment—Application after decree nisi to amend petition, without re-service, by including prayer for discretion and to file discretion statement—Full inquiries made by Queen's Proctor—Exceptional circumstances.

The husband deserted the wife who in due course consulted solicitors with a view to presenting a petition for divorce. She disclosed to her solicitor the fact that she had committed adultery and application was made for a civil aid certificate which was granted. The papers were then sent to counsel to settle a petition but through an oversight the wife's statement of her adultery was omitted. The petition did not, therefore, include a prayer for the exercise of the court's discretion in respect of her adultery and no discretion statement was filed. The petition was not defended and the wife was granted a decree nisi. Before application was made for the decree to be made absolute, the wife's solicitors discovered the omission and promptly informed the Law Society and the Queen's Proctor. The Queen's Proctor made full inquiries which showed that the wife's adultery had had no effect on the husband's conduct and the Attorney-General intimated that he did not desire to intervene. The wife now applied for leave to amend the petition without re-service so as to include in it a prayer that the discretion of the court should be exercised in her favour, for leave to file a discretion statement, and for the decree to be made absolute.

Held: in the exceptional circumstances of the present case it was proper to allow the wife to amend her petition without re-service and to file a discretion statement; the court's discretion would be exercised in her favour, but she would then have to apply in the usual manner for the decree to be made absolute.

Gill v. *Gill* ([1956] 3 All E.R. 240) applied.

[As to amendment of petition after service, see 12 HALSBURY'S LAWS (3rd Edn.) 321, para. 646, note (g); and for cases on amendment of the prayer, see 27 DIGEST (Repl.) 455, *3878-3892.*]

Case referred to:

Gill v. *Gill*, [1956] 3 All E.R. 240; [1957] P. 151; [1956] 3 W.L.R. 695; 3rd Digest Supp.

Summons in open court.

This was a summons by the wife calling on the husband and the Queen's Proctor to show cause why she should not be granted leave to amend her petition without re-service so as to include a prayer that the discretion of the court should be exercised in her favour, to file a discretion statement, and to show cause why a decree nisi pronounced by His Honour JUDGE CARR sitting as a special commissioner in divorce at Birmingham on Nov. 4, 1959, the suit being undefended, should not be made absolute. The proposed discretion statement was put before the court at the hearing of the summons.

D. G. A. Lowe for the wife.
Colin Duncan for the Queen's Proctor.

COLLINGWOOD, J.: The petition was dated July 24, 1959, and asked for dissolution of the marriage on the ground of the husband's desertion in September, 1946. The hearing of the petition was on Nov. 4, 1959, when the learned commissioner granted a decree nisi.

The wife has given evidence before me and it is to this effect, that when she first consulted her solicitor in regard to the preparation of the petition she made a full disclosure to him of the adultery which she had in fact committed. An application was then made for a civil aid certificate which was granted. A member of the firm of solicitors representing her has given evidence and he agrees that when the wife consulted him she did give a full disclosure of her adultery and he then sent the papers to the legal aid committee with the application for the grant of legal aid, forwarding therewith the admission by the wife.

There then followed an unfortunate series of events because when those papers were returned from the committee with a certificate granting legal aid, the partner who had interviewed the wife was away and the matter was then dealt with by an articled clerk in the firm. The result was that when instructions to settle the petition were sent to counsel, the wife's statement of her adultery did not accompany them, so that when the petition was in fact filed it did not contain any prayer for the exercise of the discretion of the court. This was only realised by the solicitors when the time came to apply for the decree nisi to be made absolute and a search of the file in the office showed that this statement was not among the papers. The partner who had taken the original instructions at once realised that an error had been made and he took the perfectly proper course of at once reporting this matter to the Queen's Proctor and to the Law Society, telling them of the disclosure which had in fact been made to him and accepting full responsibility for this inadvertent omission which had occurred. The gentleman concerned not only expressed his regret to the Queen's Proctor and the Law Society and, as I have said, accepted the responsibility for it, but he repeated that in the witness-box and he has expressed a desire on behalf of his firm to pay the costs occasioned by this summons, including those of the Queen's Proctor. Counsel for the Queen's Proctor not only did not oppose this application but gave it whole-hearted support.

I have been referred to *Gill* v. *Gill* (1). In that case a summons was taken out in the same form as in the present case, but KARMINSKI, J., who heard it, dismissed the summons. In *Gill* v. *Gill* (1) the Queen's Proctor resisted the summons, but here, as I have said, counsel for the Queen's Proctor has supported it. In *Gill* v. *Gill* (1) the Queen's Proctor had had no opportunity of making any inquiries at all; here the Queen's Proctor has made very full inquiries as a result of the communication of the facts. He has also done what there was no opportunity of doing, as was pointed out by KARMINSKI, J., in *Gill* v. *Gill* (1), that is to say he has consulted the Attorney-General as to what steps he wished to take, and the Attorney-General has intimated that he desires to take no step in the matter himself. A portion of the communication from the Attorney-General has been read by counsel for the Queen's Proctor and in that document it appears that the Attorney-General himself suggested that the wife should take out the present summons in the form in which it was taken out in *Gill* v. *Gill* (1).

I need hardly say that I respectfully agree with everything that was said by KARMINSKI, J., in *Gill* v. *Gill* (1) as to what is the proper and more usual course to take in circumstances such as these, and that it is only in an exceptional case that there should be any deviation from that procedure. Here the Queen's Proctor agrees that it is an exceptional case and clearly from the attitude taken by the Attorney-General he agrees with that view. The inquiries which have been made by the Queen's Proctor include inquiries with regard to the husband himself and his conduct, and it is quite clear, and I am quite satisfied, that the wife's adultery in this case had no bearing whatever on the desertion by the husband in September, 1946.

Therefore, I am prepared to accede to the application and grant leave to amend the petition, without the necessity for re-service, by the inclusion therein of a prayer for the exercise of the discretion of the court. I further give leave

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(1) [1956] 3 All E.R. 240; [1957] P. 151.

A to the wife to file the discretion statement which she put in today. I also
exercise my discretion in the wife's favour in respect of that adultery.

I am asked to grant a decree absolute. I think that the proper course to
adopt would be not to grant a decree absolute but to give leave to the wife to
apply in the usual course for the decree to be made absolute.

B *Order accordingly.*

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

C R. *v.* BARNSLEY COUNTY BOROUGH LICENSING JUSTICES, *Ex parte* BARNSLEY & DISTRICT LICENSED VICTUALLERS' ASSOCIATION AND ANOTHER.

[COURT OF APPEAL (Lord Evershed, M.R., Ormerod and Devlin, L.JJ.), May 16,
17, 18, 1960.]

D *Licensing—Justices—Bias—Application by co-operative society for off-licence—
All justices either members, or spouses of members, of the society—Interest in
profits of business carried on at premises—Disqualification of justices—
Whether licence invalidated—No evidence of bias—Licensing Act,* 1953
(1 *&* 2 *Eliz.* 2 *c.* 46), *s.* 48 (4), *s.* 48 (5).

By s. 48 (4) of the Licensing Act, 1953: " No justice shall act for any
E purpose under this Act in a case that concerns any premises in the profits
of which he is interested . . ." By s. 48 (5): " No act done by any justice
disqualified by this section shall be invalid by reason only of that disqualification . . ."

On Mar. 5, 1959, an application by the Barnsley co-operative society for a
spirits off-licence at the society's central drug department in Barnsley was
F granted by the licensing justices. Six of the bench of seven justices granting
the application were members of the society and the seventh member of the
bench was the wife of a member of the society. Some few months before the
application was made, the chairman of the bench had offered himself, unsuccessfully, as a candidate for election to the board of directors of the society, but
there was no evidence that he intended to do so again or that he had allowed
G this matter to affect his mind in coming to a decision in regard to the application. Under the society's rules, members received dividends on their shares,
and, in addition, they received out of the society's net profits a certain
percentage (about 1s. 6d. in the £), which was also called a " dividend ",
on any purchases which they had made at any of the society's shops. An
application was made by objectors for an order of certiorari to quash the
H grant of the licence on the ground of the interest which the justices had as
members of the society, on the principle established in *R.* v. *Rand* ((1866),
L.R. 1 Q.B. 230) that a direct pecuniary interest in the subject of inquiry
was a disqualification, but it was not suggested that any of the justices had
in fact acted with any improper motive.

Held: the granting of the licence by the justices was an act which, though
I done by justices who were disqualified for interest, was preserved from
invalidity by s. 48 (5) of the Licensing Act, 1953, for the following reasons—

(i) the words " premises in the profits of which he is interested " in s. 48
(4) meant " interested in the profits of the trade or business carried on on the
premises " (see p. 707, letter E, p. 712, letter C, and p. 713, letter I, post),
and

(ii) the disqualifications of the justices, in accordance with the rule in
R. v. *Rand* ((1866), L.R. 1 Q.B. 230), both for interest as shareholders of the
society and for interest as members in the discount on purchases allowed

under the name of " dividend ", were disqualifications within the scope of A
s. 48 (4), being for interests in the profits of the society (see p. 706, letter C, p. 712, letters B and C, and p. 714, letters B to E, post).

(iii) the participation of a justice in the granting of the licence was an act done by him or her within s. 48 (5) (see p. 708, letter I, post) and

(iv) section 48 (5) gave protection against invalidity for disqualifications within the scope of the preceding subsections of s. 48, and there was no B
other ground of disqualification in the present case than grounds within s. 48 (4), for there was no real likelihood of bias in fact; accordingly, s. 48 (5) made effective the grant of the licence in the present case, and to that extent the rule in *R.* v. *Rand* ((1866), L.R. 1 Q.B. 230) was ousted by the joint effect of s. 48 (4) and s. 48 (5) (see p. 709, letters A and B, p. 710, letter C, p. 712, letter A, and p. 713, letter H, post). C

R. v. *Tempest* ((1902), 86 L.T. 585) applied.

Decision of the DIVISIONAL COURT ([1959] 2 All E.R. 635) affirmed.

[As to the disqualification of licensing justices by statute and the effect thereof, and disqualification by interest or bias, see 22 HALSBURY'S LAWS (3rd Edn.) 527, 528, paras. 1040, 1041 and 1043; and for cases on the subject, see D
30 DIGEST (Repl.) 24-26, *152-166*.

As to disqualification by interest from acting as a justice, see 25 HALSBURY'S LAWS (3rd Edn.) 131-136, paras. 238-244; and for cases on the subject, see 33 DIGEST 288-300, *44-146*.

For the Licensing Act, 1953, s. 48, see 33 HALSBURY'S STATUTES (2nd Edn.) 191.] E

Cases referred to:

R. v. *Hertfordshire JJ.*, (1845), 6 Q.B. 753; 14 L.J.M.C. 73; 4 L.T.O.S. 291; 9 J.P. 198; 115 E.R. 284; 33 Digest 289, *45*.

R. v. *Rand*, (1866), L.R. 1 Q.B. 230; 35 L.J.M.C. 157; sub nom. *R.* v. *Rand, R.* v. *Bradford JJ.*, 30 J.P. 293; 33 Digest 292, *84*.

R. v. *Sunderland JJ.*, [1901] 2 K.B. 357; 70 L.J.K.B. 946; 85 L.T. 183; 65 F
J.P. 598; 33 Digest 296, *109*.

R. v. *Sussex JJ., Ex p. McCarthy*, [1924] 1 K.B. 256; 93 L.J.K.B. 129; 88 J.P. 3; sub nom. *R.* v. *Hurst, Ex p. McCarthy*, 130 L.T. 510; 33 Digest 294, *97*.

R. v. *Tempest*, (1902), 86 L.T. 585; 66 J.P. 472; 33 Digest 296, *110*.

G

Appeal.

The applicants, the Barnsley & District Licensed Victuallers' Association and the Barnsley & District Off-Licence Holders' Protection Association, appealed from an order made by the Divisional Court (LORD PARKER, C.J., and DONOVAN, J., SALMON, J., dissenting), on June 5, 1959, and reported [1959] 2 All E.R. 635, refusing an application for an order of certiorari to bring up and quash a decision H
of the licensing justices for the county borough of Barnsley, dated Mar. 5, 1959, whereby they granted an application by the Barnsley British Co-operative Society, Ltd. for a spirits off-licence at the society's central drug department in Barnsley. The society served notice that, at the hearing of the appeal, it would be contended on behalf of the society that the order of June 5, 1959, should be affirmed on the following grounds in addition to those relied on by the Divisional I
Court, namely, that, by virtue of s. 48 (5) and (7) of the Licensing Act, 1953, the remedy of certiorari did not lie on the facts disclosed by the affidavits if the justices were disqualified from acting under s. 48 (4) or on the ground that the facts disclosed a real likelihood of bias on the part of the justices.

Christmas Humphreys, Q.C., and *H. C. Beaumont* for the applicants for certiorari.

John Thompson, Q.C., and *John McLusky* for the society, the grantee of the licence.

A **LORD EVERSHED, M.R.:** This appeal from a judgment of the Divisional Court raises a question of difficulty and certainly poses for the town of Barnsley some serious problems which the court, I fear, cannot solve. The appeal is against an order rejecting an application by the Licensed Victuallers' Association for an order of certiorari to quash the decision of the licensing justices of Barnsley, given in March, 1959, whereby they granted to the respondents in this case, the Barnsley B British Co-operative Society, Ltd., a spirits off-licence in a chemist's shop or drug store which already belonged to them, in the sense that they had a tenancy or lease of the premises and carried on thereon this chemist's business. They also had a wine off-licence for the same premises.

The problem has arisen for this reason. When the justices sat on Mar. 5, 1959, they were seven in number. Six of them were members of the co-operative C society and the seventh was a lady whose husband was a member. The chairman of the bench, Alderman McVie, had, some months before, offered himself as a candidate for election to the board of directors of the society, in which enterprise, however, he was unsuccessful. It appears that he was the third of nine unsuccessful candidates. There was no evidence that he intended at the relevant date to offer himself again. It is right to say, as counsel for the applicants has made D clear, that in this case there has been no suggestion whatever that any of the seven justices acted in fact with any improper or partial motive. What is said is, first, that their " interest ", as has been found, was such that, apart from any language in the Licensing Act, 1953, the common law disqualified them altogether from acting in the matter. Alternatively, it is said that, even if the interest which they had was one which might otherwise be regarded by the court as E protected by s. 48 (5) of the Act, still there was a real likelihood of bias which deprived them of any right to rely, as they might otherwise do, on the subsection. I leave aside for the moment the separate point which arose about Alderman McVie on which SALMON, J., fastened in his dissenting judgment.

The interest of the seven justices, the members of the society—I shall not henceforth distinguish between the six who were themselves members and the F lady whose husband was a member—was that, as shareholders and as members of the society, they were entitled to receive, according to the constitution and rules of the society, certain dividends on the amount of their shares (1). In addition, by virtue of r. 18 (6), they were entitled to what is popularly called a " dividend " out of the remaining profits calculated in the manner set out in the sub-rule, which reads: G

> " The remainder of the net profits, after providing for the preceding charges [which include, for example, a provision, in r. 18 (5), for an educational fund], shall be divided between the members who have made purchases of the society during the period to which the dividend relates according to the amount of their purchases."

H It will be noted that the dividend referred to in r. 18 (6) was not arithmetically related to the amount of the shareholding. It was arithmetically related to the amount of the purchases made, and all the members had similar dividends if they made the same amount of purchases, regardless of any difference which there might be in respect of their shareholding. It is clear enough that there would have to be profits before such a dividend could be paid. We were informed that I at the relevant dates it worked in this fashion: at certain periods (I believe, quarterly) there was paid to the members, pursuant to r. 18 (6), a dividend, a division of profits, at the rate of 1s. 6d. for every 20s. worth of purchases. It would follow that, if any member of the society purchased spirits at this drug store (if a licence had been granted for the sale of those spirits), he would get a dividend which would consist of or include a sum at the rate of 1s. 6d. in 20s. for the sum paid to buy the spirits. Roughly, we were told—and, no doubt, the calculation is right—it meant that any member of the society who bought a bottle of whisky at this store would get in his dividend a sum of 2s. 9d. in respect of that bottle of whisky.

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(1) Rule 18 (2) of the society's rules deals with " Interest on share capital ".

One of the questions which must be considered is this: Does such a member of the society get a discount on his purchase? Is he in the position of being able to buy at the co-operative shop with which we are concerned a bottle of whisky at 2s. 9d. less than the ordinary man would have to pay if he bought a bottle of whisky in an ordinary retail establishment, or less than a man would pay who bought a bottle of whisky at this shop but who was not a member of the society? For my part—and I conceive that this is a somewhat important point—I conclude that it is not right to say that a member of the society is able to buy from the society's store whisky at 2s. 9d. per bottle less than the retail price. If the contrary were true, it would perhaps be a determining factor in this case; for in such case there would be a pecuniary interest which had nothing to do with profits. But my view is that the interest which the justices had in this matter cannot be put higher than that they were interested in the profits of any trade or business carried on on the premises occupied by the society. That is a pecuniary interest, and I say at once, that, apart from s. 48 of the Act of 1953, I should not doubt that, having that kind of interest, they would fall within the scope of the principle laid down in 1866 by BLACKBURN, J., in *R.* v. *Rand* (2), which counsel for the applicants has put in the forefront of his argument. The facts in *R.* v. *Rand* (2) need not be referred to in detail. It concerned a certain water undertaking, and it was suggested unsuccessfully that certain justices were disqualified because they were interested in certain bonds which had been issued in connexion with the waterworks. As the court held, the justices themselves had no pecuniary interest in the subject-matter of the decision impugned, and it was held that they were not disqualified; but in delivering the judgment of the court BLACKBURN, J., stated in clear language the principle applicable in such cases which has often been quoted. He said (3):

> "There is no doubt that any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter; and if by any possibility these gentlemen, though mere trustees, could have been liable to costs, or to other pecuniary loss or gain, in consequence of their being so, we should think the question different from what it is . . ."

That principle has often been affirmed and counsel for the applicants cited *R.* v. *Sunderland JJ.* (4), decided in this court in 1901. I need not take time to cite again the passage which counsel quoted. I do not forget that by 1901 the first of the Licensing Acts, the Act of 1872, had been passed, which is the ancestor of the present Act.

I turn next to the relevant section, s. 48 of the Licensing Act, 1953. The first four subsections formulate the disqualifying circumstances. Subsection (1) provides:

> "No justice shall act for any purpose under this Act in any county, county borough or borough having a separate commission of the peace, or be capable of being appointed or being a member of any committee therein for any such purpose, who is, or is in partnership with, a brewer, distiller, maker of malt for sale or retailer of malt or of any intoxicating liquor, in that county or borough."

Subsection (2) similarly disqualifies justices who hold shares or stocks in a company which carries on a business of the kind mentioned in sub-s. (1). In sub-s. (2) there is, however, a proviso that a member disqualified by reason of being a stockholder may be re-appointed if he makes disclosure before his re-appointment.

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(2) (1866), L.R. 1 Q.B. 230.

(3) (1866), L.R. 1 Q.B. at p. 232.

(4) [1901] 2 K.B. 357.

A Subsection (3) similarly disqualifies one who, though not being himself a shareholder or stockholder at the time when he is appointed, is beneficially interested in shares or stocks vested in somebody else's name. Again, there is a proviso which protects him in the case of his interest being so small that there is no reasonable ground for suggesting that he is not a proper person to be a member of the authority. It will be seen that so far the disqualifications formulated are disqualifications B of persons who have a particular interest in particular businesses, whether or not the particular business, for example, brewery, in which they happen to have shares, has any direct concern with the application for the licence which comes before the justices; in other words, the disqualifications are quite general. Subsection (4), which is the vital one for the present purpose, is, on the other hand, strictly limited to the premises the subject of the application for a C licence. It reads:

> " No justice shall act for any purpose under this Act in a case that concerns any premises in the profits of which he is interested, or of which he is wholly or partly the owner, lessee, or occupier, or for the owner, lessee, or occupier of which he is manager or agent . . ."

D There is a proviso to protect any person whose interest is that of a trustee only. There was some discussion before us on the meaning of the words " premises in the profits of which he is interested ". If the subsection were strictly limited to the profits of the premises, it would be confined to persons whose only concern was in any profit, rental or similar benefit which the premises themselves might confer. But there is a distinction between the words " any premises in the profits E of which he is interested " and the later words " or of which he is wholly or partly the owner, lessee, or occupier ". Therefore I, for my part, have no difficulty in agreeing with the majority of the Divisional Court (5) that the former phrase means, in its context, interested " in the profits of the trade or business carried on on the premises ".

I have already said (6) that, in my judgment, the justices were interested in the F profits of the premises here in question, in the sense contemplated by the subsection. Of course, if the society makes no profits at all over the whole of its commercial undertaking, then there could be no dividend payable, even though this particular shop itself was conducted profitably. Conversely, they would be entitled to a dividend if the whole society earned distributable profits even though this drug store made no contribution to those profits. None the less, it G could not, I think, be said that they were not interested in the profits which the trade in these premises would or might produce, and I agree with all the members of the Divisional Court, who thought that the justices were certainly comprehended by sub-s. (4).

The question then arises: Is the nature of their interest one which is broader than that comprised in the language of sub-s. (4)? It is for this reason that I have H expressed my conclusion first on the question whether they had a pecuniary interest in the subject of the application in the sense that they would be able, as members of the society, if the licence was granted, to get whisky at a discount of 2s. 9d. as compared with buying it in an ordinary retail shop. As I have said, I do not think that that is so. If it were, then it would appear to me that their interest would be one which was wider than the interest in profits, against which I alone sub-s. (4) is directed. SALMON, J., as I follow his judgment, took the view, which I have not accepted, that their interest was or included being able to buy whisky at a discount; for he said (7):

> " The present applicants now know that the justices by granting the licence obtained the advantage of being able to buy a bottle of gin at about 2s. 6d. and a bottle of whisky at about 2s. 9d. below the retail list prices at the

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(5) See [1959] 2 All E.R. at p. 637.
(6) See p. 706, letter C, ante.
(7) [1959] 2 All E.R. at p. 641.

> society's central drug department. It may be argued that the sum involved is small, but to any ordinary mortal the advantage is a very real one."

If that is right, it is an advantage which they possessed apart from any profits which might be made. But I have given my reasons for agreeing with Lord Parker, C.J., and Donovan, J., in rejecting that view. For my part, I reach the same result which appealed to the majority of the Divisional Court, namely, that the interest which the justices had was a pecuniary interest, but one falling within the compass, and strictly within the compass, of sub-s. (4). It follows none the less that the justices were disqualified. But then we come to sub-s. (5), which says:

> " No act done by any justice disqualified by this section shall be invalid by reason only of that disqualification . . ."

I think it right, though fortunately I need not express any view about it, to refer to sub-s. (7):

> " No objection shall be allowed to any justices' licence on the ground that it was granted or confirmed by justices not qualified to grant or confirm it."

The purpose of that subsection was not debated before the Divisional Court but its subject-matter was mentioned here. If the widest meaning is given to that subsection, it might cover every case in which a licence is granted by justices who for any reason were not qualified to grant it. If that were the meaning, it would make sub-s. (5) quite otiose, and I cannot, therefore, think that sub-s. (7) should be given so wide a scope. As it is unnecessary to express any concluded view about sub-s. (7), I do not do so and I say no more about it. I have thought it right to mention it because it was referred to in the argument.

I come back therefore to sub-s. (5), which is the kernel of the matter:

> " No act done by any justice disqualified by this section shall be invalid by reason only of that disqualification . . ."

The first problem is: What is meant by the words " No act done "? The argument of the applicants in this court and below was that the words apply only to the actual sales which might be conducted in the belief that there was a valid licence in the licensed premises: in other words, that the subsection was inserted to protect the licensee or the publican from possibly very severe penalties for selling intoxicating liquors in premises which were not properly licensed. The argument was put in this fashion in the court below, as I gather from the judgment delivered by Lord Parker, C.J. (8):

> " . . . this subsection in no way affects the grounds on which certiorari will lie. It is only . . . a provision to ensure that unless and until the decision granting the licence is set aside, it shall remain and be treated as valid."

On the other hand, as Lord Parker, C.J., went on to recite (8), it was argued for the respondent society that the effect of the subsection

> " . . . is to oust the remedy by way of certiorari on the ground of pecuniary interest, be that interest large or small. Only in the event of the likelihood of bias arising, otherwise than from pecuniary interest, will certiorari lie."

The majority of the court rejected both those arguments, and I agree with them. I think, for my part, that the words " No act done by any justice " mean what they say and cover an act done by a justice as such, including his participation in the grant of a licence.

> " No act done by any justice disqualified by this section shall be invalid by reason only of that disqualification . . ."

—" that disqualification " means, and I think must mean, disqualification under (but only under) one or other of the provisions of s. 48. For that view there is, in my judgment, authority in *R.* v. *Tempest* (9), to which I shall make further

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(8) [1959] 2 All E.R. at p. 638.

(9) (1902), 86 L.T. 585.

A reference in a moment. It comes back then to this, as I see it. If the disqualification is limited to a disqualification according to the terms of one or other of the subsections of s. 48, and nothing more, then that alone will not invalidate the licence which has been granted. Applying that conclusion to the facts in this case, it follows, in my judgment, that, if the only disqualification is that the justices had in fact an interest in the profits of the business carried on or intended to be B carried on at this particular drug store, that fact alone would not be sufficient to invalidate the licence. But, if it was shown that in addition to having that interest in the profits there was evidence of real bias, the matter might go the other way. It is not claimed that there is here any question of bias in fact. All that there is before the court is the interest which it is shown that the justices had because they are members of the society and, therefore, entitled as such, with other members, C to dividends paid out of the distributable profits.

It was contended that, in matters of pecuniary interest, there is nothing really which qualifies the old-established rule formulated by BLACKBURN, J., in *R.* v. *Rand* (10), and it is true to say that there is no reported case in which it has been laid down or held that the protection of sub-s. (5) arises where the disqualification has arisen by virtue of sub-s. (4). That brings me to *R.* v. *Tempest* (11). D That case did not arise under the present Act, because it was decided more than half a century before the Act was passed; but it arose under analogous provisions of the Licensing Act, 1872. The Act of 1872 contained, in proviso (3) to s. 60, words which closely correspond to the opening language of s. 48 (5) of the Act of 1953. The words of proviso (3) to s. 60 of the Act of 1872 were these (12):

> " No act done by any justice disqualified by this section shall by reason E only of such disqualification be invalid."

The only difference, except for the order in which the words are used, is the present substitution of the word " that " for the word " such "; but the result in meaning is clearly the same. In *R.* v. *Tempest* (11) one of the justices who was present was a shareholder in a brewery company, Allsopps, Ltd., and, therefore, it was said, he was disqualified, having such an interest, by virtue of that part F of s. 60 of the Act of 1872 which corresponds to s. 48 (2) of the present Act. LORD ALVERSTONE, C.J., on that point, said (13):

> " The point we have to consider is whether the licence is bad because he adjudicated upon it notwithstanding the provisions of that section. The true meaning of the proviso at the end of that section is not without difficulty."

G Then, after citing the words of proviso (3), he said:

> " It was argued by Mr. Hextall that comparing that with the analogous provision (14) in s. 38, it meant to say that no objection should be taken to the sale of liquor in that case, acting under the licence, and if the question had arisen solely under s. 38, I think that there would be some ground for that argument. But when you look at the actual language of s. 60, which H creates the status of disqualification, it says . . ."

LORD ALVERSTONE, C.J., then quoted again the language of s. 60 of the Act of 1872, and said (13):

> " In my opinion it is impossible to put such a limited construction as that contended for. I think the words of the Act here occurring in the proviso to a section creating a disqualification against the doing of the act, and creating

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(10) (1866), L.R. 1 Q.B. at p. 232. (11) (1902), 86 L.T. 585.

(12) Section 60 of the Act of 1872 was repealed by the Licensing (Consolidation) Act, 1910, which was repealed by the Act of 1953. Section 40 (3) of the Act of 1910 contained a provision corresponding to that in proviso (3) to s. 60 of the Act of 1872.

(13) (1902), 86 L.T. at p. 587.

(14) Section 38 of the Act of 1872, which dealt with the licensing committee of justices in boroughs, contained the following provision: " No objection shall be made to any licences granted . . . in pursuance of this section on the ground that the justices . . . who granted . . . the same were not qualified to make such grant . . ." The section was repealed by the Licensing (Consolidation) Act, 1910.

> a penalty, cannot be construed so narrowly; that is to say, that the act was not intended to be protected if that was the only disqualification. I would further point out that this proviso would be no protection where a case of actual bias was raised—where it is said that the interest of the brewer is such that he would be biased. In that case, of course, the section would not be wanted, but it is quite plain to my mind that the section saying ' by reason only of such disqualification ' means thereby what I may call the technical disqualification created by the Act."

I quite agree that that was a case relevant to what corresponds to sub-s. (2) and not sub-s. (4) of s. 48 of the Act of 1953, but the meaning and effect of sub-s. (5) of s. 48 cannot differ in what I may call a sub-s. (4) case from its meaning and application in a case arising under an earlier subsection. It, therefore, follows, as I think, that, if the disqualification is limited to the fact that the person concerned had an interest in the profits of the kind stated in sub-s. (4), then that alone does not render the justices' decision invalid. I agree, therefore, with the decision of the majority of the Divisional Court (15) that to that extent sub-s. (5) ousts the rule of law enunciated in *R.* v. *Rand* (16). That conclusion does not mean, however, that the general rule of law is altogether superseded. All it means is that, in a case which falls within the rule in *R.* v. *Rand* (17) but which is also within the scope of sub-s. (4) the pecuniary interest will of itself, notwithstanding the common law rule, not render invalid the justices' determination by reason of the words of sub-s. (5). I agree with SALMON, J., in his dissenting judgment (18) that *R.* v. *Tempest* (19) did not decide this precise point, but, nevertheless, I think that the construction put on proviso (3) to s. 60 of the Act of 1872 is authority for the view which I take of the meaning and effect of s. 48 (5) of the Act of 1953. I, therefore, agree with the view of the majority of the Divisional Court on this matter.

I now turn to the special circumstances relating to Alderman McVie, the chairman of the bench. He had unsuccessfully stood for election to the board of the society: that is all we know. No other relevant facts are found. Counsel for the applicants, with characteristic fairness, disclaimed any suggestion that Alderman McVie was influenced by a desire to obtain promotion in the society and put himself in the position of being elected to the board if he stood again. On this point SALMON, J., after stating his appreciation of the effect of the members' right to obtain whisky at a discount and saying that there was no reason to assume that all the justices were teetotallers, proceeded thus (20):

> "Further, the present applicants might reasonably conclude that Alderman McVie's future prospects of election to the society's board of directors would not be enhanced if a justices' meeting, of which he was chairman, refused the society's application for an off-licence."

If that view be justified, it is tantamount to saying that there was here in fact a real bias or real evidence of likelihood of bias, and, no doubt, a bias quite distinct from any pecuniary interest which Alderman McVie might have merely as a member of the society. The position of Alderman McVie is not referred to, so far as I can discover, in the judgment of the majority of the Divisional Court. No special point was there made about him, and I rather gather that the circumstances relating to Alderman McVie, which SALMON, J., was relying on, were not presented as a special ground to the Divisional Court for granting the order of certiorari. The test, I conceive, is objective. Was there in fact in his case real likelihood of bias? It is not suggested that Alderman McVie was in fact proposing to stand again or had any interest concerning his own promotion in the society in getting this licence granted. If it were otherwise, if it really could be said that he was anxious to have the licence granted in order to enhance the prospects of his election, I should, of course, agree that he was thereby disqualified. On the authority of *R.* v. *Hertfordshire JJ.* (21), I should also be disposed to think that the result would be that the whole bench was tainted with disqualification on that ground. On the whole, however, I do not think that it would be right to say that we should conclude that Alderman McVie had any interest in re-election. In other words, I am not prepared to accept as an inference which we should draw that Alderman McVie's prospects of election would be likely to be enhanced by the granting of this licence. I think that in this case we ought not to make any distinction as regards interest and possibility of bias between Alderman McVie and his colleagues on the bench. The result, therefore, is, in my judgment, that the decision of the majority in the Divisional Court is well-founded and should be affirmed.

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(15) [1959] 2 All E.R. at p. 638.

(16) (1866), L.R. 1 Q.B. at p. 232.

(17) (1866), L.R. 1 Q.B. 230.

(18) [1959] 2 All E.R. at p. 642.

(19) (1902), 86 L.T. 585.

(20) [1959] 2 All E.R. at p. 641.

The problem which faces the bench of licensing justices in Barnsley is not thereby very much assisted, as counsel for the applicants pointed out and as was plainly stated by the majority of the Divisional Court. All these justices are disqualified and, although the acts done in the past by them, if my view is the right view, should be treated as valid, that result does not suffice to validate for the future anything which they may think that they can do or propose to do. However, that is a problem for solution in Barnsley and not in this court. For the reasons which I have stated, I would dismiss the appeal.

ORMEROD, L.J.: I agree that the appeal should be dismissed. Counsel for the applicants in the first part of his argument dealing with the legal question, put in the forefront a passage from the judgment of BLACKBURN, J., in *R.* v. *Rand* (22), where he said:

> "There is no doubt that any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter . . ."

Counsel's submission was that the principle had, therefore, been established as long ago as 1866 and had received the approval of this court in *R.* v. *Sunderland JJ.* (23) in 1901, and there was no ground for saying that it had been modified by any of the statutory enactments to which we have been referred. I agree with the view expressed by LORD EVERSHED, M.R., that that submission is not well-founded.

Section 48 of the Licensing Act, 1953, is a section which deals with the disqualification of justices who have a financial interest in one way or another in the brewing, distilling or sale of intoxicating liquor. The particular subsection with which this appeal is concerned, sub-s. (4), provides that, if any justice shall act for any purpose under the Act in a case concerning any premises in the profits of which he is interested, he is disqualified. It appears that, so far as that subsection goes, the principle established there is in accordance with the principle established in *R.* v. *Rand* (24). But the section does not finish there because we have to take into account sub-s. (5):

> "No act done by any justice disqualified by this section shall be invalid by reason only of that disqualification . . ."

The disqualification of the justice remains, but the act shall not be invalidated by reason of the fact that the cause of the disqualification arises because the justice had an interest in the profits of the premises in question and, in consequence, was disqualified.

The position, therefore, appears to be that, if the justices were disqualified only because of the interest which they had in the profits of the premises, then the act which they performed under the Licensing Act, 1953, shall not be invalidated. It may very well be that, so far as the particular circumstances envisaged by sub-s. (4) and sub-s. (5) of s. 48 of the Act of 1953 are concerned, the principle laid down in *R.* v. *Rand* (25) has been modified. In my judgment that is the plain meaning of the words of the section. If, however, the justices had some direct pecuniary interest in the premises other than an interest in the profits of the premises, then the principle in *R.* v. *Rand* (25) would still apply and the act would be invalidated in spite of the provisions of s. 48 (5) of the Act of 1953.

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(21) (1845), 6 Q.B. 753. (22) (1866), L.R. 1 Q.B. at p. 232. (23) [1901] 2 K.B. 357.
(24) (1866), L.R. 1 Q.B. 230.

Therefore, the sole question on this part of the case is whether the interest which the justices undoubtedly had in the premises was an interest in the profits of the premises and nothing more. They were all members of the co-operative society. They received periodically what are called dividends, that is to say, payments which were in fact a share of the profits of the trade of the society in proportion to the amount of the purchases made by them. I think that the term " in the profits of which he is interested ", in s. 48 (4), is an elliptical expression and means the profits of any business carried on in the premises. In my judgment, the answer to the question whether the justices were interested in the profits of the premises must unquestionably be answered in the affirmative.

The question arises whether the justices had any further financial or other interest in the premises other than an interest in the profits. It was suggested in the course of the argument that they had such further interest in that they were in reality able to buy their bottles of spirits at a reduced rate of something like 2s. 6d. or 2s. 7d. per bottle. Lord Evershed, M.R., has dealt fully with that matter (26), and I do not propose to say anything more than that I agree with the view which he has expressed. It appears to me that all that in fact happens is that what the members pay for a bottle of spirits becomes part of the purchase money paid by a member in respect of which, in due course, he will receive dividends, and the dividends will be enhanced certainly by the price paid for that bottle of whisky, but no more than by the price which he has paid for the groceries and any other commodities which he has purchased from the society. In those circumstances, it appears to me that the fact that he must in due course receive dividends, some portion of which will be related to the purchase price which he has paid for a bottle of wine or a bottle of spirits, according to the amount which he requires, cannot bear any wider meaning than that he is interested in the profits of the premises. Therefore, if those are the whole of the circumstances of the case, it would appear to me that the act of the justices is fully protected by s. 48 (5).

Counsel for the applicants argued, however, that, even if sub-s. (5) applied in this case and the principle of *R.* v. *Rand* (25) should not be applied to the interest in the profits of the premises, there was still evidence of a likelihood of bias which should be taken into account and should be sufficient to invalidate the act of the justices in this case. Apart from the question of the purchase of spirits at a reduced price, he really relied on two points, the first being the position of Alderman McVie who was the chairman of the justices. There is no evidence before the court that Alderman McVie intended at any future time to offer himself again for election as a director of the society, and there is no evidence or any kind—and, indeed, it is disclaimed by the applicants—that he had this matter in mind or would be likely to allow it to affect his mind in coming to the decision in this case. For my part, I am satisfied that Alderman McVie should not be treated here in any way differently from the other justices engaged in the case.

Counsel for the applicants went further and said that there was here evidence of a real likelihood of bias because of the powerful social and political influence

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(25) (1866), L.R. 1 Q.B. 230.

(26) See p. 706, letters A to E, ante.

A of the co-operative society in a town of the size of Barnsley, which is a town of some seventy-five thousand inhabitants. Again, there was no evidence before the court that the co-operative society was a society with any powerful social and political influence. The evidence was that it was a large co-operative trading society of which a very high proportion of the inhabitants of Barnsley were members; but there was nothing, so far as I can see, to justify the submission B that the very existence and influence of the co-operative society was such that to be a member must be an indication of bias if a question of this kind came before the licensing bench. In the circumstances, in my view, the decision which was come to by the majority of the Divisional Court was a proper one, and I, also, would dismiss this appeal.

C **DEVLIN, L.J.:** I am of the same opinion as my brethren, although I have felt in the course of the argument more difficulty than they have done. In the first place, I do not think that the point of law, the construction of the statute, which counsel for the applicants put in the forefront of his argument, is beyond doubt. If the matter were res integra, I think that there is much to be said for D the construction of the section which found favour with SALMON, J. But provisions in an earlier Act (27) corresponding to those in s. 48 of the Licensing Act, 1953, have been considered before in *R.* v. *Tempest* (28), to which LORD EVERSHED, M.R., has referred (29). It is quite true that in *R.* v. *Tempest* (28) the underlying rule, the rule in *R.* v. *Rand* (30), was not involved as there was no direct pecuniary interest in the case of the justices there involved. The court considered, E however, the construction of a provision corresponding to s. 48 (5) of the Act of 1953 and they arrived at a construction which was the one adopted by the majority of the Divisional Court in the present case and which is fatal to the contention of counsel for the applicants on this point. We are not bound by *R.* v. *Tempest* (28), but in order to decide in favour of the applicants on this point F we should have to overrule the reasoning in it and that is something which, in the circumstances, I should be very reluctant to do. Where there are different possible constructions and where one of them has been given to this section—I say " this section " because it was given to its lineal predecessor, which is the same thing—since 1902, there is a great deal in the principle of stare decisis so that people who may have to administer the Act will know where they are. For G this reason, therefore, I have not felt it necessary or desirable that I should pursue any further the doubts which are in my mind, as I should have been in duty bound to do if there had been no authority from which I could seek guidance. I think that we should apply the construction which was approved in *R.* v. *Tempest* (28).

H From that it follows that, if the interest of the justices in this case falls within the description in sub-s. (4) of s. 48 of the Act of 1953, then, by virtue of sub-s. (5), any act done by them shall not be invalidated. I cannot say that I find sub-s. (4) an easy one to construe. Indeed, one of the reasons which might have led me to prefer the view adopted by SALMON, J., is the rather arbitrary situation which is created on the opposite view. I think that the right construction of it I is that which was adopted by the majority of the Divisional Court, and which has found favour with my brethren here, that the words " any premises in the profits of which he is interested " refer to the profits of any trade carried on on the premises. I reach that conclusion, not for the positive reason that that is the meaning which the language clearly conveys to me, but for the negative and less satisfactory reason that I can find no other intelligible meaning to put on the

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(27) Section 60 of the Licensing Act, 1872.

(28) (1902), 86 L.T. 585.

(29) See p. 709, letter E, ante.

(30) (1866), L.R. 1 Q.B. 230.

words. On this view, a rather arbitrary situation may arise if a man is pecuniarily A
interested in the result of the application but not interested in the profits of the
premises. In that case the underlying rule in *R.* v. *Rand* (31) applies, whereas
if his interest is of a character which comes within the subsection, then it will not
apply. I cannot regard that as a satisfactory distinction, but I think that it
inevitably follows from the construction which we have put on the section. B

It is not merely an academic point and I do not mention it merely because of
its possible consequences in the future. It has in fact arisen in this case. There
can be no doubt (and counsel for the applicants has not contended otherwise)
that the interest which members of the co-operative society receive by way of
fixed percentage on their shares is an interest in the profits of the premises. But
he has argued—and the argument commended itself to SALMON, J.—that that C
part of the dividend which is paid, not by reference to the amount of the share-
holding, but by reference to the amount which is bought, i.e., 1s. 6d. or whatever
it may be in the £ off the amount of the purchases of the member, is a discount
and not an interest in the profits. I agree that prima facie a discount is not an
interest in the profits. I should also agree that, although this is described as a
dividend, if one looks at the substance of the matter, it is a discount off the price. D
It might just as easily have been done in that form. Whether one should look at
the substance of the matter or whether one should be governed by its form I
find it unnecessary to determine, because if this be properly described as a dis-
count, it is a discount which is dependent on the profits. It is a peculiar discount
dependent on profits, and, therefore, is an interest in profits, which comes within
sub-s. (4). E

Accepting the decision in *R.* v. *Tempest* (32), the applicants must satisfy
the court that there was a real likelihood of bias. I regard this as a border-
line case on that point. We must have regard to the position of Alderman
McVie. Although I have mentioned the name expressly, I agree, as LORD
EVERSHED, M.R., has already said, that there is no suggestion of actual bias F
against anyone in this case. But Alderman McVie's position was slightly
different from that of the others. I do not derive more from the facts which
are before us than that he was a man who wished to be actively concerned in
the management of the affairs of the society and he was not, therefore, in quite
the same position as a passive shareholder; and he was in the chair. G

I agree with what LORD EVERSHED, M.R., has said (33) about the effect of the
decision in *R.* v. *Hertfordshire JJ.* (34). I do not think that in this sort of case,
if one or more members of the bench were found to have a real likelihood of bias,
it would be right or proper to count heads and say that there was a majority
of unbiased members. One cannot tell, as the judgment in that case points
out, to what extent the bias of even one justice, especially if he be the chairman, H
may influence the decision of the rest. One has to look at the whole picture.
Here is an application by the co-operative society and there is sitting to decide
it a bench which is wholly composed of members of the society and one woman
whose husband was a member of the society, and the bench is presided over by a
chairman who had interested himself actively in the conduct of the affairs of the
society or was desirous of doing so. Is there, in those circumstances, a real I
likelihood of bias? I am not quite sure what test SALMON, J., applied. If he
applied the test based on the principle "that justice should not only be done,
but should manifestly . . . be seen to be done" (35), I think that he came to

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(31) (1866), L.R. 1 Q.B. 230.

(32) (1902), 86 L.T. 585.

(33) See p. 711, letter A, ante.

(34) (1845), 6 Q.B. 753.

(35) Per LORD HEWART, C.J., in *R.* v. *Sussex JJ.*, *Ex p. McCarthy*, [1924] 1 K.B. at p. 259.

A the right conclusion on that test. I cannot imagine anything more unsatisfactory from the public point of view than applications of this sort being dealt with by a bench which was so composed, and, indeed, it is conceded that steps will have to be taken to rectify the position. But, in my judgment, it is not the test. We have not to inquire what impression might be left on the minds of the present applicants or on the minds of the public generally. We have to satisfy ourselves B that there was a real likelihood of bias, and not merely satisfy ourselves that that was the sort of impression which might reasonably get abroad. The term "real likelihood of bias" is not used, in my opinion, to import the principle in *R.* v. *Sussex JJ., Ex p. McCarthy* (36) to which SALMON, J., referred (37). It is used to show that it is not necessary that actual bias should be proved. It is unnecessary C and, indeed, might be most undesirable to investigate the state of mind of each individual justice. "Real likelihood" depends on the impression which the court gets from the circumstances in which the justices were sitting. Do they give rise to a real likelihood that the justices might be biased? The court might come to the conclusion that there was such a likelihood without impugning the affidavit of a justice that he was not in fact biased. Bias is or may be an D unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so. The matter must be determined on the probabilities to be inferred from the circumstances in which the justices sit. Although I think that this is a borderline case which comes very near the mark, I have reached the same conclusion on it as that which my brethren have already E expressed. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *J. E. Lickfold & Sons*, agents for *J. Donald Driver*, Barnsley (for the applicants); *Batchelor, Fry, Coulson & Burder*, agents for *W. Winter*, Barnsley (for the society).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(36) [1924] 1 K.B. 256.

(37) [1959] 2 All E.R. at p. 641.

STEPHENS *v.* CUCKFIELD RURAL DISTRICT COUNCIL.

[Court of Appeal (Hodson, Pearce and Upjohn, L.JJ.), May 12, 13, June 2, 1960.]

Town and Country Planning—Amenity—Notice to abate injury to amenity by condition of garden, vacant site or other open land—Building and surrounding yard used for business of car breaking—Whether "open land" included land within the curtilage of a building—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6 *c.* 51), *s.* 33 (1).

Statute—Construction—Marginal notes—Regulations made under the statute—Use for purposes of interpretation of section of statute—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6 *c.* 51), *s.* 33 (1).

Whether land is "open land" within the meaning of the words "any garden, vacant site or other open land" in the Town and Country Planning Act, 1947, s. 33 (1)* is a question to be determined in the circumstances of each case, and the court whose duty it is to decide it must exercise its common sense on the matter (see p. 720, letter B, post).

A plot of land two hundred feet square was enclosed by a wire fence with concrete posts, and had timber and metal buildings on some of it. The part of this land on which there were not buildings was used for the purposes of a business of a car breakers' yard some part of which business was carried on within a building surrounded by the unbuilt on part of the land. This use of the land was lawfully carried on without need for obtaining development permission. The local planning authority served a notice under s. 33 of the Town and Country Planning Act, 1947, requiring the removal of all cars, car bodies and machinery from the "open land within the curtilage" of the premises.

Held: the unbuilt on part of the land was not "open land" within the meaning of s. 33 (1).

Per Curiam: while the marginal note to a section cannot control the language used in the section, it is at least permissible to approach a consideration of its general purpose and the mischief at which it is aimed with the note in mind (see p. 720, letter B, post).

Semble: the words of the section should not be construed by reference to regulations made under powers therein contained, especially when such regulations are directed solely to procedural matters (see p. 718, letter G, post).

Decision of Lord Parker, C.J. ([1959] 1 All E.R. 635) affirmed on different reasoning.

[As to the reference to marginal notes in the construction of a statute, see 31 Halsbury's Laws (2nd Edn.) 464, 465, para. 567, text and note (p); and for cases on the subject, see 42 Digest 606, 607, *61-78*.

For the Town and Country Planning Act, 1947, s. 33, see 25 Halsbury's Statutes (2nd Edn.) 541.

For the Town and Country Planning (General) Regulations, 1948 (S.I. 1948 No. 1380), the Town and Country Planning (General Development) Order, 1950 (S.I. 1950 No. 728), and the Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948 (S.I. 1948 No. 955), see 21 Halsbury's Statutory Instruments 43, 142, 34.]

Cases referred to:

Bath v. *British Transport Commission*, [1954] 2 All E.R. 542; [1954] 1 W.L.R. 1013; 3rd Digest Supp.

Kimpton v. *Steel Co. of Wales, Ltd.*, ante, p. 274; [1960] 1 W.L.R. 527.

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* Section 33 (1) is printed at p. 717, letter I, post.

A **Appeal.**

A local authority, Cuckfield Rural District Council, to whom functions concerning control of development in their area had been delegated by the local planning authority, the East Sussex County Council, appealed against the decision of LORD PARKER, C.J., given on Mar. 3, 1959, and reported [1959] 1 All E.R. 635, declaring that land within the curtilage of certain premises in their area was B " not a garden, vacant site or other open land within the meaning of s. 33 (1) of the Town and Country Planning Act, 1947 " and that a notice served under s. 33 (1) on the owner of the land was of no effect in law. The facts are stated in the judgment.

J. P. Widgery, Q.C., and *Alan Fletcher* for the local authority.

G. G. Baker, Q.C., and *R. M. Bell* for the landowner.

C *Cur. adv. vult.*

June 2. **UPJOHN, L.J.**, read the following judgment of the court: This appeal raises a short question of construction on s. 33 of the Town and Country Planning Act, 1947 (which we shall call " the Act "). The question is whether certain land belonging to the respondent landowner (the plaintiff in the court D below) is properly described as " a garden, vacant site or other open land " for the purposes of that section.

At the trial which took place before the Lord Chief Justice all the facts were agreed in the documents and by reference to certain agreed photographs, and no evidence was called by either side. The facts shortly are as follows.

E The landowner has for many years been the owner of a plot of land approximately two hundred feet square on part of Tilgate Forest at Pease Pottage in the county of Sussex. During the war he erected timber and metal buildings with iron roofs on this plot of land and he used such buildings and the remainder of the plot as a sawmill for the purpose of cutting up wood hewn from the surrounding forest. The landowner ceased to use the plot for that purpose in the year F 1955 and he then let it to a company for the purposes of a car breakers' business. At some time before the issue of the notice mentioned later the landowner enclosed this plot of land with a wire fence and concrete posts, which appear in the photographs. As one would expect from the nature of this type of business and as clearly appears from the photographs, the operations carried on by the landowner's tenants were very unsightly. The appellants, who are the local authority for this district (1), invoked the assistance of s. 33 and served a notice G on the landowner under that section on Apr. 2, 1957. That notice described the landowner's land as " open land within the curtilage of the premises to the north of Parish Lane, Pease Pottage ", and ordered the landowner " to remove from the said land all cars, car bodies and machinery ".

Exercising his rights under the Act and regulations made by the Minister H under s. 33 (2), the respondent appealed to the local magistrates against the order. The magistrates, however, dismissed the appeal, and further appeals to quarter sessions and by way of Case Stated to the Divisional Court suffered the same fate. But it is common ground that (2) those courts had no jurisdiction to consider the short point that is before this court. Section 33 (1) is in these terms:

> " If it appears to a local planning authority that the amenity of any part I of the area of that authority, or of any adjoining area, is seriously injured by the condition of any garden, vacant site or other open land in their area, then, subject to any directions given by the Minister, the authority may

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(1) The local planning authority was the East Sussex County Council, but the council had delegated functions concerning control of development in the relevant area to the Cuckfield Rural District Council, the appellants, in exercise of power under s. 34 of the Town and Country Planning Act, 1947.

(2) By reason of the provisions of s. 23 (4) of the Act, as modified by the Town and Country Planning (General) Regulations, 1948 (S.I. 1948 No. 1380).

> serve on the owner and occupier of the land, in the manner prescribed by regulations under this Act, a notice requiring such steps for abating the injury as may be specified in the notice to be taken within such period as may be so specified."

This section is in Part 3 of the Act, which is headed " Control of Development etc.". Section 12 is the first section in that Part and provides that permission shall be required in respect of any development of land carried out after the appointed day (July 1, 1948). Subsection (2) further defines the meaning of the expression " development " and provides inter alia that the use of any buildings or other land within the curtilage of a dwelling-house for any purpose incidental to the enjoyment of the dwelling-house as such should not involve development of the land. Then follow a number of sections dealing with applications for planning permission and appeals and so forth.

Section 23 empowers the local planning authority to serve enforcement notices where development of land has been carried out after the appointed day without the grant of permission. Section 26 and the following sections down to s. 34 are in a section of Part 3 headed " Additional Powers of Control ". Section 26 provides that the local planning authority if they deem it expedient to do so in the interests of the proper planning of their area, may serve notices directing that the use of land should be discontinued, and s. 27 provides that in such a case the owner of the land must be compensated by the local authority.

It is not in dispute that under the Town and Country Planning (Use Classes) Order, 1950, when the building and the land surrounding it was used as a sawmill both the building and the surrounding land used for the like purpose was a " general industrial building " for the purposes of that order. Furthermore, it is common ground that its use now as a car breakers' yard does not change its character from a " general industrial building " and therefore under the provisions of the Act no development permission was required when the sawmill business was abandoned and the car breakers' yard took its place. It cannot be doubted, therefore, that the landowner by his tenants is entitled to carry on that business on that land, without obtaining planning permission.

In the court below the learned Lord Chief Justice expressed the view that the prima facie meaning of " open land " in s. 33 covered operations on or user of any open land in the sense of land which was not built on (3). He was to some extent influenced by the regulations (4) made by the Minister under s. 33 (2), which showed that in the view of the Minister " open land " might include land on which some business was carried on. We doubt very much whether it is right to construe the words of the section by reference to regulations made under powers therein contained, especially when such regulations are directed solely to procedural matters such as conferring rights of appeal in certain limited circumstances from an order of the local authority. Nevertheless, looking at the section as a whole and despite the marginal note to which reference is made later, we respectfully agree with the Lord Chief Justice that unbuilt on land on which business is carried on is not necessarily excluded from the definition of " open land " for the purposes of the section. However, he accepted the argument of counsel for the landowner that although the literal interpretation of " open land " might be " unbuilt on land ", yet, by reason of the earlier sections in Part 3, which we have briefly summarised, Parliament could not have intended the section to operate in such an absurd way as to empower a local authority, by invoking it, to bring in effect to an end activity on the land which required no development permission, and which could only be brought to an end under s. 26 on payment of compensation. He therefore came to the conclusion that s. 33 properly construed must be limited to a case where a garden, vacant site

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(3) See [1959] 1 All E.R. at p. 637.

(4) In particular reg. 7 (2) (b) of the Town and Country Planning (General) Regulations, 1948.

A or other open land is not within the curtilage of a building. He put it in this way (5):

> " In order to make sense of this scheme of legislation and to avoid the absurdity to which I have referred, one must limit the words, ' garden, vacant site or other open land ', to a garden, vacant site or other open land which is, B at any rate, not within the curtilage of a building. I appreciate that that may give rise to questions in some cases as to what is, and what is not, within the curtilage of a building, and indeed it may be that the curtilage is not the right test, but that the test is whether, as in the Use Classes Order (6), the land is occupied with and used for the same purposes as the building; but so far as the present case is concerned, there is no difficulty, because the notice C itself is specifically dealing with the condition of open land within the curtilage of the premises."

Accordingly the Lord Chief Justice decided the case in favour of the plaintiff.

We do not think that the Lord Chief Justice intended to lay down as a rule of construction of the section that the phrase " other open land " cannot include D unbuilt on land within the curtilage of a building. We think that he did no more than consider the test of being within a curtilage as being a useful test in the circumstances of the case before him.

However, before us, counsel for the appellant authority has submitted that " other open land " in s. 33 means necessarily, and as a rule of construction, land which is not surrounded by a building. He so submits, because, he says, a E " garden " may be surrounded by a high wall or hedge but it has a quality of openness in that it is not normally surrounded by a building. Then he says a " vacant site " may be a site vacant because it has not yet been built on or because it may no longer have a building on it. There again it has the quality that it is not built on and is not normally surrounded by a building. So, he argues, " open land " must have the same quality as the garden or vacant site, for it is introduced F by the qualification " other ". Therefore it is sufficient to satisfy the description " open land " that it should not itself be built on or surrounded by buildings. He further points out that as a garden is normally within the curtilage of a house it would be very extraordinary if " other open land " was construed to exclude as a principle of construction open land within the curtilage of a house or building.

It is the duty of the court to interpret the language in which Parliament has G thought fit to enact statutes and in particular to resolve verbal obscurities, ambiguities or grammatical difficulties and to explain the meaning of words and phrases. Authorities on rather similar words in other Acts passed for entirely different purposes (such, for example, as Part 5, para. 2 of Sch. 1 to the Law of Property Act, 1925) do not assist us. In this case, however, there are no relevant obscurities, ambiguities or grammatical difficulties. The sole difficulty lies in the H meaning of the phrase " open land " when used in conjunction with the words " garden " and " vacant site ". When Parliament uses ordinary words such as these, which are in common and general use in the English language, it seems inappropriate to try to define them further by judicial interpretation and to lay down as a rule of construction the meaning of such words unless the context requires that some special or particular meaning should be placed on such words. I The juxtaposition of these phrases together in s. 33 does not, in our view, require that any special or particular meaning should be placed on any of them. As SOMERVELL, L.J., said, in relation to the Factories Act, 1937, in *Bath* v. *British Transport Commission* (7):

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(5) [1959] 1 All E.R. at p. 638.

(6) I.e., the Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948; 21 HALSBURY'S STATUTORY INSTRUMENTS 34.

(7) [1954] 2 All E.R. at p. 543.

> " Where words are, as the words of s. 25 (3) are, perfectly familiar, all one can do is to say whether or not one regards them as apt to cover or describe the circumstances in question in any particular case."

These observations were cited with approval by SELLERS, L.J., in *Kimpton* v. *Steel Co. of Wales, Ltd.* (8).

In our judgment, whether a piece of land is properly described as a " garden " or " vacant site " or " open land " for the purposes of the section is a question to be determined in the circumstances of each case, and the court whose duty it is to decide it must exercise its common sense on the matter. While the marginal note to a section cannot control the language used in the section, it is at least permissible to approach a consideration of its general purpose and the mischief at which it is aimed with the note in mind. In this case it is " Power to require proper maintenance of waste land etc." We do not think it right to lay down as a rule of construction a definition which necessarily includes in the phrase " open land " all unbuilt on land not surrounded by other buildings and would include for example a yard at the back of a factory where goods may be temporarily placed. Equally we would refuse to lay down another definition which necessarily excluded from that phrase a spacious park surrounding a mansion house merely because by reason of being enclosed within a ring fence it might properly be described as part of the curtilage. Whether land satisfies the description of " open land " must be treated as a question to be answered by a consideration of all the relevant circumstances of the case.

In this case the plot of land in respect of which the notice has been served is open to the air and unbuilt on, but it is fenced and used for the purposes of a business of a car breakers' yard some part of which business is carried on within a building which this piece of land surrounds. None of these circumstances is in itself decisive of the matter but each points to the conclusion which we reach without much difficulty on looking at the matter as a whole that this plot cannot properly be described as open land for the purposes of the section.

The appeal is therefore dismissed.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Clerk to Cuckfield Rural District Council* (for the local authority); *Iliffe, Sweet & Co.* (for the landowner).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

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(8) See p. 276, ante.

BLATCHER AND ANOTHER *v.* HEAYSMAN AND ANOTHER.

[Court of Appeal (Lord Evershed, M.R., Ormerod, L.J., and Salmon, J.), May 31, 1960.]

Legal Aid—Costs—Discretion—Principles—Successful plaintiff in action for fraud—All parties legally aided—Judgment against defendant husband and wife but wife not dishonest—Contributions of defendants different—Costs awarded in proportion to and subject to limit of contributions—Legal Aid and Advice Act, 1949 (12 *&* 13 *Geo.* 6 *c.* 51), *s.* 1 (7) (*b*), *s.* 2 (2) (*e*).

Legal Aid—Costs—Appeal—Costs payable by unsuccessful assisted person—Adjournment to master in chambers for determination—Legal Aid (*General*) *Regulations,* 1960 (*S.I.* 1960 *No.* 408), *reg.* 18 (1), *proviso* (*a*).

The defendants were husband and wife and were each granted a civil aid certificate to defend an action for damages for misrepresentation. The husband's contribution was assessed at £47 10s. payable by twelve monthly instalments, and the wife's contribution was assessed at £200 payable in one sum. At the trial the judge found that the husband had deceived the plaintiffs and gave judgment against the defendants. The plaintiffs who were also legally aided applied for costs, but the judge refused to make any order for costs because both sides were legally aided. On appeal by the plaintiffs,

Held: (i) the judge had erred in principle in failing to exercise his discretion as to costs in accordance with the principles on which such discretion was normally exercised as was required by the Legal Aid and Advice Act, 1949, s. 1 (7) (b);

(ii) there was no ground for depriving the plaintiffs of an order against the defendants for the costs of the trial on a party and party basis but the amount payable by the defendants, by virtue of s. 2 (2) (e) of the Act of 1949, would be limited to an amount equivalent to their legal aid contributions, namely, £47 10s. payable by twelve monthly instalments in the case of the husband and a lump sum payment of £200 in the case of the wife;

(iii) the plaintiffs were also entitled to the costs of the appeal, but this matter would, pursuant to the Legal Aid (General) Regulations, 1960, r. 18 (1) (a), be adjourned to a master in chambers for determination of the amount proper to be paid.

Appeal allowed.

[**Editorial Note.** That the fact that a party was legally aided neither altered the rights of parties nor the duties of the court in relation to application for costs has been intimated at first instance in divorce cases in *Edwards* v. *Edwards*, [1958] 2 All E.R. 179 (see p. 180, letters F, G) and *Woodard* v. *Woodard and Curd*, [1959] 1 All E.R. 641 (see p. 647, letter A), with which the present case may, on that aspect, be considered; see also, 30 Halsbury's Laws (3rd Edn.) 502, para. 932.

As to costs awarded against an assisted person, see 30 Halsbury's Laws (3rd Edn.) 502, para. 933; and for cases on the subject, see Supplements to Digest (Practice).

For the Legal Aid and Advice Act, 1949, s. 1 (7) (b), s. 2 (2) (e), s. 3 (1), see 18 Halsbury's Statutes (2nd Edn.) 534, 535, 537.]

Appeal.

This was an appeal by the plaintiffs against the refusal by Stable, J., at Maidstone Assizes on July 14, 1959, to make an order for costs against the defendants. The plaintiffs brought an action against the defendants for damages for fraudulent misrepresentation and for breach of contract in respect of the sale of a business by the defendants to the plaintiffs. Stable, J., gave judgment for the plaintiffs on the ground of fraudulent misrepresentation and ordered the defendants to pay £350 as damages. His Lordship, however, refused to make an order for costs against the defendants. The plaintiffs and the defendants had both been granted civil aid certificates in relation to the action and in relation to the appeal.

G. V. Owen for the plaintiffs.
M. B. Smith for the defendants.

LORD EVERSHED, M.R.: This appeal relates solely to a question of costs, and the court would not normally entertain such an appeal, but the plaintiffs' case is that the learned judge did not exercise the judicial discretion which was vested in him and it has not been objected by counsel for the defendants that we should not entertain the appeal.

The plaintiffs were husband and wife, as also were the defendants. The defendants were seeking to sell a greengrocery business which the plaintiffs had contracted to buy. The nature of the case was that in the defendants' advertisements, and in their instructions to their agents, which were passed on, as was obviously intended, to the plaintiffs, the defendants, or one of them, had made dishonest and fraudulent misrepresentations as regards the takings of the business. The plaintiffs' claim was for damages based on fraud. The business itself changed hands, that is to say, the plaintiffs did not take the point that because of the misrepresentations the contract was at an end. They preferred to rely on their common law remedy, namely, to claim damages for misrepresentation.

It is unnecessary to pursue the details of the claim because STABLE, J., in a full and careful judgment, came, without any hesitation, to the conclusion that the first defendant had dishonestly represented the weekly takings of the business, and, further, that the plaintiffs, having relied on the misrepresentations, were entitled to recover damages at common law for the fraud. So he ordered payment by both the defendants of a sum assessed by way of damages of £350. Counsel for the plaintiffs read us the judgment and the point was taken whether both the defendants should be rendered liable by the order to pay damages? The learned judge, quite naturally, if I may venture to say so, took the view that, although Mrs. Heaysman, the female defendant, was not herself guilty of any personal dishonesty, still she was a seller with her husband, had associated herself with him in the sale and had been a party to defending the action, and he ordered that there should be judgment against both the defendants in the sum of £350.

Counsel for the plaintiffs naturally enough then asked for costs and stated "In this case all four people are legally assisted". On that information being imparted to him the learned judge expressed himself with the refreshing vigour characteristic of him. He said:

> "If what I am invited to do is to make some sort of contribution for the legal aid fund, I am not going to do it. I have said for years and years and years that until they pay costs to the successful defendants, when they lose, they are going to get no assistance from me."

In the context, I think that the word "they" referred to the legal fund or those who are responsible for its administration. It is, I think, plain that the learned judge holds strongly the view that under the legal aid scheme serious injustices may sometimes be done to an unaided party in a suit in which the other party is legally aided if the non-aided party wins and is thereby disabled from recovering any costs. That is a point of view which has recently received a certain amount of publicity and no one can deny the possibility of injustice to parties, who themselves are not legally aided, to law suits against legally aided litigants. It is the fact that such parties may sometimes suffer from being unable to recover any costs in asserting or defending what the court holds to be their just claim. I would add that that injustice, if such it is, is certainly no less when a case comes to the Court of Appeal, and the non-legally aided party may have to find (for the second time) the money for his own costs after he has successfully defended in

A the Court of Appeal the judgment that he has already obtained. That is a matter beyond doubt proper for public and Parliamentary consideration. Still, the Legal Aid and Advice Act, 1949, imposes duties on the court, and I am bound to say that, for my part, I think that the service which is rendered to the community by the scheme and by the Law Society in its administration of the scheme is highly creditable. I would also point out that the scheme is, after all, on its face, B a contributory scheme. Parliament has very recently seen fit to alter and amend the Act of 1949 by substantially expanding its scope, so that persons with incomes far greater than those contemplated by the Act of 1949 may be able to get legal assistance (1). But they do so on contributory terms. It is also, of course, wrong to suggest that the scheme is one which can be looked at as being in any sense for the advantage of the particular fund or the society that administers it.

C As I have said, the learned judge clearly feels strongly that there is under this scheme, as is obvious, a possibility of injustice. The passage which I have read which is in fact re-stated on the following page, seems to me to show that he felt that, until the law was altered, it was not right that he should, as he expressed it, make any order which would either give anything to the fund or would diminish the fund. He added:

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> "I was brought up in the school of law that regarded maintenance and champerty as bad things. I still think that they are."

I also was so brought up and I have read what the learned judge has said; but I hope he will forgive my saying that I cannot help thinking that it may have had the effect of his not having in mind the fact that, if an order for costs were E made against the unsuccessful defendants (one of whom, as he says, was a dishonest defendant), it would not make the slightest difference to the legal aid fund or to the Law Society. By the statute, the society, which is responsible to account to Parliament for the administration of the fund, has a first charge on any property recovered in an action (2). In this case it would be a charge on the sum of damages. So far as I can see, the society in execution of its public duty, would F be bound to enforce the charge; otherwise the amount concerned would fall on the taxpayers generally. I must, therefore, dissociate myself from what the learned judge said when he seems to indicate that the society would not in this case execute the charge. He said:

> "In this case there will be no order as regards costs on either side, each party being legally aided, and if the plaintiffs do not get their damages I hope G we shall hear more of it."

The effect of the failure to make any order as to costs was merely to benefit the defendants, one of whom, as I have already said, he found to be deliberately dishonest. So, while I certainly respect the view that the learned judge took of the working of the scheme, I am bound to say that I cannot agree that his H decision does justice to the scope and purposes of the Act, and, in any case, it seems to me impossible to say that the learned judge properly exercised his discretion in this matter by confining himself to the views which he expressed.

By s. 1 (7) (b) of the Act of 1949 it is expressly provided that

> "the rights conferred by this Part of this Act on a person receiving legal aid shall not affect the rights or liabilities of other parties to the proceedings I or the principles on which the discretion of any court . . . is normally exercised."

That imposes on the court the duty of considering the question who is to pay costs in accordance with the principles on which such discretion is normally exercised. If that be the right premise, it seems to me unanswerable, I confess, that, prima facie, the defendants ought to have been ordered to pay the costs of the action. If no parties had been legally aided, the defendants would manifestly have been ordered to pay the costs. Therefore, I think that, subject to the limitation which the next subsection imposes, the inescapable result here is that the defendants, one of whom, as I repeat, was held to have deceived the plaintiffs, should pay the costs. By s. 2 (2) it is provided:

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(1) Legal Aid Act, 1960, s. 1.

(2) Legal Aid and Advice Act, 1949, s. 3 (4); 18 HALSBURY'S STATUTES (2nd Edn.) 537.

> " Where a person receives legal aid in connexion with any proceedings . . . (e) his liability by virtue of an order for costs made against him with respect to the proceedings shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, including the means of all the parties and their conduct in connexion with the dispute."

As regards the last few words, " and their conduct in connexion with the dispute ", there is, plainly, no ground for altering what would be the normal incidence of costs. I must, therefore, look and see what, on the evidence before us, it is reasonable for the two defendants in this case to pay having regard to all the circumstances, including the means of everybody concerned.

The material before us shows that substantially speaking the plaintiffs have no means and their contributions would be negligible. The only relevance of that is to emphasise the point that if the defendants are not bound to pay costs, then the damages which the plaintiffs have been rightly awarded will, for the most part, be expended in the payment of costs. Mr. and Mrs. Heaysman appear to have carried on in collaboration this greengrocery business. I do not use any more precise term because I know not whether there was anything in the nature of a partnership or how they regarded themselves as beneficially interested. It appears, however, from the certificate obtained in the usual course from the National Assistance Board that Mr. Heaysman when he obtained that certificate had an income of £251 and a capital of £4. I do not read s. 3 (1) which specifies the limits of the disposable income relevant to the total of the income. It is sufficient to say that the relevant committee of the Law Society assessed the proper contribution that Mr. Heaysman should make towards his own costs at £47 10s., payable, broadly speaking, at the rate of £4 a month. His wife, Mrs. Heaysman, though, as I repeat, herself innocent of any dishonesty, was perhaps more generously treated when the proceeds of sale were received, for the finding in her case was that her disposable income was £346 per annum and her disposable capital was £491. On the basis of these figures an assessment of her liability was a single capital payment of £200. I need hardly add that if her own costs and those of her husband's costs came to less than the sum total of those two amounts they would be entitled to a refund of the balance. If the costs exceeded the total of their contributions, then the excess would fall on the general assets of the fund.

Those being the data in front of us relevant to our consideration, under the enactment (3), the question then arises what order ought we now to make? After considering the matter with my brethren, the conclusion which I think is the right one is to take as broadly correct the assessment which the Law Society made for the purposes of the defendants' own costs. So I would make an order as regards the costs in the court below on the two defendants jointly to pay between them the costs of the plaintiffs of the action, subject to the limitation that the taxed costs payable should not exceed the sum total of the contribution in the case of Mr. Heaysman corresponding to that which he was ordered to make of £47 10s., and in the case of Mrs. Heaysman of the single figure of £200. The effect of that, be it observed, will be that, when the costs are taxed, they will be apportioned between the two defendants, and each will be liable only to the extent of the contribution which I have mentioned. If the costs when taxed do not amount to the sum total of the two sums, then each will be naturally relieved to the extent to which that total is not reached. If the taxed total exceeds those two sums, then the two defendants' liability will be exhausted when they have contributed the amounts which I have stated. I think that there should be no

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(3) Legal Aid and Advice Act, 1949, s. 2 (2) (e), and see s. 2 (3).

A practical difficulty in working that out. It may be, from what counsel for the plaintiffs says, that the costs will be in excess of the sum total which I have mentioned, and it follows that to that extent the plaintiffs might suffer by the excess being discharged out of the damages, but I should hope that the excess, if there be an excess, will not be as great as counsel has intimated. However that may be, I think, applying myself as best I can to the obligations imposed B by the enactments (4), that is the order as to costs which I would make.

When I have spoken of costs, I mean of course costs taxed as between party and party. That will be the costs which the defendants would, subject to the limitation which I have mentioned, be bound to pay. That disposes of the matter subject only to the costs in this court. Counsel for the plaintiffs can justly say that he was not only bound to come, but was entitled in the result to come, to C this court, and, therefore, he is entitled, in accordance with the practice of this court, to an order that his costs here as between party and party be paid by the defendants, the respondents. Following our usual practice, the order will contain the proviso that no step will be taken towards enforcing that order without leave of the court and there shall be liberty to apply—I would suggest that it is feasible to apply in the Queen's Bench Division—in order that this D matter may be disposed of. It may be on reflection that those concerned will feel that there are not enough funds available to make an application worth while. That I know not. It is a matter for which I am quite sure the experienced solicitors concerned will provide a solution. In addition to that, in both cases we must make an order for taxation as between solicitor and client of those separate costs in accordance with the Schedule to the Act.

E **ORMEROD, L.J.:** I agree and I have nothing to add.

SALMON, J.: I agree.

Appeal allowed.

[There then followed a discussion as to the costs of the appeal. The amount of the defendants' legal aid contribution was not necessarily a guide to the amount F of costs which the defendants were now able to pay since the assessment would not be up to date for the purpose of a determination by the Court of Appeal.]

G. V. Owen for the plaintiffs: Regulation 18 (1) of the Legal Aid (General) Regulations, 1960 (5), contains a proviso that

> "... the court may, if it thinks it expedient in the interests of justice and upon such terms, if any, as it thinks fit, (a) . . . adjourn the determination G for such time and to such place, including chambers, as the court thinks fit, so however that the determination shall take place before the judge, official referee, master or registrar, before whom the trial or hearing took place . . ."

It appears from that regulation that, unless your Lordships make some other order, or unless my friend consents, it would have to go back to STABLE, J., in chambers.

H **LORD EVERSHED, M.R.:** The reference which we have made relates to the case in this court. We are the judges here. We shall adjourn to a master in the Queen's Bench Division the determination of the amount proper to be paid as costs of the appeal, but no order is to be made without further application to this court.

Solicitors: *Rubinstein, Nash & Co.* (for the plaintiffs); *F. B. Jevons, Riley & Pope,* Tonbridge (for the defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(4) Legal Aid and Advice Act, 1949, s. 2 (2) (e), and see s. 2 (3).
(5) S.I. 1960 No. 408.

COMMISSIONERS OF CROWN LANDS *v.* PAGE.

[Court of Appeal (Lord Evershed, M.R., Ormerod and Devlin, L.JJ.), May 10, 11, June 2, 1960.]

Landlord and Tenant—Eviction—Characteristics of act of eviction—Crown lease—Covenant for quiet enjoyment implied—Extent of covenant in relation to acts done in performance of Crown's executive duty—Requisition by Crown under Defence (General) Regulations, 1939, *reg.* 51.

In 1937 the Commissioners of Crown Lands* granted a lease for a term of twenty-five years which in 1939 was assigned to the tenants. The premises were requisitioned in 1945 by the Ministry of Works on behalf of the Crown in exercise of the powers conferred by the Defence (General) Regulations, 1939, reg. 51, and were retained in requisition until 1955. From the date of the requisition no rent was paid by the tenant, and the Crown claimed arrears of rent accrued within the period allowed by the Limitation Act, 1939. The lease contained no express covenant for quiet enjoyment.

Held: the requisitioning of the premises did not constitute an eviction of the tenant so as to disentitle the Crown to rent because—

(i) (per Lord Evershed, M.R., Ormerod, L.J., concurring) in order to constitute an eviction at law a landlord's act must have the characteristics of permanence, of having been done with an intention of depriving the tenant of the enjoyment of the property demised, and of wrongfulness (see p. 729, letters C and D, p. 732, letter A, p. 733, letters E and F, post); in the present case (a) the intention attributable to the Crown in requisitioning the property under statutory powers and in performance of executive duty was not such an intention as characterised an eviction, particularly as compensation was payable for the requisition, and (b) the act of requisition under statutory powers lacked the element of wrongfulness, particularly as no covenant on the part of the Crown to refrain from exercising statutory powers would be implied in the lease.

(ii) (per Devlin, L.J.): an act which would amount to an eviction by the Crown would also amount to a fundamental breach of the implied covenant for quiet enjoyment, and there had been no act which amounted to that, since any covenant on the part of the Crown for quiet enjoyment that might be implied in the lease would exclude acts done for a general executive purpose in the national interest, such as an act of requisition under statutory powers or under the royal prerogative (see p. 735, letter D, and p. 736, letters D and E, post).

Upton v. *Townend* ((1855), 17 C.B. 30) applied.

William Cory & Son, Ltd. v. *London Corpn.* ([1951] 2 All E.R. 85) considered.

Appeal dismissed.

[As to acts amounting to eviction of tenant, see 23 Halsbury's Laws (3rd Edn.) 551-553, paras. 1211-1213; and for cases on the subject, see 31 Digest (Repl.) 141-143, *2795-2814.*]

Cases referred to:

Ayr Harbour Trustees v. *Oswald*, (1883), 8 App. Cas. 623; 11 Digest (Repl.) 103, *5.*

Board of Trade v. *Temperley Steam Shipping Co., Ltd.*, (1926), 26 Lloyd's Rep. 76; 27 Lloyd's Rep. 230.

Cory (William) & Son, Ltd. v. *London Corpn.*, [1950] 2 All E.R. 584; [1951] 1 K.B. 8; *affd.* C.A., [1951] 2 All E.R. 85; [1951] 2 K.B. 476; 115 J.P. 371; 2nd Digest Supp.

Howell v. *Falmouth Boat Construction, Ltd.*, [1951] 2 All E.R. 278; [1951] A.C. 837; 2nd Digest Supp.

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* See p. 734, footnote (15), post.

Rederiaktiebolaget Amphitrite v. *R.*, [1921] 3 K.B. 500; 91 L.J.K.B. 75; 126 L.T. 63; 16 Digest 238, *341*.

Robertson v. *Minister of Pensions*, [1948] 2 All E.R. 767; [1949] 1 K.B. 227; [1949] L.J.R. 323; 2nd Digest Supp.

Upton v. *Townend, Upton* v. *Greenlees*, (1855), 17 C.B. 30; 25 L.J.C.P. 44; 26 L.T.O.S. 76; 19 J.P. 775; 139 E.R. 976; 36 Digest (Repl.) 159, *839*.

Walls v. *Atcheson*, (1826), 3 Bing. 462; 2 C. & P. 268; 11 Moore, C.P. 379; 130 E.R. 591; sub nom. *Watts* v. *Atcheson*, 4 L.J.O.S.C.P. 154; 31 Digest (Repl.) 278, *4121*.

Appeal.

This was an appeal by the defendant from an order of GORMAN, J., dated June 18, 1959, in which he ordered that the plaintiffs should recover from the defendant £1,920 arrears of rent in respect of premises for a period when they were requisitioned by the Crown.

R. H. W. Dunn for the tenant.

Peter Foster, Q.C. and *J. C. Leonard* for the landlords.

Cur. adv. vult.

June 2. The following judgments were read.

LORD EVERSHED, M.R.: By a lease dated Nov. 23, 1937, and made between the King's Most Excellent Majesty of the first part, the Commissioners of Crown Lands* of the second part, and one Rudolph Edgar Francis de Trafford of the third part, there was demised to the party of the third part for a term of twenty-five years from July 5, 1937 the premises known as No. 4 Cornwall Terrace and the mews adjoining in the Borough of St. Marylebone in London. The terms of the lease were in common form, and need not be recited. They did not include any covenant for quiet enjoyment. The unexpired term of the lease was by deed dated Jan. 14, 1939, duly conveyed to Una Lady Handley Page, the defendant named in the present proceedings. On Feb. 22, 1945, the Minister of Works, on behalf of the Crown and in exercise of the powers conferred by the Defence Regulations, requisitioned the premises, the subject of the lease, and took (and thereafter until Sept. 3, 1955 retained) possession thereof. From the date of such requisition, no rent was paid, and the claim in the present proceedings was for the sum of £3,280, being arrears of rent alleged to be due under the lease from Apr. 5, 1945 until July 5, 1955. The defendant in her defence relied (inter alia) on the Limitation Act, 1939, and the validity of that defence has been conceded so as to limit the claim in the action to the amount of rent alleged to be due in respect of the period of six years immediately preceding the date of the writ.

Una Lady Handley Page died after the commencement of the suit; and accordingly, by virtue of an order made in the action on Sept. 4, 1957, proceedings have since been carried on against Sir Frederick Handley Page as executor of the original defendant. As Sir Frederick Handley Page in fact acted at all material times on his wife's behalf in relation to the requisition of the premises, I shall hereafter in this judgment treat Sir Frederick Handley Page as though he had been at all material times the assignee of the term granted by the lease, and had been the defendant in the action since its commencement.

The short point raised in the action and the appeal is whether the exercise by the Minister of Works of the power of requisitioning the house and premises at No. 4 Cornwall Terrace operated as an " eviction " of the lessee as that term is properly understood. It has been conceded that for the purposes of the case the Crown must be regarded as one and indivisible so that the lessor of the property, viz., the Crown, must be treated as having itself requisitioned the property which it (the Crown) had demised, and to have thereby ousted its own lessee from the right of occupation thereof during the period of the requisition; and it has also been conceded that if in truth there was an " eviction ", then

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* See p. 734, footnote (15), post.

(at least during the period of its operation) the rent under the lease was suspended. It is then necessary first to ascertain what in law amounts to an eviction, for it is clear that it is not every disturbance of the lessee's enjoyment of his right of occupation that so qualifies.

In Foa on Landlord and Tenant (8th Edn.) at p. 159 it is stated:

> "To constitute an eviction at law the lessee must establish that the lessor, without his consent or against his will, wrongfully entered upon the demised premises, and evicted him and kept him so evicted; but if the lessee has sublet, eviction of his under-tenant will, for this purpose, be an eviction of himself. But actual physical expulsion is not necessary; any act of a permanent character done by the landlord or by his procurement, with the intention of depriving the tenant of the enjoyment of the premises demised, or any part of them, will be sufficient."

The language used in Foa is closely similar to that found in 23 Halsbury's Laws of England (3rd Edn.), p. 552, para. 1211, where it is stated:

> "To constitute an eviction for this purpose, it is not necessary that there should be an actual physical expulsion from any part of the premises; any act of a permanent character done by the landlord or his agent with the intention of depriving the tenant of the enjoyment of the demised premises, or any part thereof, will operate as an eviction. Thus, there is an eviction if the landlord enters and uses the premises, the tenant remaining in possession; though a mere trespass by the landlord is not sufficient. It seems that it will be an eviction if the landlord induces the under-tenants to leave by notice to quit, so that the premises are left unoccupied."

It will be observed that the citation in Halsbury does not state that the landlord's action must be "wrongful", though counsel for the tenant as I understood his argument before us, accepted that the landlord's action must have that characteristic to constitute an eviction. It will, however, also be observed from the succeeding paragraph in Halsbury that where a tenant goes out of occupation so as to leave the property vacant, a landlord will protect himself from the effects of an eviction if he relets the property on the tenant's account, giving notice to the tenant accordingly, a proposition supported by the authority of *Walls* v. *Atcheson* (1).

Counsel for the tenant in opening his case, cited to us *Upton* v. *Townend* (2) a case which, as appears from the text-books above mentioned, provides much of the foundation for the passages cited. In *Upton* v. *Townend* (2) certain premises subject to demises to two lessees had been destroyed by fire, and their reconstruction by the Goldsmiths Company (who were treated as equivalent to the landlord or his agent) was such that the identity of the respective demised premises was lost, and possession by the lessees of the true subject-matter of the demises thenceforth made impossible. It was held that there had been eviction of both lessees. Jervis, C.J., after stating that "eviction" had formerly connoted expulsion by title paramount, and that it was extremely difficult to define its then meaning with technical accuracy, continued (3):

> "Getting rid thus of the old notion of eviction, I think it may now be taken to mean this—not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises."

Williams, J., said (4):

> "There clearly are some acts of interference by the landlord with the tenant's enjoyment of the premises which do not amount to an eviction, but which may be either mere acts of trespass or eviction according to the

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(1) (1826), 3 Bing. 462. (2) (1855), 17 C.B. 30. (3) (1855), 17 C.B. at p. 64.
(4) (1855), 17 C.B. at p. 68.

> intention with which they are done. If those acts amount to a clear indication of intention on the landlord's part that the tenant shall no longer continue to hold the premises, they would constitute an eviction."

Finally I cite from WILLES, J., who did not, however, in terms attempt a definition so much as a conclusion of the effect of what the landlord in that case had done. He said (5):

> "In both cases, therefore, as it seems to me, the tenant was, by an act of the landlord, which was intended to be, and was, of a permanent character, deprived of the perfect and convenient use of the thing demised."

From the citations which I have made, it seems to me that the act of the landlord (or his agent) in order to constitute an eviction at law must at least have certain characteristics which, though they have not been (and may not indeed be capable of being) precisely defined, will be regarded as satisfied or not satisfied according to the standards of common sense and ordinary understanding in the light of the facts of each particular case. I leave aside at this stage the question of the "wrongfulness" of the landlord's act. But apart from any requisite of wrongfulness, the landlord's act must (i) be of a "permanent character", and (ii) be done with a particular "intention", viz., that of disabling the tenant from continuing to "hold" the subject of his demise, or of depriving him of the "enjoyment" of the thing demised, or some part thereof. I add (and I think it important for reasons later appearing) that a disturbance of the requisite quality of a sub-tenant will operate as an "eviction" of the lessee himself. Does the exercise of the statutory power of requisition have the required characteristics to constitute an eviction? I have come to the conclusion that it does not.

The act of requisitioning was done pursuant to the Defence (General) Regulations, 1939, reg. 51, a regulation originally made pursuant to the Emergency Powers (Defence) Act, 1939, but later continued in operation by virtue of the Supplies and Services (Transitional Powers) Act, 1945, (6). The effect of the act of requisitioning was the "taking of possession or control on behalf of His Majesty" of the house in Cornwall Terrace; and its purpose and justification the maintenance, so long as the emergency conditions immediately following the last war subsisted, of (so far as here relevant) "supplies and services essential to the life of the community". By virtue of the Compensation (Defence) Act, 1939, the lessee became entitled to compensation in accordance with s. 2 of that Act, viz., first, under sub-s. (1) (a)—

> "a sum equal to the rent which might reasonably be expected to be payable by a tenant in occupation of the land, during the period for which possession of the land is retained in the exercise of emergency powers, under a lease granted immediately before the beginning of that period . . ."

together also (in this case) with secondly, by sub-s. (1) (b), the sum required to make good any damage done during the requisition period. Subsection (2) of the same section provides that the compensation under the first above-mentioned head should (inter alia) be paid to the person who "for the time being would be entitled to occupy the land but for the fact" of the requisition.

First, has the landlord's act the required characteristic of "permanence"? I am prepared to accept counsel for the tenant's submission that the word "permanent" in the relevant context does not mean "for ever" or "in perpetuity". It may not always indicate "for the whole unexpired term of the lease". It is no doubt used in contra-distinction to "temporary". I agree also with counsel for the tenant that the period of the requisition (as it in fact endured) in the present case, viz., ten years, was, particularly in relation to the unexpired term of the lease at the date of the requisition, viz., seventeen years, substantial. Nevertheless I think there is much to be said for the view that the characteristic of permanence to constitute an eviction was not here satisfied. The powers of requisition were measures intended for an emergency situation, to last only so long as the " emergency " itself lasted. It is not, to my mind, witheout significanc that the relevant statutory authority for the exercise of the powers in the present case bore the titles " Emergency Powers (Defence) Act", and " Supplies and Services (Transitional Powers) Act ". In other words, although the " emergency " which justified and required the use of the powers was of uncertain duration, still it was an "emergency ", and would fairly be regarded accordingly as of a temporary rather than of a permanent nature according to the ordinary sense of those words. On the other hand, I appreciate that a contract may be frustrated by a requisitioning of its essential subject-matter—e.g., a contract of charterparty by the requisitioning of the ship which is the subject of the charter—unless the requisitioning is of a merely " temporary " character as that word would be ordinarily understood. The truth may be that, although the word " permanent " may in the relevant context be used by way of antithesis to " temporary ", yet the argument may not thereby be much advanced, for what one may mean by " temporary " as a matter of ordinary language may greatly vary according to the circumstances in which it is used. And although a requisition of premises might be readily so described if it lasted for a few weeks or months only, the answer might be otherwise in a case where the duration of the requisition, whatever had been originally contemplated, was for a period of more than ten years. I prefer, therefore, to express no view on this aspect of the matter, but turn to the second requisite of intention.

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(5) (1855), 17 C.B. at p. 75.

(6) Defence (General) Regulations, 1939, reg. 51, was continued in force by virtue of the Supplies and Services (Transitional Powers) Act, 1945, for purposes which were varied or extended subsequently by the Supplies and Services (Extended Purposes) Act, 1947, and the Supplies and Services (Defence Purposes) Act, 1951. The regulation was ultimately revoked as from Dec. 31, 1958, by s. 1 (1) of the Land Powers (Defence) Act, 1958, which, by s. 6, confers limited powers to requisition land for defence training purposes.

What was the " intention " which should be attributed to the Crown when exercising its powers under the regulation? In answering this question it is to be borne in mind (i) that under the prevailing post-war conditions it must be taken as generally accepted and understood that all occupiers of property, whether freeholders or leaseholders or under-tenants, were liable to be called on to submit to the " possession or control " of their premises being taken by or on behalf of His Majesty for essential public purposes; (ii) that, as was conceded before us, the Crown, on the exercise of its requisitioning powers, acquired thereby no estate or proprietary interest in the property taken; and (iii) that the compensation payable, particularly that under sub-s. (1) (a) of the Compensation (Defence) Act, 1939, and the provisions as to its payment under sub-s. (2), postulate that the estate, the proprietary interest, of the freeholder or of the lessee (in the present case) should remain undisturbed save only that the Crown should have actual occupation of the property. As a matter of law, the requisitioning authority should therefore, as I think, be taken to have acquired the right of occupation as compulsory licensee. In any event, the situation of the lessee in such a case as the present cannot be put higher than that he was, by the effect of the statute and the regulation and order made thereunder, compelled to quit the premises; but the occupier was bound to pay him a " rent " appropriate to the situation if (in the present case) the Crown, the freeholder, had become also the sub-tenant.

I do not attempt for my part any further definitions, or any exposition of the language used in the cases, including *Upton* v. *Townend* (7). The exceptional situation—the situation of national emergency—with which the Acts of 1939 and 1945 were designed to deal was obviously something not at all contemplated by the common law of one hundred years before. In my judgment, the " intention " to be attributed to the Crown, when it exercised its powers and performed its executive duty, cannot fairly be said to have been an intention on its part qua landlord of depriving the lessee of his " enjoyment " of the premises, or to have

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(7) (1855), 17 C.B. 30.

A been an intention that the lessee should not continue to " hold the premises ". It may, no doubt, be said that the " intention " must have been to deprive the lessee (in the language of WILLES, J.) of the " perfect and convenient use " of the premises; but my answer to that suggestion is that WILLES, J.'s words were used (as I have earlier stated) not by way of definition of " eviction ", but as a description of what the effect of the landlord's action was on the facts in *Upton* v.
B *Townend* (8).

Possession of premises in law includes the right to receive their rents and profits; and that right, as it seems to me, was preserved notwithstanding the requisition. The matter is, to my mind, further illustrated if the case is supposed where the Crown's lessee has underlet the premises. If counsel for the tenant's contention is accepted, then it would seem to follow that the requisition of the premises in
C the hands of the under-tenant would amount to an eviction of the lessee; and if so, then not only would the lessee be disabled from receiving rent thereafter from his under-tenant, but (since the under-tenant's interest would have gone with the eviction of the lessee) the under-tenant would appear himself to be deprived of any right to compensation as being no longer entitled, but for the requisition, to occupy the land. Such a result is, in my view, wholly at variance with the intend-
D ment of the relevant legislation.

In justice to Sir Frederick Handley Page in the present case, it must be stated that he has not sought to receive the " rent " compensation under s. 2 (1) (a) of the Compensation (Defence) Act, 1939, without a set-off or deduction of the rent payable under the lease. But in strictness I can see no justification for the concession. If he has been effectively evicted, then it may be said that he has
E ceased to be " entitled", apart from the requisition, to occupy the land. Alternatively, if he is still so " entitled ", then he would appear to be able to receive the " rental " compensation in full, even though his liability for rent under the lease be suspended. It may be added that it is not, as I understand, in dispute that on termination of the requisition, Sir Frederick became entitled to the full enjoyment of the subject of the demise until its termination in 1962.

F In the result, therefore, the " intention " to be attributed to the Crown cannot, in my judgment, be put higher than this: an intention to disturb the lessee's enjoyment to the extent only of requiring him to submit to the Crown's occupation of the premises as a licensee during the " emergency " without otherwise qualifying the lessee's interest or " possession " under the demise, and on terms that the lessee should, by way of " rent " and otherwise, be fairly compensated for the
G licence; in other words, that the lessee should be put in no worse position than he would occupy if he had granted a sub-tenancy for the duration of the requisition on terms appropriate to a sub-demise between a willing sub-lessor and sub-lessee. In my judgment such a conception is not consistent with the intention requisite to an " eviction ".

It will be recalled that I earlier put aside the question whether the landlord's
H act, amounting to an eviction, must also have the quality of being " wrongful " as well as done " without the lessee's consent ". In the present case it was conceded by counsel for the Crown that Sir Frederick should be taken not to have consented to the requisition. I cannot, however, refrain from observing that, as it seems to me, this matter of consent introduces something of an unreality into the matter. It is plain that in at least the great majority of cases of requisi-
I tioning, absence of consent on the occupier's part could have made no difference whatever in the result. The Crown was exercising not only a power, but a generally accepted duty. It would appear to me strange that the question whether rent was or was not suspended should depend on the consent or absence of consent, in a state of national emergency, of the occupier concerned, on whether in such circumstances the occupier formally indicated an absence of consent on his part.

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(8) (1855), 17 C.B. 30.

However that may be, was the requisition in any sense " wrongful "? Counsel for the tenant, as I have said, did not dispute the necessity of " wrongfulness " if there was to be " eviction ". But he contended that the wrongfulness need not be actionable. I would agree with him that " wrongful " in its context does not mean tortious; and apart from its effect on any of the terms of the lease it is clear that the act of the Crown in requisitioning the house was not sensibly " wrongful " seeing that it was done in pursuance of a statutory power and a statutory duty. But it was counsel for the tenant's submission that the requisition was " wrongful " in that (i) the Crown thereby deprived its lessee of possession, and, therefore, that the consideration for the rent had gone; (ii) the Crown had thereby derogated from its grant; and (iii) the Crown was in breach of its implied covenant for quiet enjoyment.

I am unable to accept either of the first two heads of alleged wrongfulness. The first indeed seems to me to beg the question at issue. Moreover since the lessee is (according to the Compensation (Defence) Act, 1939) entitled to receive the compensation " rent ", he is not, for reasons already indicated, deprived of " possession " in the legal sense. I refer again also to the case where the occupant at the time of the requisition was a sub-tenant. Similarly, if the views I have above expressed are correct, it cannot, in my judgment, be said that the Crown has derogated from its grant.

There remains the question of the covenant (implied in this case) for quiet enjoyment. This has occasioned me a little greater difficulty. I observe, however, that counsel for the tenant conceded in his argument that he would have no cause of action for breach of the implied covenant, because the lessee suffered no damage. If this concession was rightly made, it seems to me, I confess, somewhat contrary to logic and common sense that none the less the lessee can allege breach of covenant. But there is, I think, another answer. There is here no express covenant. It is well established that, in the absence of an express covenant, a covenant for quiet enjoyment will be implied by virtue of the " demise ". I am not, however, satisfied that in a demise by the Crown the covenant implicit in the demise would extend to prevent the future exercise by the Crown of powers and duties imposed on it in its executive capacity by statute. Whatever might be the position if the demise had contained an express covenant unqualified in terms (on which I prefer to express no opinion) I think that any implied covenant should be treated as qualified to the extent indicated.

This view is, I think, supported by the decision of Lord Goddard, C.J., and the Court of Appeal in *William Cory & Son, Ltd.* v. *London Corpn.* (9). In that case the promulgation by the defendant corporation, under its statutory power and duty, of new bye-laws, which made the continuation of the contract between the corporation and the plaintiffs commercially impossible, operated to frustrate the contract; but both courts rejected the plaintiffs' arguments that the notice given to the plaintiffs by the corporation of the latter's intention to make the new bye-laws operated as an anticipatory repudiation of the contract by the corporation on the ground that no term could be implied in the contract (and none was expressed) that the corporation would not exercise the bye-law making powers and duties under statute in a way which would be inconsistent with the terms of the contract. So in the present case it might, I conceive, be said that the terms of the demise (which contained in express terms no provision to the contrary) must be treated as impliedly subject to the effect of any proper exercise in the future of the Crown's executive authority. It is, however, sufficient in the present case to hold that no covenant for quiet enjoyment should be implied which would limit the Crown's future proper exercise of its powers and duties under statute; in other words, that there was here no " wrongfulness " in the Crown's requisition. On this ground, as on the ground of absence of the requisite

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(9) [1950] 2 All E.R. 584; [1951] 1 K.B. 8; C.A., [1951] 2 All E.R. 85; [1951] 2 K.B. 476.

A "intention", I think accordingly that there has been no "eviction" established on the part of the Crown.

I should add that on the question of the implied covenant for quiet enjoyment we were referred to the view expressed by DENNING, J., in *Robertson* v. *Minister of Pensions* (10) to the effect that in the present day and age no distinction should be drawn as to the legal effect of its or their actions between the Crown and B ordinary subjects, so that the effect of a representation made by the Crown could no longer be qualified so as to be subject to the future exercise by the Crown of its executive authority. The case was, however, on its facts very different from the present; and the learned judge's general proposition was disapproved by VISCOUNT SIMONDS and LORD NORMAND in *Howell* v. *Falmouth Boat Construction, Ltd.* (11). I do not, therefore, think that counsel for the tenant's contention on C this point can be sustained by reference to DENNING, J.'s case. I would, therefore, dismiss the appeal.

ORMEROD, L.J.: I have had the opportunity of reading in advance the judgment which has been delivered by LORD EVERSHED, M.R., and I am in full agreement with the views that he has expressed. The question, as I see it, D however, can be sufficiently determined on the ground that the action of the Minister in requisitioning the demised premises did not contain the element of wrongfulness which appears to be essential in an eviction; and it is only if the action of the Minister amounts to an eviction that the obligation to pay rent would be suspended. Counsel for the tenant conceded in the course of his argument that in order to amount to an eviction an act must be wrongful, but submitted E that such an act need not necessarily be tortious.

It is not easy to state with precision what constitutes the element of wrongfulness. The relevant passages in the judgments in *Upton* v. *Townend* (12) have already been cited, and it is unnecessary to repeat them. CROWDER, J., is the only judge in whose judgment the word "wrongful" appears, but it is clearly implicit in the language of the other judgments. In 1855, of course, when *Upton* F v. *Townend* (12) was under consideration, no question of requisitioning arose, and the forms of interference by the lessor with the demise which were in the contemplation of the learned judges were trespass on the one hand, and on the other, to quote the words of JERVIS, C.J. (13), something of a

> "grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises."

G In either event the act in question would be a wrongful act. There are various reasons why a landlord may enter on the demised premises, or otherwise interfere with the demise, which could not be regarded as wrongful. He may enter by leave of the lessee, or in pursuance of the provisions of the lease, and for the purposes therein provided. If, however, his entry was not by leave, or pursuant to his H powers under the lease, then it appears that his action would be wrongful and amount to a trespass or an eviction, or (which may well amount to the same thing) a breach of the lessor's covenant for quiet enjoyment.

The question to be considered in this case is whether the action of the Minister in exercising his powers of requisition under the regulations made pursuant to the Emergency Powers (Defence) Act, 1939, and continued under the Supplies and Services (Transitional Powers) Act, 1945, was wrongful, or whether his I interference with the full enjoyment of the demise was an act which should not be so regarded. He was acting in pursuance of statutory authority, which gave him the right to enter on premises and take possession of them if he regarded it as necessary so to do in the interests of the public safety. It would be surprising if an act authorised by statute which was proper in the case of other premises should be regarded as wrongful in the case of premises demised by the Crown. If the act of entry was as of right, whether pursuant to the provisions of the lease, or pursuant to statute, it is difficult to see how it could be wrongful. In my judgment, it cannot be so regarded.

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(10) [1948] 2 All E.R. 767; [1949] 1 K.B. 227.

(11) [1951] 2 All E.R. at pp. 280, 284; [1951] A.C. at pp. 845, 849.

(12) (1855), 17 C.B. 30.

(13) (1855), 17 C.B. at p. 64.

Counsel for the tenant submitted that the act of the lessors was wrongful because it was in breach of the lessor's covenant for quiet enjoyment. There was no express covenant in the lease, and counsel had, therefore, to rely on the covenant implied from the use of the word " demise ". A breach of the covenant for quiet enjoyment may be so fundamental that it amounts in effect to an eviction, thereby terminating the obligation of the lessee for rent; on the other hand, it may be such as to do no more than give rise to an action for damages. In this case, if there was a breach, it might well be regarded as fundamental; but for my part I cannot accept that a covenant for quiet enjoyment implied in a lease from the Crown must be taken to go so far as to imply an undertaking by the Crown to refrain from exercising statutory powers in respect of the demised premises which the Crown may properly deem necessary. The position in regard to an express covenant does not arise here, and therefore I express no opinion on it. In my judgment, the action of the Crown in requisitioning the demised premises in this case did not amount to an eviction, and did not give any ground for the suspension of the obligation of the lessee to pay rent. I would therefore dismiss the appeal.

DEVLIN, L.J.: The obligation to pay rent continues so long as the tenancy lasts, and whether or not the tenant is in occupation or enjoyment of the premises, unless he is evicted by the landlord. Eviction does not necessarily involve physical expulsion; an act that deprives the tenant of the enjoyment of the premises, or part of them, may be sufficient. The liability to pay rent, and the corresponding liability of the landlord not to interfere with the tenant's enjoyment of what he has been granted flow out of the grant of the estate, and are independent of covenant, though it would now be an exceptional lease which did not contain a tenant's covenant to pay rent, and a landlord's covenant of quiet enjoyment.

An eviction or breach that goes to the root of the covenant (and for practical purposes they are the same thing) is a defence to an action for rent. The tenant, therefore, relies, as the only defence to the claim by the Commissioners of Crown Lands for rent, on the action of the Commissioners of Works (14) in requisitioning the premises. It has been admitted that the Crown is one and indivisible, and acted as much through the Commissioners of Works as through the Commissioners of Crown Lands (15). There can be no doubt, therefore, that the Crown dispossessed the tenant. The element of wrongfulness which is generally said to be necessary to constitute an eviction means in my judgment no more than the breach by the landlord of his obligation—whether that obligation be expressed or implied, and whether it arises from covenant, or from the letting itself—to leave the tenant undisturbed except to the extent that he has expressly reserved the power to re-enter. This obligation, whatever its source, is one and the same in character and extent; and that is why it is unfruitful to distinguish between an eviction and a breach that goes to the root of the covenant of quiet enjoyment. Since it is conceded that there is in this lease an implied covenant for quiet enjoyment, I shall deal with the extent of the Crown's obligation by reference to that covenant.

Has the Crown committed a fundamental breach of the covenant? To answer that question one must consider the true scope and object of the covenant in such a lease as this where the Crown is the grantor. On the face of it, and if the covenant is taken as read without any limitation, there has been a breach. The Crown has deprived the tenant of the enjoyment of the demised premises for a long and indefinite period, and has done so deliberately, and (if one ignores the compulsion of public duty) has done so of its own free will; its act was authorised, but was not required by the statute. But, it is said by the Crown, it is not an act done as landlord, and it lacks other necessary constituents of the act of eviction.

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(14) Power to appoint a Minister of Works was enacted by the Minister of Works Act, 1942, and by the Ministry of Works (Transfer of Powers) (No. 1) Order, 1945 (S.R. & O. 1945 No. 991), all property, rights, liabilities, etc. of the Commissioners of Works were transferred to the Minister.

(15) The Commissioners of Crown Lands were reconstituted as the Crown Estate Commissioners by the Crown Estate Act, 1956, s. 1, as from Dec. 14, 1956.

I think that it may well be that the covenant of quiet enjoyment is limited to acts that are done by the landlord in supposed assertion of his rights as landlord, and that other trespasses, however grave, are outside the covenant. But because the landlord in this case is also the Crown, I have found it on the whole simpler to answer the question in the case not by reference to any special limitation on the covenant of quiet enjoyment affecting all landlords, but by reference to the general limitation that affects all contracts or covenants entered into by the Crown, or for that matter by any other public authority.

When the Crown, or any other person, is entrusted, whether by virtue of the prerogative or by statute, with discretionary powers to be exercised for the public good, it does not, when making a private contract in general terms, undertake (and it may be that it could not even with the use of specific language validly undertake) to fetter itself in the use of those powers, and in the exercise of its discretion. This principle has been accepted in a number of authorities; it is sufficient to mention *Ayr Harbour Trustees* v. *Oswald* (16); *Rederiaktiebolaget Amphitrite* v. *R.* (17); *Board of Trade* v. *Temperley Steam Shipping Co., Ltd.* (18); and *William Cory & Son, Ltd.* v. *London Corpn.* (19). The covenant for quiet enjoyment in this case is implied, and is not dissimilar to the contractual provision considered in the two cases last cited, which were both concerned with the implied obligation on one party to a contract not to interfere with the performance by the other party of his obligations under it. In *Board of Trade* v. *Temperley Steam Shipping Co., Ltd.* (18) the board were the charterers of the defendants' ship, and it was contended that they had prevented the defendants from making their ship efficient for her service under the charterparty because one of the board's surveyors had refused a licence to do certain repairs. In *William Cory & Son, Ltd.* v. *London Corpn.* (19), the City Corporation had a contract with the plaintiffs whereunder the plaintiffs undertook to remove refuse by means of lighters and barges. Some time later the City Corporation passed a bye-law concerning the fitment of vessels transporting refuse which it was agreed was such as to make the performance of the contract impossible. It was held by the Court of Appeal that the corporation was not in breach of the implied term.

I do not, however, rest my decision in this case simply on the fact that the covenant for quiet enjoyment has to be implied. For reasons which I think will appear sufficiently in the next paragraph, I should reach the same conclusion if the ordinary covenant was expressed.

In some of the cases in which public authorities have been defendants, the judgments have been put on the ground that it would be ultra vires for them to bind themselves not to exercise their powers; and it has also been said that a promise to do so would be contrary to public policy. It may perhaps be difficult to apply this reasoning to the Crown, but it seems to me to be unnecessary to delve into the constitutional position. When the Crown, in dealing with one of its subjects, is dealing as if it too were a private person, and is granting leases or buying and selling as ordinary persons do, it is absurd to suppose that it is making any promise about the way in which it will conduct the affairs of the nation. No one can imagine, for example, that when the Crown makes a contract which could not be fulfilled in time of war, it is pledging itself not to declare war for so long as the contract lasts. Even if, therefore, there was an express covenant for quiet enjoyment, or an express promise by the Crown that it would not do any act which might hinder the other party to the contract in the performance of his obligations, the covenant or promise must by necessary implication be read to exclude those measures affecting the nation as a whole which the Crown takes for the public good.

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(16) (1883), 8 App. Cas. 623.
(17) [1921] 3 K.B. 500.
(18) (1926), 26 Lloyd's Rep. 76; 27 Lloyd's Rep. 230.
(19) [1951] 2 All E.R. 85; [1951] 2 K.B. 476.

During the last war the Ministries of War Transport, Food and Supply were trading on a vast scale, and were also issuing orders under their statutory powers which quite frequently frustrated their own contracts, or those made by some other government department. The Minister of Supply, for example, might be found prohibiting all importation of a commodity of a sort which he had contracted to buy; or the Ministry of War Transport might fail to make cargo space available for purchases by another department. So far as I am aware, there is no case in which it has been contended that because of such action, the Crown was in breach of contract. That shows the general understanding under which such business was done. If at the time of making any such contract the " officious bystander " had asked whether it was clear that the Crown was not undertaking to limit the use of its general executive powers, I think that there could have been only one answer. That is the proper basis for a necessary implication. I need not examine the question whether, if the Crown sought to fetter its future action in express and specific terms, it could effectively do so. It is most unlikely that in a contract with the subject, it would ever make the attempt. For the purpose of this case it is unnecessary to go further than to say that in making a lease or other contract with its subjects, the Crown does not (at least in the absence of specific words) promise to refrain from exercising its general powers under a statute or under the prerogative, or to exercise them in any particular way. That does not mean that the Crown can escape from any contract which it finds disadvantageous by saying that it never promised to act otherwise than for the public good. The distinction was clearly put by Roche, J., in *Board of Trade* v. *Temperley Steam Shipping Co., Ltd.* (20) where he said:

> " I think and I hold that in this charterparty it is to be implied that the Crown should do nothing in connexion with and in relation to and in the carrying out of the contract contained in the charterparty to prevent the shipowners from keeping the vessel seaworthy and to prevent them earning their hire. But I am utterly unable to imply in the charterparty a term or condition that the Crown should do nothing by virtue of some general legislation, or by virtue of some executive action, entirely remote from the charterparty, and done by persons not connected with the performance of the contract directly or indirectly to bring about the results in question."

That is a different thing from saying that the Crown can never bind itself in its dealings with the subject in case it might turn out that the fulfilment of the contract was not advantageous. The observations of Denning, J., in *Robertson* v. *Minister of Pensions* (21) on the doctrine of " executive necessity " were, I think, directed to a case of that sort. Here we are dealing with an act done for a general executive purpose, and not an act done for the purpose of achieving a particular result under the contract in question.

I agree that the appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Allen & Overy* (for the tenant); *Treasury Solicitor.*

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

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(20) (1926), 26 Lloyd's Rep. at p. 78.

(21) [1948] 2 All E.R. at p. 770; [1949] 1 K.B. at p. 231.

MIDLAND SILICONES, LTD. *v.* SCRUTTONS, LTD.

[Court of Appeal (Hodson, Pearce and Upjohn, L.JJ.), May 2, 3, 4, 5, June 2, 1960.]

Shipping—Carriage by sea—Negligence—Limitation of liability in contract of carriage—Whether stevedores entitled to rely on contract contained in bill of lading as limiting their liability to cargo-owner—Whether " carrier " in United States Act, and in bill of lading included stevedores—United States Carriage of Goods by Sea Act, 1936, *s.* 4 (5).

The decision in *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co.* ([1924] All E.R. Rep. 135) does not establish any general principle of exception to the rule of common law that a person who is not a party to a contract is not entitled (save in cases of agency) to the benefit of a term of the contract.

Principle of vicarious immunity from liability for tort by virtue of exception clauses in contracts of affreightment, stated by Scrutton, L.J., in *Mersey Shipping & Transport Co., Ltd.* v. *Rea, Ltd.* ((1925), 21 Lloyd's Rep. at p. 378) disapproved. See p. 743, letter D, p. 746, letters G and H, and p. 750, letter B, post.

The plaintiffs were consignees, and at material times owners, of a drum bought on terms c.i.f. London and consigned to them from America by ship. The bill of lading (dated Mar. 26, 1957) incorporated s. 4 (5)* of the United States Carriage of Goods by Sea Act, 1936, which would limit the liability of the shipowners (as carriers) to $500, and by cl. 3 of the long form of the bill the term " carrier " included " the ship . . . her owner, operator and demise charterer, and also any . . . person to the extent bound by this bill of lading, whether acting as carrier or bailee ". Section 1 of the Act of 1936 provided that the term " carrier " included the owner or charterer who entered into a contract of carriage with a shipper.

The shipowners employed the defendant stevedores as their agents in unloading and delivering goods to consignees, and the contract (dated in 1952) between the shipowners and the stevedores stated that the stevedores would be responsible for any negligence of their servants, but should " have such protection as is afforded by the terms " of the bills of lading. The consignees did not know of the contract of 1952. Servants of the defendants, when handling the drum in the course of their duties regarding unloading and delivery, negligently dropped it causing damage amounting to £593 12s. 2d. In an action by the consignees for this sum as damages the defendant stevedores contended that they were entitled to limit their liability to $500 by virtue of the contract of carriage (evidenced by the bill of lading) between the shipowners and the consignees, either because there was an implied term that the benefit of the contract should enure to the stevedores or because the shipowners contracted on behalf of the stevedores in this respect or because the stevedores were sub-bailees of the goods.

Held: the stevedores were not entitled to limitation of liability by virtue of the contract of carriage because—

(i) the stevedores were not parties to the contract of carriage (see p. 742, letter B, p. 743, letter F, p. 746, letters F and G, and p. 750, letter B, post), nor had it been entered into by the shipowners as agents on behalf of the stevedores (see p. 742, letter C, p. 748, letter B, and p. 751, letter A, post), so that they were not entitled to the benefit of its terms.

Dunlop Pneumatic Tyre Co., Ltd. v. *Selfridge & Co., Ltd.* ([1915] A.C. 847) followed.

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* For the terms of s. 4 (5), see p. 740, letter B, post; and for the relevant provisions regarding the meaning of " carrier " in the United States Carriage of Goods by Sea Act, 1936, and the bill of lading, see p. 747, letters G and H, post.

Adler v. *Dickson* ([1954] 3 All E.R. 397); *Wilson* v. *Darling Island* A
Stevedoring & Lighterage Co., Ltd. ([1956] 1 Lloyd's Rep. 346) and *Krawill Machinery Corpn.* v. *Robert C. Herd & Co., Inc.* ([1959] 1 Lloyd's Rep. 307) applied.

(ii) the stevedores were not within the meaning of the term "carrier" in the bill of lading, and were not acting as bailees so as to come within the term of cl. 3 of the long form of the bill of lading (see p. 739, letter I, B
p. 740, letter A, p. 747, letters H and I, and p. 750, letter I, to p. 751, letter A, post).

(iii) the stevedores were not within the term "carrier" in the United States Carriage of Goods by Sea Act, 1936 (see passages cited at the end of (ii) supra).

Krawill Machinery Corpn. v. *Robert C. Herd & Co., Inc.* ([1959] 1 C
Lloyd's Rep. 307) applied.

Per PEARCE, L.J. (having referred to decisions of the High Court of Australia and the Supreme Court of the United States): it is desirable that great common law jurisdictions should not lightly differ, more particularly on so universal a matter as commercial law (see p. 745, letter G, post).

Decision of DIPLOCK, J. ([1959] 2 All E.R. 289) affirmed. D

[**Editorial Note.** In *Krawill Machinery Corpn.* v. *Robert C. Herd & Co., Inc.* ([1959] 1 Lloyd's Rep. at p. 311, which is quoted at p. 745, letter D, post), it is pointed out that the person claiming the benefit of an exception in a contract of carriage was neither a party to the contract " nor a beneficiary of the contract ". It seems, therefore, that if there were in such a contract as a contract of carriage, words which expressed a trust of the benefit of an exemption clause for particular E
parties within the scope of its terms, they would be entitled in accordance with ordinary principles (see 14 HALSBURY'S LAWS (3rd Edn.) 556, 557, para. 1038, and 8 ibid., para. 114) to the benefit of the exception.

As to the limitation of the liability of a carrier by sea under Art. I (a) and Art. IV, para. 5, of the Schedule to the Carriage of Goods by Sea Act, 1924 (corresponding respectively to s. 1 (a) and s. 4 (5) of the United States Carriage F
of Goods by Sea Act, 1936) see 30 HALSBURY'S LAWS (2nd Edn.) 609, 617, para. 769, para. 772, and for the Carriage of Goods by Sea Act, 1924, Schedule, see 23 HALSBURY'S STATUTES (2nd Edn.) 886, 892.

As to the rights of strangers to a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 66-68, paras. 110-117; and for cases on the subject, see 12 DIGEST (Repl.) 45-51, 227-278.] G

Cases referred to:

Adler v. *Dickson*, [1954] 3 All E.R. 21; *affd.* C.A., [1954] 3 All E.R. 397; [1955] 1 Q.B. 158; [1954] 3 W.L.R. 696; 3rd Digest Supp.

Collins & Co. v. *Panama Ry. Co.*, (1952), 197 Fed. Rep. (2nd Series) 893; [1952] American Maritime Cases 2054.

Cosgrove v. *Horsfall*, (1945), 175 L.T. 334; 2nd Digest Supp. H

Dunlop Pneumatic Tyre Co., Ltd. v. *Selfridge & Co., Ltd.*, [1915] A.C. 847; 84 L.J.K.B. 1680; 113 L.T. 386; 12 Digest (Repl.) 234, *1754*.

Elder, Dempster & Co. v. *Paterson, Zochonis & Co.*, [1924] All E.R. Rep. 135; [1924] A.C. 522; 93 L.J.K.B. 625; 131 L.T. 449; *revsg.* sub nom. *Paterson, Zochonis & Co.* v. *Elder, Dempster & Co.*, [1923] 1 K.B. 420; 41 Digest 478, *3118*. I

Gilbert Stokes & Kerr Proprietary, Ltd. v. *Dalgety & Co., Ltd.*, (1948), 81 Lloyd's Rep. 337.

Green v. *Russell*, [1959] 2 All E.R. 525; [1959] 2 Q.B. 226; [1959] 3 W.L.R. 17.

Krawill Machinery Corpn. v. *Robert C. Herd & Co., Inc.*, [1959] 1 Lloyd's Rep. 307.

Mersey Shipping & Transport Co., Ltd. v. *Rea, Ltd.*, (1925), 21 Lloyd's Rep. 375.

Pyrene Co., Ltd. v. *Scindia Steam Navigation Co., Ltd.*, [1954] 2 All E.R. 158; [1954] 2 Q.B. 402; [1954] 2 W.L.R. 1005; 3rd Digest Supp.

Smith v. *River Douglas Catchment Board*, [1949] 2 All E.R. 179; 113 J.P. 388; sub nom. *Smith & Snipes Hall Farm, Ltd.* v. *River Douglas Catchment Board*, [1949] 2 K.B. 500; 2nd Digest Supp.

Waters Trading Co., Ltd. v. *Dalgety & Co., Ltd.*, [1951] 2 Lloyd's Rep. 385.

Wilson v. *Darling Island Stevedoring & Lighterage Co., Ltd.*, [1956] 1 Lloyd's Rep. 346.

Appeal.

The defendant stevedores appealed from the decision of DIPLOCK, J., dated Apr. 28, 1959, and reported [1959] 2 All E.R. 289, whereby the learned judge held that they were not entitled to limit to $500 (£179) their liability to the plaintiffs, the owners of the cargo, for negligently causing damage, amounting to £593 12s. 2d., to part of the cargo, viz. a drum of chemicals bought on c.i.f. terms and shipped from New York for carriage by sea to London under a bill of lading dated Mar. 26, 1957. Negligence by the stevedores in handling the drum at the Port of London was admitted. HIS LORDSHIP gave judgment for the plaintiffs for £593 12s. 2d. with interest thereon. The facts are fully stated in the judgment of HODSON, L.J.

Eustace Roskill, Q.C., and *S. O. Olson* for the defendants, the stevedores.

A. A. Mocatta, Q.C., and *M. R. E. Kerr* for the plaintiffs, the cargo-owners.

Cur. adv. vult.

June 2. The following judgments were read.

HODSON, L.J.: The defendants are stevedores employed by United States Lines, owners of the American Reporter, to discharge and deliver cargo carried from New York to London. They rely on the bill of lading between the United States Lines and the plaintiffs (a contract of affreightment in which they are not named as parties) as giving to them the same protection as if they had been so named. The negligence consisted in the dropping of a drum of chemicals belonging to the plaintiffs in the course of delivering it in the following circumstances.

On Apr. 15, 1957, the defendants discharged the drum from the No. 3 shelter deck of the vessel by means of a crane hired by the United States Lines from the Port of London Authority, and operated by the defendants, and the drum was placed on the veranda leading to the upper floor of "D" transit shed, Royal Victoria Dock, which was rented by the United States Lines from the Port of London Authority. From this point the drum was transferred by the defendants by hand truck to a place on the upper floor of "D" shed where it remained until May 3. On that day the Port of London Authority received a delivery note from Messrs. Neale & Wilkinson (the plaintiffs' forwarding agents) requesting delivery of the drum to Messrs. Tingle, Jacobs & Co., cartage contractors. On the same day the defendants removed the drum to an opening on the top floor of "D" shed, and prepared to sling the drum down to Messrs. Tingle, Jacobs' lorry. While the drum was being lowered, the drum was dropped and damaged by the negligent act of the defendants, and part of the contents of the drum was lost. The bill of lading was in force at the time the drum was lost, and the defendants contend that they are protected by its terms.

I have said that the defendants were not parties to the bill of lading. They were not anywhere mentioned in it, either directly or indirectly. The bill of lading is in short form, but incorporates the United States Lines long form bill of lading. Clause 1 of the short form provides that its terms, and those of the long form,

> "shall govern the relations whatsoever they may be between shipper, consignee and carrier, master and ship in every contingency wheresoever and whensoever occurring."

I see no justification for holding that the word "carrier" includes stevedore. Stevedores are referred to in cl. 17 of the long bill of lading, which mentions the right of the carrier and master to appoint stevedores, which does not suggest that the word "carrier" can include stevedore. The defendants further rely on the conditions in this clause, and say that as sub-bailees of the goods of the plaintiffs from the United States Lines they come under the heading of bailees in the bill of lading. On the question of bailment it is, I think, sufficient to say that on the facts as I have stated them there was no such exclusive possession on the part of the defendants as would support a bailment.

It is further contended that under the United States Carriage of Goods by Sea Act, 1936, incorporated in the bill of lading by cl. 3 of the short form and cl. 1 of the long form the defendants are protected, if not expressly, by implication. Section 4 (5) reads:

> " Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the transportation of the goods in an amount exceeding $500 per package lawful money of the United States "

unless a declaration of value has been made. It is true that the definition of carrier in the Act is not exhaustive, but it is sufficient to say that the phrase " carrier or his agent ", or like expressions, appear throughout the Act, and do not support the view that " carrier " includes stevedore, but rather point to the contrary. Stevedores do not make a contract of carriage, although they may agree to put things on board ship. I agree with the construction of the United States Act adopted by DIPLOCK, J. (1). This construction of the Act has been adopted by the United States Supreme Court in *Krawill Machinery Corpn.* v. *Robert C. Herd & Co., Inc.* (2) where the same contention was made and rejected as in this case, namely, that the liability limiting provisions of the Carriage of Goods by Sea Act, 1936, and the bill of lading, should be construed as limiting the liability of the stevedores as well as that of the carrier.

There remains to be considered the argument which has had in the past some support from authorities in this country, in the Commonwealth of Australia and the United States of America. This argument is as follows. Having regard to the nature of this contract, the tort of negligence having been committed in the course of delivery of goods under a bill of lading was not an independent tort unconnected with the performance of any contract so that the act being done in the course of rendering the very service provided for in the bill of lading, the limitation on liability must attach whatever the form of action, and whether the ship or the stevedore be sued. So far as the courts of this country are concerned, the argument stems from a dictum of SCRUTTON, L.J., in *Mersey Shipping & Transport Co., Ltd.* v. *Rea, Ltd.* (3) where the learned lord justice, differing from BANKES, L.J., the other member of the Divisional Court which was sitting on an appeal from the Liverpool County Court, said (4):

> " I think that the reasoning of the House of Lords in the *Elder, Dempster* case (5) shows that, where there is a contract which contains an exemption clause, the servants or agents who act under that contract have the benefit of the exemption clause. They cannot be sued in tort as independent people, but they can claim the protection of the contract made with their employers on whose behalf they are acting. I think that is the result of the second point in the judgments of LORD CAVE and LORD SUMNER with whom LORD DUNEDIN concurs in the *Elder, Dempster* case (5)."

In view of what SCRUTTON, L.J., said it would be an impertinence for me to say that grounds for his observations are not to be discerned in the speeches in the House of Lords in the case to which he is referring, namely, *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co.* (5) not only in the speeches to which he referred. but also in the speech of LORD FINLAY, who dissented on the result of the appeal.

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(1) [1959] 2 All E.R. at p. 293.
(2) [1959] 1 Lloyd's Rep. 307.
(3) (1925), 21 Lloyd's Rep. 375.
(4) (1925), 21 Lloyd's Rep. at p. 378.
(5) *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co.*, [1924] All E.R. Rep. 135; [1924] A.C. 522.

A so that his observations may be treated as obiter. Moreover, in the *Elder, Dempster* case (6), sitting in the Court of Appeal, SCRUTTON, L.J., had said in his judgment:

> " The real answer to the claim is in my view that the shipowner is not in possession as a bailee, but as the agent of a person, the charterer, with whom the owner of the goods has made a contract defining his liability, and B that the owner as servant or agent of the charterer can claim the same protection as the charterer. Were it otherwise there would be an easy way round the bill of lading in the case of every chartered ship; the owner of the goods would simply sue the owner of the ship and ignore the bill of lading exceptions, though he had contracted with the charterer for carriage on those terms and the owner had only received the goods as agent for the C charterer."

In none of the speeches in the House of Lords was this passage in the judgment of SCRUTTON, L.J., subject to criticism.

The statement of the law as set out in *Mersey Shipping & Transport Co., Ltd.* v. *Rea, Ltd.* (7) was adopted in Australia in *Gilbert Stokes & Kerr Proprietary,* D *Ltd.* v. *Dalgety & Co., Ltd.* (8) and *Waters Trading Co., Ltd.* v. *Dalgety & Co., Ltd.* (9) where the Supreme Court of New South Wales held that stevedores who negligently performed part of the work undertaken by the carrier were entitled to the limiting provisions of the bill of lading though the stevedores were neither parties to nor express beneficiaries of the bill of lading. However, in *Wilson* v. *Darling Island Stevedoring & Lighterage Co., Ltd.* (10) an appeal involving facts E indistinguishable from those involved in the two New South Wales cases, the High Court of Australia overruled both cases. I quote the passage from FULLAGAR, J.'s opinion cited by the United States Supreme Court in *Krawill Machinery Corpn.* v. *Robert C. Herd & Co., Inc.* (11):

> " The stevedore is a complete stranger to the contract of carriage, and it is no concern of his whether there is a bill of lading or not, or, if there is, what F are its terms. He is engaged by the shipowner and by nobody else, and the terms on which he handles the goods are to be found in his contract with the shipowner, and nowhere else. The shipowner has no authority whatever to bind the shipper or consignee of cargo by contract with the stevedore, and there is, in my opinion, no principle of law deducible from the *Elder, Dempster* case (12), or from any other case which compels the inference of any contract G between the shipper or consignee and the stevedore. If the stevedore negligently soaks cargo and ruins it, I can find neither rule of law nor contract to save him from the normal consequences of his tort."

The view expressed by SCRUTTON, L.J., had been adopted in various decisions in the United States of America (13) all of which must now be taken to have been overruled by the decision of the Supreme Court in the *Krawill* case (14), H which expressly rejected this view, and found no foundation for it in the opinions given by the members of the House of Lords in the *Elder, Dempster* case (12).

In this country the view of the *Elder, Dempster* case (12) entertained by SCRUTTON, L.J., has been recognised as authoritative, if not directly applied, having regard to the overseas expressions of opinion by the common law courts of the United States and Australia; cf. *Pyrene Co., Ltd.* v. *Scindia Steam Naviga-* I *tion Co., Ltd.* (15) where DEVLIN, J., although not basing his judgment on what I may call the Scrutton principle, recognised it as in his opinion authoritative. A This court is not absolved by the United States and Australian decisions from giving its decision on the question, since the case has been presented to this court on the footing that we are bound by the *Elder, Dempster* case (16) itself to reach the conclusion at which Scrutton, L.J., himself arrived.

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(6) [1923] 1 K.B. 420 at p. 441.

(7) (1925), 21 Lloyd's Rep. at p. 378.

(8) (1948), 81 Lloyd's Rep. 337.

(9) [1951] 2 Lloyd's Rep. 385.

(10) [1956] 1 Lloyd's Rep. 346.

(11) [1959] 1 Lloyd's Rep. at p. 310, citing [1956] 1 Lloyd's Rep. at p. 364.

(12) [1924] All E.R. Rep. 135; [1924] A.C. 522.

(13) *Collins & Co.* v. *Panama Ry. Co.*, (1952), 197 Fed. Rep. (2nd Series) 893; *Ford Motor Co.* v. *Jarka Corpn.*, (1954), 134 N.Y.S. 2d. 52, *Autobuses Modernos S.A.* v. *The Federal Mariner* (1954), 125 Fed. Supp. 780.

(14) [1959] 1 Lloyd's Rep. 307.

(15) [1954] 2 All E.R. 158; [1954] 2 Q.B. 402.

Before referring to that case, I must first state the elementary principle of English law which is to be found in a decision of the House of Lords itself in B *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co., Ltd.* (17) which is clear authority for the general proposition that the defendants cannot limit their liability to the plaintiffs in tort by relying on a contract between the plaintiff and a third party to which they themselves were not parties. To this rule there is an apparent exception where one party to a contract is shown by admissible evidence to have contracted as agent for an undisclosed principal. On this part C of the case I can find nothing in the evidence to justify the inference that the United States Lines were contracting as agents for the defendants, nor does the language of the bill of lading itself support such a conclusion. Other exceptions to the rule are not here relevant, such as exceptions dependent on trusts or covenants running with the land, and the exceptions contained in s. 25 of the Restrictive Trade Practices Act, 1956. Section 56 of the Law of Property Act, D 1925, was relied on in the pleadings, but not in this court. Is there a further exception to the rule in *Dunlop* v. *Selfridge* (17)?

It was argued in this court in *Adler* v. *Dickson* (18), that the true effect of the *Elder, Dempster* case (16) as explained by Scrutton, L.J., in *Mersey Shipping & Transport Co., Ltd.* v. *Rea, Ltd.* (19) was that a master of a ship was protected against an action for tort brought against him by a passenger on his ship by reason E of the conditions on the sailing ticket issued by a shipping company which contained the following provision:

> " Passengers are carried at passenger's entire risk. [and] The company will not be responsible for and shall be exempt from all liability in respect of any injury whatsoever of or to the person of any passenger whether the same F shall arise from or be occasioned by the negligence of the company's servants in the discharge of their duties, or whether by the negligence of other persons directly or indirectly in the employment or service of the company under any circumstances whatsoever."

This court, following its own decision in *Cosgrove* v. *Horsfall* (20), which was indeed fatal to the defendant's contention, rejected the argument, but dealt with G the matter fully since the defendants relied on the *Elder, Dempster* case (16) not having been cited to the court in *Cosgrove* v. *Horsfall* (20) so that it could be said that the latter case had been decided per incuriam. In *Cosgrove* v. *Horsfall* (20) the London Passenger Transport Board had specifically provided that when not travelling on the board's business, neither the company *nor their servants* would be liable to the holder of a free pass, namely, the plaintiff. Nevertheless H the plaintiff was held to be entitled to recover damages for injuries received in an action against the negligent driver of the board's omnibus. In *Adler* v. *Dickson* (21), on the preliminary question whether the defendants were entitled to the protection admittedly afforded to the company by the ticket, the point was decided against the defendants by Pilcher, J., (21) whose judgment was confirmed on appeal to this court (18). At first instance Pilcher, J., had followed I *Cosgrove* v. *Horsfall* (20), holding that even if, as he assumed to be correct, the dictum of Scrutton, L.J., in the *Mersey* case (22) applied to carriage of goods by sea, the same doctrine could not be applied so as to give vicarious immunity for a tort in an action for personal injuries. In the Court of Appeal the argument based on the observations of Scrutton, L.J., in the *Mersey* case (23) was fully considered, and no distinction in principle was drawn by the majority of the court; nor, I think, could it be drawn between actions of the special character therein mentioned, and actions for personal injuries laid in tort where the tort is connected with the performance of a contract. The speeches in the *Elder, Dempster* case (24) were studied by the members of the court as they have been by us in this case; and the conclusion reached by Jenkins, L.J., was that he preferred the view expressed by Bankes, L.J., in the *Mersey* case (23) to that expressed by Scrutton, L.J. The former had said (25):

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(16) [1924] All E.R. Rep. 135; [1924] A.C. 522.
(17) [1915] A.C. 847.
(18) [1954] 3 All E.R. 397; [1955] 1 Q.B. 158.
(19) (1925), 21 Lloyd's Rep. at p. 378.
(20) (1945), 175 L.T. 334.
(21) [1954] 3 All E.R. 21.
(22) (1925), 21 Lloyd's Rep. 375.

> "But the court there held that under the circumstances of the vessel being chartered to form one of the owners' regular line, the proper inference to draw was that the goods were shipped under conditions which would cover both charterer and shipowner."

Morris, L.J., was of opinion that the House of Lords in the *Elder, Dempster* case (24) did not direct any different conclusion from that which was reached in *Cosgrove* v. *Horsfall* (26).

On this view the House of Lords in the *Elder, Dempster* case (24) did not intend to introduce a further exception to the general rule that only parties to a contract can rely on its terms; and the decision itself on this part of that case must be taken to have depended on the special circumstances there being considered. Notwithstanding the argument addressed to us on behalf of the defendants, I am not persuaded, even if I were entitled to distinguish *Adler* v. *Dickson* (27) (which I doubt) that any new principle—as was thought by Scrutton, L.J., (23)—was introduced into our law by the House of Lords in the *Elder, Dempster* case (24). In the circumstances, since these speeches have been so much discussed, not only in the Court of Appeal in *Adler* v. *Dickson* (27) but also in the United States Supreme Court in the *Krawill* case (28), and in the High Court of Australia in *Wilson* v. *Darling Island Stevedoring & Lighterage Co., Ltd.* (29), I do not think that it would be profitable to endeavour to add my own analysis of those speeches.

I would accordingly dismiss the appeal for the same reason as that stated by Diplock, J., that is to say, on the ground that the case is covered in principle by the decision of the House of Lords in *Dunlop* v. *Selfridge* (30). I need only add that argument was not addressed to us (as it was to Diplock, J.), to the effect that a further principle was to be found to support the defendants' case in some observations made by Denning, L.J., in *Smith* v. *River Douglas Catchment Board* (31) and by the same learned lord justice in other cases (32), including *Adler* v. *Dickson* (33) itself. This course was taken by counsel for the defendants in view of a decision of this court, reached after Diplock, J., had given his decision in this case, in *Green* v. *Russell* (34).

I would dismiss the appeal.

PEARCE, L.J.: The defendants are stevedores who negligently damaged the plaintiffs' goods while in transit under a bill of lading. Being sued, they claim to limit the plaintiffs' damages by relying on a limitation clause of the bill of lading in the carrier's favour. This limitation (founded on the Hague Rules) is also contained in the United States Carriage of Goods by Sea Act, 1936, which was incorporated in the bill of lading. The learned judge held that the stevedores were not parties to the bill of lading, and gave no consideration under it, and that they cannot claim the protection of its conditions.

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(23) (1925), 21 Lloyd's Rep. 375. (24) [1924] All E.R. Rep. 135; [1924] A.C. 522.

(25) (1925), 21 Lloyd's Rep. at p. 377. (26) (1945), 175 L.T. 334.

(27) [1954] 3 All E.R. 397; [1955] 1 Q.B. 158. (28) [1959] 1 Lloyd's Rep. 307.

(29) [1956] 1 Lloyd's Rep. 346. (30) [1915] A.C. 847.

(31) [1949] 2 All E.R. at pp. 188, 189; [1949] 2 K.B. at pp. 514, 515.

(32) Reference was also made before Diplock, J., to the observations of Denning, L.J., in *White* v. *John Warrick & Co., Ltd.*, [1953] 2 All E.R. at p. 1026.

(33) [1954] 3 All E.R. at pp. 400, 401; [1955] 1 Q.B. at pp. 181, 182.

(34) [1959] 2 All E.R. 525; [1959] 2 Q.B. 226. Counsel for the defendants had mentioned this argument, so as to keep it open to him to use it, if necessary, in the House of Lords.

It is for the defendants to establish their right to a limitation which will deprive the plaintiffs of their full measure of damages. Their main argument before us has been the argument (which the learned judge rejected) of "vicarious immunity", to use the convenient phrase of HOLMES, J., in *Collins & Co.* v. *Panama Ry. Co.* (35). That argument is as follows. The carriers were bailees of the plaintiffs' goods on the terms of the bill of lading which contemplated and provided for vicarious performance by the carriers of part or all of their obligations to the plaintiffs (see cl. 8 and cl. 17). The defendants were the carrier's agents to perform part of such obligations, whether as bailees, sub-bailees, or otherwise. The defendants are therefore entitled, it is argued, to the same right of limitation as the carrier, for their's was not an independent tort unconnected with the performance of the contract. It was a negligent act done in the course of rendering the very services provided for in the bill of lading, and the limitation on liability must apply to the resulting damage whatever the form of action, and whether the shipowner or the stevedore be sued.

This proposition plainly has much to commend it as a matter of convenience from the carrier's point of view, although the shipper might well hold strong views to the contrary. In cases of carriage of goods, one contract frequently covers a chain of activities by various persons in connexion with the carriage of the goods. If the contract contains a limitation of liability for negligence, and if that limitation can only be enforced by the initial link of the chain—namely, the immediate party to the contract—the goods owner (the defendants argue) can avoid the spirit at least of his bargain by an action in tort for unlimited damages against some other link in the chain. Thus, it is said, can the object of the Hague Rules be circumvented since, for instance, if the master, when sued in tort, is not protected by a limitation, its existence will be of little value to the shipowner. But convenience is not a legal principle; and such a far-reaching departure from the general law can be justified only by clear authority, for *Dunlop* v. *Selfridge* (36) firmly laid down the rule that a person cannot sue on a contract (or, by clear inference, use it in defence) unless he is a party to it, and has given consideration.

The doctrine of vicarious immunity has been most clearly expressed by SCRUTTON, L.J., (obiter) in *Mersey* v. *Rea, Ltd.* (37) in the words:

> "Where there is a contract which contains an exemption clause, the servants or agents who act under that contract have the benefit of the exemption clause. They cannot be sued in tort as independent people, but they can claim the protection of the contract made with their employers on whose behalf they are acting."

In his view the doctrine was established by the House of Lords in *Elder, Dempster & Co., Ltd.* v. *Paterson, Zochonis & Co.* (38), a case of some complication whose precise effect has been debated in courts here and abroad. That view was not shared by BANKES, L.J., in *Mersey* v. *Rea, Ltd.* (39); and although the matter has been considered in this court, the exact point before us has not been decided in this country.

Recently the High Court of Australia and the Supreme Court of the United States have both decided against the doctrine of vicarious immunity on facts similar to those now before us. The Australian High Court in *Wilson* v. *Darling Island Stevedoring & Lighterage Co., Ltd.* (40) held that negligent stevedores were not protected by such a limitation in a bill of lading, and that no principle deducible from the *Elder, Dempster* case (38) protected them. The Supreme Court of the United States in *Krawill Machinery Corpn.* v. *Robert C. Herd & Co.*,

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(35) (1952), 197 Fed. Rep. (2nd Series) 893.

(36) [1915] A.C. 847.

(37) (1925), 21 Lloyd's Rep. at p. 378.

(38) [1924] All E.R. Rep. 135; [1924] A.C. 522.

(39) (1925), 21 Lloyd's Rep. at p. 377.

(40) [1956] 1 Lloyd's Rep. 346.

A *Inc.* (41) also expressed the view that the *Elder, Dempster* case (42) was no authority for the doctrine of vicarious immunity. WHITTAKER, J., in delivering the opinion of the court, said (43):

> " A careful reading of the several lengthy opinions of their Lordships in that case [*Elder, Dempster* (42)] disclosed that the question whether a B provision in the bill of lading limiting the liability of the carrier likewise limits the liability of its negligent agent, though the agent is neither a party to nor an express beneficiary of the bill of lading, was not involved in or decided by that case. Nor has any English case ever held that a bill of lading that expressly limited the liability of only the carrier nevertheless applies to and limits the liability of its negligent agent; see SCRUTTON ON CHARTER-PARTIES (16th Edn., 1955) at pp. 286 to 287, note (g)."

C He concluded (44):

> " Under the common law as declared by this court, petitioner was liable for all damages caused by its negligence unless exonerated therefrom, in whole or in part, by a constitutional rule of law. No statute has limited its liability, and it was not a party to nor a beneficiary of the contract of carriage D between the shipper and the carrier, and hence its liability was not limited by that contract."

The learned judge also considered with approval the recent decision of the Australian High Court in *Wilson* v. *Darling Island Stevedoring & Lighterage Co., Ltd.* (45) and quoted (43) from the judgment of FULLAGAR, J. (46) (with which DIXON, C.J., entirely agreed), as follows:

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> " The stevedore is a complete stranger to the contract of carriage, and it is no concern of his whether there is a bill of lading or not, or, if there is, what are its terms. He is engaged by the shipowner and by nobody else, and the terms on which he handles the goods are to be found in his contract with the shipowner and nowhere else. The shipowner has no authority what-F ever to bind the shipper or consignee of cargo by contract with the stevedore, and there is, in my opinion, no principle of law—deducible from the *Elder, Dempster* case (42), or from any other case—which compels the inference of any contract between the shipper or consignee and the stevedore. If the stevedore negligently soaks cargo with water and ruins it, I can find neither rule of law nor contract to save him from the normal consequences of his tort."

G These decisions must carry great weight with us on account of their inherent force and persuasion; and it is desirable that great common law jurisdictions should not lightly differ, more particularly on so universal a matter as commercial law.

This court has considered the doctrine in connexion with the carriage of H passengers in *Adler* v. *Dickson* (47). I pass over *Cosgrove* v. *Horsfall* (48) since the *Elder, Dempster* case (42) was not there cited, and therefore the doctrine was not fairly tested. In *Adler* v. *Dickson* (47) the plaintiff claimed that she had, while a passenger on a cruise, been injured by the negligence of the master and boatswain of the ship. Her ticket from the steamship company contained a condition that passengers were carried at passenger's entire risk, and that the I company would not be responsible for any liability in respect of the company's servants. This court, after considering the *Elder, Dempster* case (42) in detail, could find no general principle which would give the immunity contained in the plaintiff's contract with the company to the defendants, who were not parties to it. It is conceded that by reason of that case the defendants cannot in this court maintain that the principle of vicarious immunity exists in the case of carriage of passengers. Nevertheless, counsel for the defendants contends with ingenuity and force that he can distinguish *Adler* v. *Dickson* (49) on the ground that " vicarious immunity " applies to the carriage of goods (with which the *Elder, Dempster* case (50) was concerned) although it does not apply to the carriage of passengers. But why should there be such a distinction between two kinds of carriage? Any argument of convenience or principle that supports the doctrine of vicarious immunity seems to me equally applicable both to the carriage of goods and to the carriage of passengers. Counsel for the defendants argues that goods are more apt than passengers to pass from one hand to another, and that they pass more literally through such hands in that they are bailed, and in the possession of their transporters, in a sense which never applies to passengers. But to my mind that is a question of degree, and it is not a distinction that would, without more, justify separate rules of law for goods and passengers in so fundamental a respect. It is not easy to justify on legal principles a special rule of law for a special class, namely, contracts of carriage. It is harder still to justify it for a sub-division of that class.

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(41) [1959] 1 Lloyd's Rep. 307. (42) [1924] All E.R. Rep. 135; [1924] A.C. 522.
(43) [1959] 1 Lloyd's Rep. at p. 310. (44) [1959] 1 Lloyd's Rep. at p. 311.
(45) [1956] 1 Lloyd's Rep. 346. (46) [1956] 1 Lloyd's Rep. at p. 364.
(47) [1954] 3 All E.R. 397; [1955] 1 Q.B. 158. (48) (1945), 175 L.T. 334.

I am not persuaded that any such justification exists here. The judgments in *Adler* v. *Dickson* (49) show no trace of such a distinction, and treat the argument as applicable to goods and persons indiscriminately. MORRIS, L.J., sums up the matter at the end of his judgment (51):

> " In cases where goods are handed over from one person to another then, unless some express contract defines the position, there is often the necessity on a consideration of all the facts and circumstances to imply the basis or the terms which have effect. Each case must depend on its own facts. But whether in relation to goods or generally in all situations immunity from the consequences of some action which would normally in the circumstances give rise to liability at the suit of another must, unless given by law, be secured by contract. Such contract may be express and it may become effective by the operation of the principles of agency: or it may be implied in particular circumstances: but a contract to which the party seeking immunity is a complete stranger will not avail."

Nor in the *Elder, Dempster* case (50) itself is there any indication that their Lordships were differentiating between the carriage of goods and the carriage of passengers. If they did in truth intend to lay down any principle of vicarious immunity, it must, I think, have been intended to apply to all those contracts which are by their nature intended to be wholly or in part vicariously performed. For that reason, in my opinion, this court is bound by *Adler* v. *Dickson* (49). But even if this court be not so bound, I would hold that the House of Lords did not in fact purport to lay down in the *Elder, Dempster* case (50) the principle for which the defendants contend. The matter is not free from difficulty, and it is susceptible of much discussion. But I respectfully accept the careful analysis of the facts and of the reasoning contained in the opinions in the *Elder, Dempster* case (50) which JENKINS, L.J., made in *Adler* v. *Dickson* (52) and the conclusion which he reached (53). FULLAGAR, J., expressed agreement with those views in his clear and forceful exposition of the matter in *Wilson* v. *Darling Island Stevedoring & Lighterage Co., Ltd.* (54) with which also I find myself in accord. I see no purpose in embarking on further elaboration of the often discussed problem as to the precise intention of the reasons given in the relevant portion of the *Elder, Dempster* case (50). It must be remembered that that portion is somewhat subsidiary to the main important decision in the case which turned on the question of seaworthiness. Had it been intended that the immunity of the shipowners arose, not on the special facts and implied agreement, but from some important, general and hitherto undefined legal principle affecting both the law of tort and contract, I have little doubt that the scope of the principle would have been laid down more precisely, and with more detailed reasoning. As FULLAGAR, J., aptly observed in *Wilson* v. *Darling Island Stevedoring & Lighterage Co., Ltd.* (55):

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(49) [1954] 3 All E.R. 397; [1955] 1 Q.B. 158.
(50) [1924] All E.R. Rep. 135; [1924] A.C. 522.
(51) [1954] 3 All E.R. at p. 412; [1955] 1 Q.B. at p. 201.
(52) [1954] 3 All E.R. at pp. 405-408; [1955] 1 Q.B. at pp. 190-194.
(53) [1954] 3 All E.R. at p. 409; [1955] 1 Q.B. at pp. 195, 196.
(54) [1956] 1 Lloyd's Rep. at p. 362.

> "When no precise legal ground for supporting an immunity can be found, there must be strong reason for suspecting that the immunity cannot be supported at all."

If the defendants cannot establish the doctrine of vicarious immunity, they are driven to argue that on a proper construction of the bill of lading (and of the Hague Rules which it was to that extent embodying) the limitation was intended to apply to stevedores, and the United States Lines Incorporated was entering into the bill of lading as agent for the defendants. Alternatively, the defendants contend that as bailees (or sub-bailees) they took possession of the plaintiffs' goods by implication on terms that included the limitation. In the final resort they contend that, although not parties, they can enforce the benefit of a clause intended to protect them in a contract between two other parties. It is conceded that this final argument cannot be maintained in this court in the face of *Green* v. *Russell* (56).

The two former arguments depend on the hypothesis that the limitation clause in the contract itself, or in the Act which the contract incorporated, was intended to protect the stevedores inter alios. I cannot accept that hypothesis. The bill of lading in both the short and the long form provides that its terms

> "shall govern the relations whatsoever they may be, between shipper, consignee and carrier, master and ship in every contingency, wheresoever and whensoever occurring."

There is thus no reference to stevedores.

By cl. 3 of the short form and cl. 1 of the long form the bill of lading is expressed to

> "have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved Apr. 16, 1936, which shall be deemed to be incorporated therein, and where there is repugnancy the Act is to prevail."

That Act by s. 4 (5) lays down the limitation of liability in favour of the "carrier" and the "ship", and no other. The term "carrier" is not defined in the Act, but s. 1 (a) provides that "the term carrier includes the owner or the charterer who enters into a contract of carriage with a shipper". There is thus no provision in the Act which expressly purports to cover stevedores. The Supreme Court of the United States (which has considerably modified the rigour of the principle contained in *Dunlop* v. *Selfridge* (57), which binds us) has held that stevedores are not included as beneficiaries in the term "carrier" as used in that Act, and are not protected by its limitation provisions; *Krawill Machinery Corpn.* v. *Herd* (58). I respectfully agree with that. They also held that "carrier" did not include stevedores under the terms of the bill of lading there under review.

The terms of the bill of lading in our case give no ground for reading "carrier" as including stevedores or agents. Clause 24 of the long form provides the limitation of the "carrier's liability", and by cl. 3 "carrier" includes

> "the ship . . . her owner, operator and demise charterer, and also any time charterer or person to the extent bound by this bill of lading, whether acting as carrier or bailee."

Those words are not in my view intended to include stevedores. Nor does the right of the carrier and the master under cl. 17 to appoint stevedores, master, porters or other agents affect the matter. There is thus nothing in the condition of the bill of lading to show that the contracting parties intended to limit the liability of stevedores or other agents of the carrier for damages caused by their negligence. The bill of lading does not therefore purport to provide any limitation of liability for the stevedores.

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(55) [1956] 1 Lloyd's Rep. at p. 361.

(56) [1959] 2 All E.R. 525; [1959] 2 Q.B. 226.

(57) [1915] A.C. 847.

(58) [1959] 1 Lloyd's Rep. 307.

On the admitted facts there is nothing to suggest that as to some conditions of the bill of lading the carrier was contracting on the defendants' behalf. The language does not support this contention, and it would be wholly artificial to attempt to carve out parts of the bill of lading as intended to be applicable to an agreement by the carrier on behalf of the stevedores. Indeed it would be impossible to decide what terms were so intended, and what would be the limits and effect of any contract so made on the defendants' behalf. Nor was there any bailment on implied terms as between the defendants and the plaintiffs. Like the learned judge (59), I doubt whether the defendants were ever bailees of the goods; but in any event there is no evidence of any such implied contractual relationship between the plaintiffs and the defendants. The defendants were under contract with United States Lines Incorporated to act as stevedores, and they so acted in accordance with that contract.

For these reasons I also agree with the judgment of the learned judge, and I would dismiss the appeal.

UPJOHN, L.J., summarised the facts and continued: The defendants seek to limit their liability [to $500] in one of two ways. First, they say that if there was no contract between the defendants and the plaintiffs, yet they are entitled to the benefit of the limitation contained in the bill of lading on certain principles which formed the main subject of debate before us. Secondly they say that although they did not themselves enter into any contract with the plaintiffs, yet the United States Lines did so as their agent, and they are entitled to the benefit of the limitation clause contained in the bill of lading.

On the first point, it is a fundamental proposition of English law that in general a man cannot claim the benefit of a stipulation in a contract unless he is a party to that contract, or it has been made on his behalf by his agent, or by a trustee for him. To that rule there are certain exceptions, and the exception which is said to cover this case is said to be a principle to be discerned in the well-known and much debated case of *Paterson, Zochonis & Co.* v. *Elder, Dempster & Co.* (60). The principle is stated in the dissenting judgment of Scrutton, L.J. (61):

> " The real answer to the claim is in my view that the shipowner is not in possession as a bailee, but as the agent of a person, the charterer, with whom the owner of the goods has made a contract defining his liability, and that the owner as servant or agent of the charterer can claim the same protection as the charterer. Were it otherwise there would be an easy way round the bill of lading in the case of every chartered ship; the owner of the goods would simply sue the owner of the ship and ignore the bill of lading exceptions, though he had contracted with the charterer for carriage on those terms and the owner had only received the goods as agent for the charterer."

The shippers appealed to the House of Lords where it is reported (62) sub nom. *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co.* Lord Cave and Lord Finlay referred to the judgment of Scrutton, L.J., without disapproval, but neither of them affirmed his judgment in terms which showed that they approved the principle as he had clearly stated it. Lord Sumner, while affirming the dissenting judgment of Scrutton, L.J., put the immunity of the shipowner on a rather different basis.

However, the speeches of their Lordships in this case led Scrutton, L.J., in

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(59) See [1959] 2 All E.R. at p. 296.
(60) [1923] 1 K.B. 420.
(61) [1923] 1 K.B. at p. 441.
(62) [1924] All E.R. Rep. 135; [1924] A.C. 522.

A the subsequent case, *Mersey Shipping & Transport Co., Ltd.* v. *Rea, Ltd.* (63), to restate the principle in these clear terms (64):

> " I think that the reasoning of the House of Lords in the *Elder, Dempster* case (65) shows that, where there is a contract which contains an exemption clause, the servants or agents who act under that contract have the benefit of the exemption clause. They cannot be sued in tort as independent people, B but they can claim the protection of the contract made with their employers on whose behalf they are acting. I think that is the result of the second point in the judgments of LORD CAVE and of LORD SUMNER, with whom LORD DUNEDIN concurs, in the *Elder, Dempster* case (65)."

If that is indeed part of the law of England, it is a principle which should be of general application to all contracts where the parties contemplate that the main C contractor is going to employ a number of sub-contractors to perform specialised services, and not be limited to contracts relating to the carriage of goods; indeed SCRUTTON, L.J., stated it in wide and general terms. His remarks, however, were obiter, and BANKES, L.J., did not agree with them. Yet it is clear that this court in subsequent cases has not accepted the general proposition laid down by SCRUTTON, L.J., which appears to be unsupported by earlier authority. Thus in D *Cosgrove* v. *Horsfall* (66) the plaintiff, himself an employee of the London Passenger Transport Board, was travelling on one of their vehicles on the terms of a free pass which stated that neither the company nor their servants would be liable for injury however caused. The plaintiff was injured owing to the negligence of the driver of the vehicle, whom he sued. It was held, however, that the defendant driver, although a servant of the London Passenger Transport Board, E could not claim the benefit of the condition in the pass. However, it was urged that this case was wrongly decided because the court was not referred to the *Elder, Dempster* case (65). In the subsequent case of *Adler* v. *Dickson* (67) the majority of this court quite clearly refused to recognise any such general principle. In that case the plaintiff was a passenger in a liner, and she suffered serious injuries due to the negligence of the captain in making fast a gangway. She sued F the captain in tort, and the majority of this court held that a clause of immunity in the shipping company's ticket which had been issued to the plaintiff conferred no immunity on the captain. The *Elder, Dempster* case (65) was debated before the court at great length. DENNING, L.J., it is true, came to the conclusion that on general principles a clause which exempted the main contractor from liability was effective to protect sub-contractors, but the majority of the court G refused to recognise any such principle. JENKINS, L.J., after a full review of the authorities, said this (68):

> "The *Elder, Dempster* case (65) can well be explained by reference to its own facts without ascribing to their Lordships any intention to lay down any such general principle as the defendants here contend for, nor do I think that H their Lordships' language, carefully directed as it was to the particular facts of the case then before the House, can fairly be construed as doing so."

A little later in his judgment, after citing the passage in the judgment of SCRUTTON, L.J., in the *Mersey Shipping* case (64) which I have quoted, the learned lord justice said that he preferred the view of BANKES, L.J., to that of SCRUTTON, L.J. MORRIS, L.J., said this (69):

> I " That [the *Elder, Dempster* case (65)] was a somewhat special case and in my judgment the reasoning in the speeches in the House of Lords did not direct any different conclusion from that which was reached in *Cosgrove* v. *Horsfall* (66)."

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(63) (1925), 21 Lloyd's Rep. 375. (64) (1925), 21 Lloyd's Rep. at p. 378.
(65) [1924] All E.R. Rep. 135; [1924] A.C. 522. (66) (1945), 175 L.T. 334.
(67) [1954] 3 All E.R. 397; [1955] 1 Q.B. 158.
(68) [1954] 3 All E.R. at p. 409; [1955] 1 Q.B. at p. 195.
(69) [1954] 3 All E.R. at p. 411; [1955] 1 Q.B. at p. 198.

He dealt with the *Elder, Dempster* case (70) again in this way (71):

> "I do not read the decision in the *Elder, Dempster* case (70) as laying it down that if A makes a contract with B by which he agrees not to hold B answerable for the tort of his servant C, that C is thereby automatically given immunity if he commits a tort against A."

In my judgment, in that state of the authorities, this court is not at liberty to treat the *Elder, Dempster* case (70) as establishing any general principle by way of exception to the general rule that no one can claim the benefit of a stipulation in a contract unless he is a party to that contract, or it is made on his behalf.

Counsel for the defendants, recognising the difficulty in his way created by these two cases, has in this court confined his argument to submitting that the principle of immunity is limited to cases of carriage of goods. So limited, he says that the defendants, carrying out their duties as stevedores, were within the contemplation of the limitation of liability conferred on the United States Lines. It was contemplated that the latter would employ stevedoring companies to do the work of loading and unloading, and therefore on this narrower principle they are entitled to the benefit of the limitation. I am not prepared to accept this argument.

I do not propose to attempt any analysis of the speeches in the *Elder, Dempster* case (70) in the House of Lords, but to content myself with respectfully adopting the language of Jenkins, L.J., that I have quoted from *Adler* v. *Dickson* (72). For myself, I can see no reason why the *Elder, Dempster* case (70) should be extended to cover the activities of stevedores carrying out ordinary stevedoring duties unless it is extended to all cases of sub-contractors where it is contemplated that sub-contractors will render services in carrying out the main contract.

In reaching this conclusion, I am fortified by the knowledge (as was Diplock, J.), that a similar conclusion has been reached by the United States Supreme Court in a unanimous judgment (73), and by a majority of the High Court of Australia (74).

I turn therefore to the other heading under which the defendants seek to claim the benefit of the clause in the bill of lading. The bill of lading issued by the United States Lines incorporated a document of portentous length called the long form bill of lading, and also the Carriage of Goods by Sea Act, 1936, of the United States. Clause 24 of the long form contains the limitation on liability in question, and in terms limits the "carrier's" liability. "Carrier" is defined in cl. 3 as including

> "the ship as defined herein her owner, operator and demise charterer, and also any time charterer or person to the extent bound by this bill of lading whether acting as carrier or bailee."

The United States Carriage of Goods by Sea Act, 1936, contains a more restricted definition of "carrier" (75).

The argument, as I understand it, is this. First, "carrier" as above defined includes stevedores. That, however, is not sufficient by itself; see *Cosgrove* v. *Horsfall* (76), already cited. Secondly, it must also be established that the bill of lading, at all events for the purposes of cl. 24, was entered into by the United States Lines not only for themselves, but as agents for all other persons properly described as carriers. Stevedores are not, in my judgment, aptly described as acting as carriers; and if they were, for a very short time, properly described as bailees of the oil drum (which in my opinion they were not) they were not bailees bound by the bill of lading.

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(70) [1924] All E.R. Rep. 135; [1924] A.C. 522.

(71) [1954] 3 All E.R. at p. 412; [1955] 1 Q.B. at p. 199.

(72) [1954] 3 All E.R. at p. 409; [1955] 1 Q.B. at p. 195.

(73) In *Krawill Machinery Corpn.* v. *Robert C. Herd & Co., Inc.*, [1959] 1 Lloyd's Rep. 307.

(74) In *Wilson* v. *Darling Island Stevedoring & Lighterage Co., Ltd.*, [1956] 1 Lloyd's Rep. 346.

(75) See s. 1 (a), printed ante p. 747, letter G.

(76) (1945), 175 L.T. 334.

On the second point, the United States Lines did not contract expressly as agents for the stevedores, and I see no necessity to imply such a term in the bill of lading. Furthermore, there was no evidence to show that the parties ever intended by any collateral arrangement that the United States Lines should in fact contract as agents for this purpose. In my judgment the defendants fail to establish either limb of the argument on this part of the case. I would dismiss this appeal.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Hill, Dickinson & Co.* (for the defendants); *Ince & Co.* (for the plaintiffs).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

KING *v.* CAVE-BROWNE-CAVE.

[QUEEN'S BENCH DIVISION (McNair, J.), May 19, 20, 26, 1960.]

Landlord and Tenant—Lease—Covenant to pay " rates imposed upon the demised premises "—Water rate—Water facilities used by tenant not in demised premises—Whether tenant liable for water rate.

By an underlease and deed of variation premises comprising office accommodation on the whole of the second floor of a building were demised to the tenant who covenanted " to pay all existing and future rates taxes assessments and outgoings whether parliamentary local or otherwise now or hereafter imposed upon the demised premises ". The tenant had the right, in common with the tenants of the third floor premises, to use the lavatory and wash basin on the third floor, there being no water facilities on the second floor. Water was supplied to the building through a single supply pipe provided by the Metropolitan Water Board, and was brought to the lavatory and wash basin through internal pipes provided by the owner of the building. The landlord sought to recover from the tenant the amount of the water rate appropriate to the second floor of the building according to the annual value of those premises as stated in the board's notice of water rate given to the landlord.

Held: the landlord was entitled to recover from the tenant the amount of the water rate appropriate to the second floor of the building because, although liability to pay the water rate was a personal obligation and the rate was not charged on the premises, yet, on the true construction of the covenant, " rates . . . imposed upon the demised premises " meant " rates . . . in respect of the demised premises " and the water rate was such a rate.

Drieselman v. *Winstanley* ((1909), 53 Sol. Jo. 631) and *Bourne & Tant* v. *Salmon & Gluckstein, Ltd.* ([1907] 1 Ch. 616) followed.

Badcock v. *Hunt* ((1888), 22 Q.B.D. 145) not followed.

[**Editorial Note.** In considering this case with the previous authorities it will be observed that, as is indicated in the judgment at p. 755, letter B, post, the covenant in *Bourne & Tant* v. *Salmon & Gluckstein, Ltd.* ([1907] 1 Ch. 616) did not contain the description " rates imposed " on the premises but referred to " rates in respect of " the premises. In *Badcock* v. *Hunt* ((1888), 22 Q.B.D. 145), which was also a decision of the Court of Appeal, the covenant contained the phrase " rates . . . imposed " together with the further qualification " which . . . may be rated, charged, or assessed on " the premises. The judgment in the present case intimates that, in regard to a water rate for domestic supply at any rate, the expression " upon the premises " in a covenant to pay " rates imposed upon the premises " is equivalent to " in respect of the premises " (see p. 754, letter C, post).

As to what charges come within a tenant's covenant to pay rates, taxes and assessments, see 23 Halsbury's Laws (3rd Edn.) 613-617, paras. 1312-1314; and for cases on the subject, see 31 Digest (Repl.) 321-332, *4570-4661*.]

Cases referred to:

Badcock v. *Hunt*, (1888), 22 Q.B.D. 145; 58 L.J.Q.B. 134; 60 L.T. 314; 53 J.P. 340; 31 Digest (Repl.) 330, *4647*.

Bourne & Tant v. *Salmon & Gluckstein, Ltd.*, [1907] 1 Ch. 616; 76 L.J.Ch. 374; 96 L.T. 629; 71 J.P. 329; 31 Digest (Repl.) 322, *4578*.

Crane v. *Hegeman-Harris Co., Inc.*, [1939] 1 All E.R. 662; *affd.* C.A., [1939] 4 All E.R. 68; Digest Supp.

Drieselman v. *Winstanley*, (1909), 53 Sol. Jo. 631; 31 Digest (Repl.) 322, *4579*.

Floyd, Re, Floyd v. *J. Lyons & Co.*, [1897] 1 Ch. 633; 66 L.J.Ch. 350; 76 L.T. 251; 31 Digest (Repl.) 324, *4593*.

Spanish Telegraph Co. v. *Shepherd*, (1884), 13 Q.B.D. 202; sub nom. *Direct Spanish Telegraph Co.* v. *Shepherd*, 53 L.J.Q.B. 420; 51 L.T. 124; 48 J.P. 550; 31 Digest (Repl.) 322, *4576*.

Action.

By an underlease dated Oct. 2, 1956, the plaintiff, Annie King, a married woman, in consideration of the rent and covenants reserved by the underlease, demised to the defendant, Paul Astley Cave-Browne-Cave, premises comprising two front offices on the second floor of a building known as 77, Chancery Lane, in the County of London, together with the use in common with other tenants of the third floor of the building of the lavatories and conveniences on the third floor. The underlease was for a term of fifteen and a quarter years less three days, and at a rent of £350 per annum. By cl. 2 of the underlease the defendant covenanted with the plaintiff—

> " (1) to pay the reserved rents on the days and in manner aforesaid (2) to pay all existing and future rates taxes assessments and outgoings whether parliamentary local or otherwise now or hereafter imposed upon the demised premises except only such as the owner is by law bound to pay notwithstanding any contract to the contrary . . ."

By deed of variation dated Aug. 14, 1957, made between the plaintiff and the defendant, the plaintiff demised to the defendant the two rear offices on the second floor of 77, Chancery Lane, on the covenants and conditions of the underlease dated Oct. 2, 1956. Pursuant to the underlease and the deed of variation the defendant occupied the whole of the second floor of 77, Chancery Lane for the purpose of his profession as a public relations officer. There were no water facilities on the second floor but by virtue of the underlease the defendant made use, in common with the tenants of the third floor, of a lavatory and wash basin on the third floor. The lavatory and wash basin were connected by internal water pipes provided by the owner of the building to the single supply pipe provided by the Metropolitan Water Board. Early in 1958 the Metropolitan Water Board served the plaintiff with notice of water rate for the two quarters commencing on Apr. 1, 1958. The notice stated that the water rate was " on the undermentioned premises " namely, " the second floor front offices and two rear offices " and " third floor offices " of 77, Chancery Lane, and it gave the net annual value of each floor, stated gross charges, allowed the statutory rebate from domestic rate on premises solely occupied for trade or business purposes and not residentially, and gave a net sum payable. The plaintiff applied to the defendant to pay the water rate set out in the notice (viz., the net sum) but the defendant refused to pay. The plaintiff now claimed payment of the water rate contending that on the true construction of cl. 2 (2) of the underlease the defendant was liable for water rate in respect of water supplied to the lavatory and wash basin on the third floor. Alternatively, the plaintiff claimed rectification of cl. 2 (2) to provide expressly for payment of such water rate by the defendant.

T. M. Eastham for the plaintiff.
G. Dobry for the defendant.

Cur. adv. vult.

May 26. **McNAIR, J.,** having stated the facts, read the following judgment: The statutory position seems to be, in summary, as follows. While the main provisions of the Water Act, 1945, apply to the Metropolitan Water Board, their powers are primarily derived from the incorporation into their private Acts of the Waterworks Clauses Acts of 1847 and 1863 (1). By virtue of s. 53 of the Act of 1847 (2), every owner and occupier of a dwelling-house or part of a dwelling-house within the limits of the special Act (3) shall, where he has laid certain communicating pipes, i.e., internal pipes, and paid or tendered the water rate, be entitled to demand from the undertakers a sufficient supply of water for his domestic purposes; and by virtue of s. 20 of the Act of 1863, there is a prohibition against any person not being a person supplied with water by the undertakers, using any water supplied by the undertakers for use of any consumer of the water of the undertakers (4). Power is given to the undertakers to charge a water rate for water supplied for domestic purposes based on the net annual value of the premises (5).

In practice, in the case of buildings supplied by the board with a single supply of water but which are divided into separate hereditaments, the tenants of which have the use of water supplied by the board, the board, usually by agreement with the owner or head lessee of the building, make an assessment of the water rate which is in law payable by the owner or head lessee on the whole of the building, but they divide this assessment to show how much is payable in respect of each of the separate hereditaments, based on the net annual value of such hereditaments, to enable the owner or head lessee to recover the share of the rate from the tenants in appropriate cases.

The representative of the board called before me at short notice was unable to produce the particular agreement relating to 77, Chancery Lane, but he stated that there may well have been such an agreement many years ago. So far as it is a question of fact, I infer that there was such an agreement. In a letter dated Feb. 18, 1958, the assessment officer for the board stated in reply to a letter from the plaintiff's agent setting out the position that the second floor tenant had the right to use the water closet and lavatory on the third floor,

> "that the situation you outline is quite common as many offices have no individual water fittings and their occupiers have a right of access to communal fittings elsewhere in the building. In those circumstances the water rate is invariably charged on the net annual value of all parts benefiting from the board's supply."

In these circumstances the material question is whether the assessment of the water rate contained in the notice of assessment falls within the covenant

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(1) The Waterworks Clauses Act, 1847 and the Waterworks Clauses Act, 1863, were repealed by the Water Act, 1945, s. 62 and Sch. 5; but a local enactment (including a public Act relating to the supply of water in London: see Water Act, 1945, s. 59 (1)) which incorporates those Acts remains applicable to any undertaker until an order applying the modern waterworks code contained in Sch. 3 to the Act of 1945 is made (see s. 32) or the local enactment is repealed under s. 33.

(2) This section corresponds to s. 30 of Sch. 3 to the Water Act, 1945.

(3) I.e., any Act authorising the construction of waterworks and with which the Act of 1847 was incorporated; see s. 2 of the Waterworks Clauses Act, 1847.

(4) Section 20 of the Waterworks Clauses Act, 1863, corresponds to s. 65 (in part) of Sch. 3 to the Water Act, 1945.

(5) See s. 46 of Sch. 3 to the Water Act, 1945.

> "to pay all existing and future rates taxes assessments and outgoings whether parliamentary local or otherwise now or hereafter imposed upon the demised premises . . ."

Unguided by authority and regarding this matter purely as a matter of construction, I should have little doubt that it did. Giving the words of the covenant their ordinary, natural meaning, it seems to me quite plain that the charge falls within the words: "rates . . . imposed upon the demised premises". I also think that the covenant would be so understood by any person taking office premises in London. Such a person whether paying an inclusive or exclusive rent would naturally be interested in both general rates and the water rates.

It was argued, however, on behalf of the defendant, first, that inasmuch as there were no water facilities in the demised premises the rate in question was not a rate imposed on the demised premises. It is clear that the phrase "upon the demised premises" is not strictly apt since the rate is imposed on the owner or occupier, see s. 38 (2) of the Water Act, 1945. The rate is not a charge on the premises, see per LINDLEY, L.J., in *Re Floyd, Floyd* v. *J. Lyons & Co.* (6). The expression, clearly, in effect means in respect of the demised premises. It is also clear that in most of the authorities relevant to the question of payment of water rates as between landlord and tenant, such as *Spanish Telegraph Co.* v. *Shepherd* (7); *Badcock* v. *Hunt* (8); *Re Floyd, Floyd* v. *J. Lyons & Co.* (9); and *Bourne & Tant* v. *Salmon & Gluckstein, Ltd.* (10), there were water facilities in the demised premises themselves. On the other hand in *Drieselman* v. *Winstanley* (11) the tenant of a shop had the right to use the lavatory in another part of the building. It was nevertheless held by EVE, J. (11), that the case was indistinguishable from *Bourne & Tant* v. *Salmon & Gluckstein, Ltd.* (10).

The more formidable argument advanced on behalf of the defendant was based on the word "imposed". It was urged that since the charge arose out of a private bargain between the supplier and the private owner, it was, in effect, merely the price of a commodity supplied privately, albeit that it fell within the word "water rate" as defined (12) in the Waterworks Clauses Act, 1847. Reliance was placed on the decision in *Badcock* v. *Hunt* (8), where the construction of a covenant by the lessor to pay all rates, taxes and impositions charged or assessed on the premises was in question; FRY, L.J., said this (13):

> "It is argued that this charge for water or so-called water-rate is a rate or imposition within the meaning of this covenant. It is a rate in one sense, because it is so called in the statute, but it is in substance a payment for water supplied. The obligation to pay it is one which is voluntarily incurred by the person supplied, because he is not bound to take the water. The water company is compelled to supply if required, but the occupier is not bound to take a supply. Then can this be called a parliamentary rate? I think that the meaning of that term is clear, and that it refers to rates imposed by Parliament on persons who have no choice whether they will come under the obligation to pay them, but must pay them whether they will or no. So also with regard to parochial rates, they are rates imposed by the parochial authorities on persons who must pay them whether they will or no. Then is this a rate that comes within the words 'imposed otherwise howsoever?' In my judgment it is not imposed at all within the meaning of the covenant; it becomes payable by the voluntary action of the person who chooses to take the water and thereby incurs the legal liability to pay for it; it is not, like the rates and charges previously mentioned in the covenant, an imposition

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(6) [1897] 1 Ch. 633 at p. 637.

(7) (1884), 13 Q.B.D. 202.

(8) (1888), 22 Q.B.D. 145.

(9) [1897] 1 Ch. 633.

(10) [1907] 1 Ch. 616.

(11) (1909), 53 Sol. Jo. 631.

(12) See s. 3 of the Waterworks Clauses Act, 1847; 26 HALSBURY'S STATUTES (2nd Edn.) 733.

(13) (1888), 22 Q.B.D. at p. 148.

A by some superior authority which a man becomes liable to pay whether he will or no."

On the other hand, in *Bourne & Tant* v. *Salmon & Gluckstein, Ltd.* (14), the Court of Appeal expressly affirmed the Divisional Court in *Spanish Telegraph Co.* v. *Shepherd* (15), and upheld the judgment of Buckley, J., who felt himself bound by the last mentioned case to hold that water rate was a rate within the B terms of the lessor's covenant to procure to be paid all rates and taxes payable in respect of the demised premises and rejected the argument that the charge was not a rate because it was voluntarily incurred. See also *Re Floyd, Floyd* v. *J. Lyons & Co.* (16) where the distinction is drawn between the charge for water for trade purposes, which is a matter of private bargaining and not imposed, and the charge for water supplied for domestic purposes.

C In my judgment there is nothing in these authorities which persuades or compels me to adopt a construction of this covenant differing from that which appeals to me to be correct as set out previously in this judgment (17). On the contrary I am reinforced in the conclusion which I have reached by the decisions referred to and in particular by *Bourne & Tant* v. *Salmon & Gluckstein, Ltd.* (14). I therefore hold that the water rate in question is within the express terms of the D covenant. In those circumstances it is not necessary for me to consider in detail the alternative plea for rectification advanced by the plaintiff. It is sufficient for me to say that I am fully satisfied on the basis of the contemporary document and on the evidence called on behalf of the plaintiff, that the estate agents negotiating on behalf of the plaintiff fully intended that the defendant should be liable to pay this water rate. I do not feel that the evidence in support of a E common intention, which is necessary, was sufficiently precise to satisfy the very stringent test applicable in cases of rectification as set out in the judgment of Simonds, J., in *Crane* v. *Hegeman-Harris Co., Inc.* (18), a judgment which was described by Sir Wilfrid Greene, M.R., in the same case on appeal (19) as one of " conspicuous clarity ".

There must, accordingly, be judgment for the plaintiff.

F *Judgment for the plaintiff.*

Solicitors: *Tackley, Fall & Read* (for the plaintiff); *Jaques & Co.* (for the defendant).

[*Reported by* Wendy Shockett, *Barrister-at-Law.*]

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(14) [1907] 1 Ch. 616. (15) (1884), 13 Q.B.D. 202. (16) [1897] 1 Ch. 633.

(17) See p. 754, letter B, ante. (18) [1939] 1 All E.R. 662 at pp. 664, 665.

(19) [1939] 4 All E.R. 68 at p. 71.

THE SOYA MARGARETA. OWNERS OF CARGO ON BOARD THE SOYA LOVISA *v.* OWNERS OF THE SOYA MARGARETA.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hewson, J.), May 23, 24, 30, 1960.]

Admiralty—Practice—Lis alibi pendens—Discretion to stay proceedings in England—Cargo on board Swedish ship alleged damaged on voyage to Italy—By charterparty contract to be governed by law of flag but any dispute to be settled in London—Proceedings in personam initiated by charterers in Italy against shipowners—Arbitration proceedings by charterers in England—Action in rem subsequently brought by charterers in England against another ship of same owner to obtain security—Motion by shipowners to set aside or stay the action in England—Election—Administration of Justice Act, 1956 (4 *&* 5 *Eliz.* 2 *c.* 46), *s.* 3 (4) (*b*).

By a charterparty dated Apr. 9, 1958, the Soya Lovisa was chartered to carry cargo from Texas City and Marcus Hook to Venice. The bills of lading incorporated all the terms of the charterparty, which provided (by cl. 13) that the contract should be governed by the laws of the flag of the vessel, which was registered in Sweden, and (by cl. 18) that any dispute between the parties arising during the exercise of the charterparty should be settled in London. The Soya Lovisa duly arrived in Venice at the end of August, 1958, and discharged her cargo. The charterers, who were also the cargo owners, alleged that this cargo was contaminated, and that the contamination had occurred whilst the cargo was on board the vessel. The shipowners denied this. On about Apr. 9, 1959, the charterers instituted proceedings in the Italian courts by issuing a writ in the official Judicial List of Venice, claiming 404,753,273 Italian lire by way of damages. Subsequently, the charterers, being advised that the dispute was within the arbitration clause of the charterparty, insituted proceedings in England in June, 1959, and appointed an arbitrator. The shipowners also appointed an arbitrator, at the same time protesting that the case should be fought in Italy. On July 6, 1959, the charterers instituted proceedings in rem in England, under s. 3 (4) (b)* of the Administration of Justice Act, 1956, and arrested the Soya Margareta, which was also owned by the shipowners and was berthed in London at the time, and obtained security in £300,000 which the shipowners provided to secure the release of the Soya Margareta. No further steps were taken by the charterers after July, 1959, save that they issued their statement of claim on Apr. 1, 1960. On a motion by the shipowners to set aside the writ of July 6, 1959, or, alternatively, for an order that all further proceedings be stayed in England as vexatious,

Held: the action in England would not be stayed nor the writ set aside because in all the circumstances of the case (and despite the fact that the balance of convenience might favour proceedings being in Italy) the shipowners had not satisfied the court that the proceedings in the action were vexatious; but, for the protection of the shipowners against proceedings being prosecuted concurrently by the charterers in Italy, an injunction restraining them from proceeding there would be granted.

Principle stated by SCOTT, L.J., in *St. Pierre* v. *South American Stores* (*Gath & Chaves*), *Ltd.* ([1935] All E.R. Rep. at p. 414), *The Hartlepool* ((1950), 84 Lloyd's Rep. 145) and dictum of BAGGALLAY, L.J., in *The Christiansborg* ((1885), 10 P.D. at p. 152) applied.

[As to stay of proceedings where lis alibi pendens, see 7 HALSBURY'S LAWS (3rd Edn.) 170-172, paras. 306, 307; and especially 174, 175, para. 311; and for cases on the subject, see 11 DIGEST (Repl.) 550-552, *1578-1589* and 41 DIGEST 925, *8143*.

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* The material part of s. 3 (4) (b) of the Administration of Justice Act, 1956, is set out at footnote (2), p. 759, post.

As to stay of proceedings in English courts where foreign proceedings pending, see 30 Halsbury's Laws (3rd Edn.) 409, para. 769; and for cases on the subject, see Digest (Practice) 975, 976, *5091-5097*, 979, *5113*.

For the Administration of Justice Act, 1956, s. 3, see 36 Halsbury's Statutes (2nd Edn.) 11.]

Cases referred to:

Christiansborg, The, (1885), 10 P.D. 141; 54 L.J.P. 84; 53 L.T. 612; 5 Asp. M.L.C. 491; 11 Digest (Repl.) 551, *1587*.

Hartlepool, The, (1950), 84 Lloyd's Rep. 145.

Monte Urbasa, The, [1953] 1 Lloyd's Rep. 587.

St. Pierre v. *South American Stores* (*Gath & Chaves*), *Ltd.*, [1935] All E.R. Rep. 408; [1936] 1 K.B. 382; 105 L.J.K.B. 436; 154 L.T. 546; 11 Digest (Repl.) 372, *378*.

Motion.

This was a motion by the shipowners, the owners of the motor tanker Soya Margareta to set aside a writ dated July 6, 1959, issued by the charterers, Sicedison S.p.a. of Milan, the owners of a cargo laden on board the motor tanker Soya Lovisa, also owned by the shipowners; or, alternatively, that all further proceedings be stayed.

By a charterparty dated Apr. 9, 1958, the charterers chartered the Soya Lovisa from the shipowners, the charterparty providing, inter alia, for a single voyage from Texas City and Marcus Hook to Venice with the maximum cargo of 3,800 tons of three to four grades of solvents. Clause 13 of the charterparty provided as follows:

> "This contract shall be governed by the laws of the flag of the vessel carrying the goods, except in cases of average or general average, when the same shall be settled according to the York/Antwerp Rules, 1950."

The flag of the vessel concerned was Swedish. The law of average was not relevant in this case. Clause 18 of the charterparty provided as follows:

> "Any dispute arising during the exercise of this charterparty shall be settled in London. Owners and charterers, each appointing an arbitrator . . . and the two thus chosen, if they cannot agree, shall nominate a third arbitrator . . . whose decision shall be final . . ."

By two bills of lading, dated July 27, 28, 1958, respectively, in respect of two parcels of cargo, the shipowners acknowledged the shipment on board the vessel at Texas City of 1,103 long tons of No. 2 ethyl hexanol and 1,833 long tons of ethyl benzene for carriage to Venice and delivery there to the charterers, who were also the owners of the cargo. The bills of lading incorporated all the terms of the charterparty. Towards the end of August, 1958, the Soya Lovisa arrived at Venice and discharged her cargo. After the discharge of the cargo the charterers claimed that the cargo was contaminated and that the contamination had occurred whilst the cargo was on board the vessel, which fact the shipowners denied.

On Apr. 6, 7 or 9, 1959, the charterers, by writ No. 8657 in the official Judicial List of Venice, instituted proceedings in the Italian courts against the shipowners in respect of their claim in the sum of 404,753,273 Italian lire. On Jan. 22, 1960, and Mar. 4, 1960, interlocutory proceedings took place in Italy. At all times the shipowners wished to have the validity of the charterers' claim tested in the Italian courts; but the charterers, being advised that the dispute was within the arbitration clause of their charterparty with the defendants, instituted arbitration proceedings in this country on or about June 4, 1959, appointing a Mr. Bunker as arbitrator. The shipowners also appointed an arbitrator, a Mr. Owen Ellis, whilst at the same time protesting that the proceedings should be fought in Italy in accordance with the lex fori originally selected by the charterers themselves. On July 6, 1959, the charterers issued a writ in London in respect of their claims and arrested the Soya Margareta, owned, as stated previously, by the shipowners.

There were thus three sets of proceedings at the same time pending against the shipowners, all instituted by the charterers in respect of the same claims. In order to secure the release of the Soya Margareta, the shipowners undertook to provide security to the satisfaction of the charterers in the sum of £300,000, to cover the claims put forward by them as charterers and costs. Since July, 1959, the only further step taken by the charterers was that they delivered their statement of claim to the shipowners on Apr. 1, 1960. The shipowners made it clear that whether the writ were set aside or the proceedings were stayed, the undertaking by them in respect of proceedings in the English courts should remain available to the charterers to satisfy any judgment which might be obtained against them, the shipowners, in the Italian courts.

The authority and cases enumerated below were cited in argument in addition to those cited in the judgment*.

Ashton Roskill, Q.C., and *Basil Eckersley* for the plaintiffs, the charterers.

A. A. Mocatta, Q.C., and *R. A. MacCrindle* for the defendants, the shipowners.

May 24. **HEWSON, J.**, having stated the facts, continued: As the claim is in respect of contaminating the cargo, it is obvious that a considerable amount of evidence, if not all the evidence, from the shore side of the discharge of the ship in Venice must lie in Italy and the defendants, the shipowners, have said throughout that they were and are willing to have the validity of the claim decided in the court in that country. Notwithstanding the action begun by the plaintiffs, the charterers, in Venice to which I have referred, it would appear that, on being advised that the dispute with the shipowners was within the arbitration clause of the charterparty, the charterers instituted proceedings in this country. On June 4, 1959, they began arbitration proceedings in London and appointed an arbitrator, Mr. Bunker.

The shipowners say that in order to safeguard their position in this country they, the shipowners, also appointed an arbitrator, whilst making it clear to the charterers that they considered the matter should be fought in Italy. Well, I do not think that on the evidence I have before me that statement is correct. There is a letter dated June 22, 1959, from the shipowners, the last paragraph of which says this:

> " According to the penultimate paragraph of your letter under reply, you may be contemplating some kind of limited arbitration proceedings (1). To this we cannot agree. We feel that the entire dispute should be settled by arbitration in London as provided for in the charterparty of July 9, 1958."

I have no reason to believe that that is not a true statement of the attitude of the shipowners towards the arbitration proceedings in London in June, 1959. It appears that in the same month, the month of June, 1959, the charterers asked for security in the sum of £300,000 in this country. This security apparently was not forthcoming and, on July 6, 1959, the charterers, taking advantage of s. 3

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* DICEY, CONFLICT OF LAWS (7th Edn.), pp. 1087, 1090-1092; *Cope* v. *Doherty*, (1858), 4 K. & J. 367; *McHenry* v. *Lewis*, (1882), 22 Ch.D. 397; *Peruvian Guano Co.* v. *Bochwoldt*, (1883), 23 Ch.D. 225; 5 Asp. M.L.C. 29; *The Reinbeck*, (1889), 60 L.T. 209; 6 Asp. M.L.C. 366; *Logan* v. *Bank of Scotland*, [1906] 1 K.B. at pp. 145, 151, 152; *The Marinero*, [1955] 1 All E.R. 676; *The Fehmarn*, [1958] 1 All E.R. 333.

(1) The penultimate paragraph of the charterers' letter dated June 4, 1959, read as follows:

" The undersigned (i.e., the charterers) is aware that according to the principle laid down in the International Maritime Legislation (Convention of Brussels of Aug. 25, 1924 and others) the carrier and ship are exempt from responsibility if judicial action is not taken against them within a year from the date of the delivery of the goods."

(4) (b) of the Administration of Justice Act, 1956 (2), instituted proceedings in this court in respect of the same claim, arresting the Soya Margareta which, as I have already said, is under the same ownership as the Soya Lovisa, in order to found jurisdiction in this court. To secure the release of the Soya Margareta the shipowners were obliged to undertake to provide security in the sum of £300,000. Since then the charterers have taken no further steps in this action except to deliver the statement of claim, which they did on Apr. 1, 1960. The shipowners made it clear that, whether the writ in this action is set aside or proceedings are stayed, they will allow the undertaking given in respect of proceedings in this court to remain available to the charterers to satisfy any judgment which may be obtained against them in the Italian court.

The charterers' solicitors contend that this dispute could be more easily and expeditiously decided in the Admiralty court than by arbitration. The shipowners' solicitors' reply to that suggestion is that they are quite content that this matter should be dealt with in the Italian proceedings, to which the charterers' solicitors reply that they are quite prepared to withdraw the Italian proceedings. This is an attitude which the charterers, through their solicitors, have maintained and made abundantly clear to the defendants. There is no need for me to refer in detail to the correspondence. Suffice it to say that that attitude has been maintained throughout.

The shipowners have adopted a different attitude. In a letter from their solicitors dated Feb. 26, 1960, they inform the charterers' solicitors that they are

> " instructed to seek to resist any attempts by your clients [the charterers] to have the matter dealt with in any form of proceedings in England at the same time as your clients are pursuing the proceedings which they began in Italy."

As I have already said, the charterers have shown willingness throughout to abandon these proceedings in Italy but, although they are willing to do so, I have affidavit evidence from an Italian lawyer which makes it clear that under Italian law the charterers are unable to abandon proceedings there without the concurrence of the shipowners (3).

Counsel for the shipowners has urged on me very strongly that in the exercise of the discretion of this court I should stay the action here for several reasons. The first point urged was that from the point of view of obtaining the evidence necessary in this case it will be much more convenient and much cheaper to proceed in Italy. It is perfectly true that probably all of the evidence from the shore side of the discharge of this vessel is obtainable only in Italy. That does not deal with the ship's evidence which may be available anywhere wherever the ship may be. I have considered this very carefully because there is much merit in what counsel for the shipowners has urged so strongly to me and I must look at all the surrounding features of this case to see how much there is in that submission.

Contamination of a petroleum cargo is not a novel occurrence and I have in mind that the charterparty under which the cargo was carried contemplated arbitration in London to settle any disputes arising out of the contract of carriage, and that this was apparently agreed by counsel for the shipowners. Also I have in mind that the shipowners by the letter of June 22, 1959, said that they were agreeable to arbitration in London. Further, I have in mind that the charterers are an Italian company in Italy and, wherever they fight their case, the burden of proving their case lies on them, and yet they have chosen this court in which to prove, or attempt to prove, their claim. They have taken some steps towards the prosecution of their claim in this court and I am told by their counsel that a marine surveyor and legal advisers have spent some ten days in Italy for the sole purpose of preparing the evidence to that end. In spite of these apparent difficulties they are content, in fact desirous, of pursuing their claim here. I have no knowledge of what the evidence is or what will be necessary for them to prove their case, and I can only conclude that the charterers at least do not feel embarrassed by any difficulties there may be in bringing the evidence to this country.

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(2) Section 3 (4) of the Administration of Justice Act, 1956, reads, so far as is material, as follows:

" In the case of any such claim . . . being a claim arising in connexion with a ship, where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of . . . the ship, the Admiralty jurisdiction of the High Court . . . may (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action in rem against . . . (b) any other ship which, at the time when the action is brought, is beneficially owned [by that person]."

(3) The Italian lawyer, Professor G. Sarfatti, one of the legal advisers to the charterers' company in Italy, stated in para. 7 of his affidavit of May 9, 1960: " Under Article 306 of the Italian Code of Civil Procedure . . . the plaintiffs [i.e., the charterers] in civil proceedings in the Italian courts may not withdraw from such proceedings without the express and unqualified consent of the defendants [i.e., the shipowners]. [The charterers] are, therefore, unable to abandon the proceedings instituted by them . . . before the Tribunal of Venice without the consent of the [shipowners]."

It is quite clear from the cases to which I have been referred in this hearing that balance of convenience is a matter seriously to be considered, but that it is not the only factor which I have to consider. Counsel for the shipowners has referred me to several cases, amongst others *The Monte Urbasa* (4). In the course of his judgment LORD MERRIMAN, P., said (5):

> " In the absence of anything in the nature of overwhelming convenience, or, indeed in the absence of any strong balance of convenience, in favour of the trial in Argentina, I do not think I ought to deprive the plaintiffs in this action of their right to proceed here, and, in those circumstances, exercising my discretion as best I can, I think that the proper course for me to adopt is to decline to stay these proceedings ",

that is, the proceedings in this court.

I have also been referred to *St. Pierre* v. *South American Stores* (*Gath & Chaves*), *Ltd.* (6), where SCOTT, L.J., in the Court of Appeal, said (7):

> " The true rule about a stay under s. 41 [i.e., s. 41 of the Supreme Court of Judicature (Consolidation) Act, 1925 (8)] so far as relevant to this case, may, I think, be stated thus: (i) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English court if it is otherwise properly brought. The right of access to the King's court must not be lightly refused; (ii) in order to justify a stay two conditions must be satisfied, one positive and the other negative; (a) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive, or vexatious to him, or would be an abuse of the powers of the court in some other way, and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant."

Counsel for the shipowners has not been slow to urge on me that this action in this court is also a vexatious one in that the charterers have instituted no less than three separate actions in respect of their claim, and I confess that at first sight it does seem to be an excessive number of actions in respect of one claim. A few moments' reflection, however, on all the surrounding circumstances of this case rather clears one's mind when it is remembered that the charterers believe that the procedure of this court will be more expeditious than that in their own country. After all, they are the charterers who, rightly or wrongly, are claiming to have suffered a very large loss amounting to well over £200,000. Further, I must remember that the procedure in this court by way

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(4) [1953] 1 Lloyd's Rep. 587.
(5) [1953] 1 Lloyd's Rep. at p. 590.
(6) [1935] All E.R. Rep. 408; [1936] 1 K.B. 382.
(7) [1935] All E.R. Rep. at p. 414; [1936] 1 K.B. at p. 398.
(8) See 18 HALSBURY'S STATUTES (2nd Edn.) 478 and SUPPLEMENT.

A of an action in rem is the only one of these three proceedings instituted by the charterers which ensures security for this large claim. It is perfectly true that the shipowners in correspondence, and again through their counsel in this court, have indicated that they are perfectly willing that the undertaking which they originally gave as a result of the action in rem instituted in this country should be applied to satisfy any judgment by an Italian court. But the only B original means of obliging the shipowners to give any undertaking at all was by proceedings in this court.

With those considerations in mind it is true that this court does provide a ready remedy to charterers who consider themselves injured or to have suffered damage, and it is a remedy from which in my view they should never be lightly excluded. On this motion it is for the shipowners to satisfy me in all the circumstances C of the case that this action is vexatious and, after giving considerable thought to the matter, I have come to the conclusion that, in the circumstances, they have not satisfied me that it is vexatious. I have in mind that no date for hearing of the final action in Italy has been fixed, nor has any case been prepared in that country on behalf of the charterers for the prosecution of their claim there; but some steps have been taken in respect of their claim D in this country.

It was suggested that the Swedish limitation would apply in Italy, but would not apply to an action in this country. It was also suggested that the Swedish limitation of liability is lower than that provided for by the Merchant Shipping Acts of this country. This argument has been referred to by counsel for the shipowners and, though I am not certain about it, I think also by counsel for the E charterers, as a " red herring ". I have no evidence whatever as to the Swedish limitation of liability and, in the absence of such evidence, I must assume it is the same as that provided by the relevant Acts in this country. I am not in any way swayed by any suggestions as to limitations of liability. In my view this is a " red herring " and I propose to let it rot as far as this motion is concerned.

F As I have already said, I have been referred to a number of cases including *The Hartlepool* (9), and I propose to read a passage from the judgment of WILLMER, J. There the learned judge said this (10):

> " The fact that no security has been furnished in the proceedings abroad distinguishes this case at once from that of *The Christiansborg* (11), and the other cases, of which there are quite a number, in which attempts have been G made in one form or another to initiate proceedings in rem in two countries at once. Over and over again it has been held that once a ship has been arrested and bail or security has been furnished, the ship's release has been purchased, and she is free from further arrest in any country in respect of the same claim. But that is something very different from the situation which has arisen in this case. Here it is merely a personal action which H has been started abroad; and where a personal action has been started abroad, and it is desired to sue here as well, there is no doubt that it is a matter for the discretion of the court whether to make an order in the action in this country."

If I may say so, with respect, I adopt those words of the learned judge with I the reminder that in this case the action initiated by the charterers in Italy was, so far as I have been able to discover at this hearing, purely in personam. They have, for reasons which they have doubtless considered, chosen to proceed in rem in this country and so obtain the security to which I have already referred. Though convenience is a matter, as I have already said, not lightly to be discarded, I do not think that there is such a preponderance of convenience in the getting together of the evidence necessary in this case as to make this action so vexatious that I ought to prevent the charterers from following the course which they have chosen. A

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(9) (1950), 84 Lloyd's Rep. 145.
(10) (1950), 84 Lloyd's Rep. at p. 146.
(11) (1885), 10 P.D. 141; 5 Asp. M.L.C. 491.

In those circumstances I must refer myself to the three ways that are open to me to deal with this case, three ways which were suggested by BAGGALLAY, L.J., in *The Christiansborg* (12) and which are referred to and set out in WILLMER, J.'s judgment in *The Hartlepool* (13). They are these: B

> " First, [the court] may put the party seeking to sue in this country to his election as to whether he will proceed in this country or abroad; secondly, it may stay the proceedings in this country . . . or, thirdly, it may grant an injunction restraining the plaintiffs from prosecuting their proceedings abroad."

C

By their correspondence and through their counsel in court the charterers made it clear as to their election. They have made it clear, too, that but for the action of the shipowners in Italy they would have abandoned the proceedings there which they, the charterers, originated. It seems to me that they indicated their election and, in order to safeguard that so far as it lies in my power, I feel that I should adopt the third of BAGGALLAY, L.J.'s methods, namely, to restrain them by injunction from prosecuting their claim abroad. D

I do not think that there is much left for me to say except to say in open court that in this connexion the plaintiffs made it clear yesterday that they have undertaken to do all they can to abandon the Italian proceedings and that they are perfectly willing to pay the costs incurred in them provided, if the shipowners decline to co-operate in the abandonment of the proceedings in Italy, they should not be prejudiced in the matter so far as further costs are concerned. E

The result of this is that I do not stay the action in this court as prayed by the shipowners in this action.

Motion dismissed.

May 30. The parties, with HIS LORDSHIP's approval, agreed the following order: " Upon the charterers and the shipowners by their respective counsel mutually undertaking to do and to join in the doing of all such deeds acts and things as may be necessary to procure abandonment of the action instituted by the charterers in the courts of Venice by a writ numbered 8657 in the official Judicial List of Venice and upon the charterers by their counsel undertaking to pay such costs of the shipowners in such action down to and including the abandonment thereof as are recoverable under Italian law it is ordered that (a) the charterers be restrained from further prosecuting such action otherwise than as may be necessary to procure its abandonment; (b) the motion be dismissed with costs. Liberty to apply ". F G

Solicitors: *Crawley & de Reya* (for the plaintiffs, the charterers); *William A. Crump & Son* (for the defendants, the shipowners).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(12) (1885), 10 P.D. at p. 152; 5 Asp. M.L.C. at p. 496.
(13) (1950), 84 Lloyd's Rep. at p. 146.

ABBOTT *v.* PHILBIN (INSPECTOR OF TAXES).

[HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Keith of Avonholm and Lord Denning), May 2, 3, June 21, 1960.]

Income Tax—Income—Option to purchase its shares sold to company's employee – Subsequent exercise of right of purchase—Increase in value of shares after date of option—Whether increase taxable at date of exercise of option—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 156, *Sch. E, Case I, r.* 1.

Income Tax—Assessment—Option to purchase its shares sold to company's employee—Subsequent exercise of right of purchase—Increase in value of shares after date of option—In what year value of option assessable—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 156, *Sch. E, Case I, r.* 1.

In accordance with an offer made by a limited company to certain of its responsible officers, the taxpayer, who was an employee of the company, applied in October, 1954, for an option (not transferable) to purchase up to two thousand £1 shares in the company at their then market price of 68s. 6d. a share. He was granted the option in return for a payment of £20. He exercised the option in respect of 250 shares in March, 1956, when their value had risen to 82s. per share. He was assessed to income tax under Sch. E for the tax year 1955-56 in the sum of £166 in respect of the increase in value less a proportion of the £20 option payment on the basis that the shares acquired by the exercise of the option in 1956 were a perquisite from his office within r. 1* of the Rules applicable to Sch. E contained in Sch. 9 to the Income Tax Act, 1952.

Held (LORD KEITH OF AVONHOLM and LORD DENNING dissenting): the assessment was bad because the perquisite of the taxpayer's office was the option granted to him, which was something that was capable of being turned to pecuniary account (dictum of LORD WATSON in *Tennant* v. *Smith*, (1892), 3 Tax Cas. at p. 167, applied) although it was not assignable, and the perquisite was assessable to tax in the year in which it was granted (viz., 1954-55), though if it then had no ascertainable value there would be nothing on which an assessment could be made.

Forbes' Executors v. *Inland Revenue Comrs.* ((1958), 38 Tax Cas. 12) overruled.

Decision of the COURT OF APPEAL ([1959] 3 All E.R. 590) reversed.

Per VISCOUNT SIMONDS and LORD RADCLIFFE: the benefit accruing from the option at the time when it was exercised did not necessarily arise from the office, but was the profit of exploiting then a valuable right acquired in a previous year (compare p. 767, letter G, and p. 774, letter I, to p. 775, letter C, post).

[**Editorial Note.** There was not a majority decision on the ground that the benefit gained in a future year of assessment by the exercise of the option then, i.e., the difference between the market value of the shares then acquired and their cost to the employee, was not a profit that arose from the employee's office. This was, however, stated by VISCOUNT SIMONDS as a second ground of his decision (see p. 767, letter G, post). Market values of shares can be much influenced by factors wholly independent of the company's business and the employee's services (e.g., scarcity of shares, political events, credit restrictions and the bank rate), and accordingly rises or falls in value of shares during the currency of an option do not truly, or at any rate wholly, arise from the services of employees or managers to whom options may be granted.

As to emoluments chargeable to tax under Sch. E, see 20 HALSBURY'S LAWS (3rd Edn.) 311-313, paras. 573, 574; and for cases on the subject, see 28 DIGEST (Repl.) 225-237, *971-1040*.

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* This rule so far as relevant is printed at p. 766, letter A, post.

As to the basis of charge to Sch. E, see 20 Halsbury's Laws (3rd Edn.) 311, para. 572.

For the Income Tax Act, 1952, s. 156, Sch. E, Case I, see 31 Halsbury's Statutes (2nd Edn.) 149; and for r. 1 of the Rules applicable to Sch. E, see ibid., 522.]

Cases referred to:

Bridges (Inspector of Taxes) v. *Hewitt; Bridges (Inspector of Taxes)* v. *Bearsley*, [1956] 3 All E.R. 789; [1957] 1 W.L.R. 59; *revsd.* C.A., [1957] 2 All E.R. 281; 37 Tax Cas. 289, 306; [1957] 1 W.L.R. 674; 28 Digest (Repl.) 227, *985*.

Forbes' Executors v. *Inland Revenue Comrs.*, 1958 S.C. 177; 38 Tax Cas. 12; 28 Digest (Repl.) 241, *590*.

Income Tax Comrs. v. *Gibbs*, [1942] 1 All E.R. 415; [1942] A.C. 402; 111 L.J.K.B. 301; 166 L.T. 354; sub nom. *R.* v. *Income Tax Comrs., Ex p. Gibbs*, 24 Tax Cas. 221; 28 Digest (Repl.) 275, *1232*.

Income Tax Special Purposes Comrs. v. *Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cas. 53; 15 Digest (Repl.) 13, *45*.

North Western Ry. Co. v. *M'Michael, Birkenhead, Lancashire & Cheshire Junction Ry. Co.* v. *Pilcher*, (1850), 5 Exch. 114; 6 Ry. & Can. Cas. 618; 155 E.R. 49; sub nom. *London & North Western Ry. Co.* v. *M'Michael, Birkenhead, Lancashire & Cheshire Junction Ry. Co.* v. *Pilcher*, 20 L.J.Ex. 97; 16 L.T.O.S. 44; 28 Digest (Repl.) 503, *194*.

Salmon v. *Weight*, [1935] All E.R. Rep. 904; 153 L.T. 55; sub nom. *Weight* v. *Salmon*, 19 Tax Cas. 174; 28 Digest (Repl.) 230, *1002*.

Tait v. *Smith*, (1954), 35 Tax Cas. 79; 28 Digest (Repl.) 158, *622*.

Tennant v. *Smith*, [1892] A.C. 150; 61 L.J.P.C. 11; 66 L.T. 327; 56 J.P. 596; 3 Tax Cas. 158; 28 Digest (Repl.) 216, *916*.

Appeal.

Appeal by the taxpayer, E. C. Abbott, from an order of the Court of Appeal (Lord Evershed, M.R., Sellers and Harman, L.JJ.), dated Oct. 6, 1959, and reported [1959] 3 All E.R. 590, reversing an order of Roxburgh, J., dated Mar. 19, 1959, and reported [1959] 2 All E.R. 270. The taxpayer appealed to the Special Commissioners of Income Tax against an assessment for 1955-56 made on him under Sch. E to the Income Tax Act, 1952, in respect of emoluments of his employment. The question for determination was whether he was assessable for 1955-56 in respect of an option granted to him by his employing company to subscribe for shares, such option having been exercised in 1955-56, or whether he was not so assessable (as he contended) but was assessable in the previous year in which he purchased the option. The commissioners held that the taxpayer was assessable in 1955-56 and that the appeal failed. On appeal to the High Court by way of Case Stated, Roxburgh, J., held that the option was not additional remuneration, but was a perquisite for which any assessment to income tax fell to be made in 1954-55; and that any increase in value of the option was of a capital nature and was not taxable. He, therefore, allowed the appeal. The Court of Appeal, reversing this decision, held that the value of the option should be assessed to income tax in the year in which it was exercised, i.e., 1955-56, and not in the year in which it was granted. The facts are set out in the opinion of Viscount Simonds.

Heyworth Talbot, Q.C., R. O. Wilberforce, Q.C., and *D. C. Miller* for the appellant taxpayer.

R. E. Borneman, Q.C., A. S. Orr and *A. J. MacKenzie Stuart* (of the Scottish Bar) for the Crown.

The House took time for consideration.

June 21. The following opinions were read.

VISCOUNT SIMONDS: My Lords, this appeal relates to an assessment to income tax under Sch. E to the Income Tax Act, 1952, made on the appellant for the year of assessment 1955-56 in respect of the emoluments of his office as secretary of E. S. & A. Robinson, Ltd., which I will call " the company ". The Court of Appeal decided the case against him in deference to a decision of the Court of Session, *Forbes' Executors* v. *Inland Revenue Comrs.* (1). Your Lordships will find it necessary to review that case.

The facts are not in dispute. At the annual general meeting of the company held on June 28, 1954, it was resolved that 250,000 of 290,319 unclassified shares of £1 each in the capital of the company be classified as ordinary shares, and that the directors be authorised to grant options over such shares, or any of them, to executives of the company or its subsidiaries at such times and generally on such terms and subject to such conditions as the directors should think proper. Pursuant to this resolution, the directors of the company, at a board meeting held on Oct. 6, 1954, resolved that options on the terms contained in a draft letter then produced to subscribe for ordinary shares in the company at 68s. 6d. per share (being the middle price ruling on the Bristol Stock Exchange on that day) be granted to the executives. The appellant, accordingly, as secretary of the company, sent to each of the executives, including himself, a letter of which the salient conditions were that he was granted, at the price of £1 for every one hundred shares, an option to purchase a specified number of shares at the price of 68s. 6d. per share, such option to be exercisable at any time within ten years from the date of the grant of the option. The option was expressed to be non-transferable and was to expire on the death or retirement of the executive (or employee, as I will call him) before the expiration of the ten years. If the employee desired to purchase the option, he was required to send in a form of application (which accompanied the letter) together with his cheque for the price of the option, whereupon an option certificate would be issued to him. The appellant, being included in the list as entitled to a grant of an option in respect of 2,000 shares, applied accordingly on Oct. 7, 1954, for such option, enclosing his cheque for £20 which was duly cashed. Some delay occurred in the issue of option certificates, and he was not given his until May 6, 1955, but it bore on its face the statement that the option was granted on Oct. 6, 1954. It was indorsed with the conditions as to the non-transferability and expiry to which I have referred. On Mar. 28, 1956, the price of the company's shares having then risen to 82s., the appellant exercised pro tanto his option by applying to the company for the issue to him of 250 shares at the price of 68s. 6d. per share, and sent with his application his cheque for £856 5s. The shares were duly issued to him. He was subsequently assessed to tax under Sch. E for the year 1955-56 in inter alia the sum of £166 which was made up as follows:

	£	s.	d.	£	s.	d.
" 250 shares taken up on Mar. 28, 1956, when the middle market price was 82s. ..				1,025	0	0
Deduct: option price 68s. 6d.	856	5	0			
cost of option at £1 per 100 shares	2	10	0	858	15	0
				£166	5	0 "

The Special Commissioners upheld the assessment, considering the case indistinguishable from *Forbes'* case (1) to which I have referred. ROXBURGH, J., if I understand his judgment, thought it possible to distinguish that case, and on Case Stated allowed the present appellant's appeal. The Court of Appeal, as I have already said, decided in favour of the Crown.

My Lords, once more your Lordships have to consider the words of r. 1 of the

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(1) 38 Tax Cas. 12.

Rules applicable to Sch. E contained in Sch. 9 to the Income Tax Act, 1952, A which is as follows:

> " Tax under Sch. E shall be annually charged on every person having or exercising an office or employment mentioned in Sch. E . . . in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment . . ." B

Summarily the question is: Was the difference between (a) the market price on Mar. 28, 1956, £1,025, and (b) the option price, £856 5s., plus a proportionate part of the cost of option, £2 10s., a " perquisite or profit therefrom ", i.e., from the office of secretary held by him, for the year of assessment? The curious feature of this case is that the Crown appears to reach the conclusion that the sum of £166 was assessable for the year 1955-56 by first denying that the grant C of the option was itself a perquisite or profit of the year 1954-55 and this is, I think, the aspect of the case that must first be examined. For it would not, as I understand the argument of learned counsel for the Crown, be contended that, if the grant of the option was itself a perquisite or profit arising from the office, the subsequent exercise of it would be another perquisite or profit.

My Lords, I cannot entertain any doubt that, when the company granted D the option to the appellant, he acquired something of potential value. I do not think that it matters whether it falls into the category of proprietary or contractual right, or into some dim twilight that divides those juristic conceptions. We are concerned with a taxing statute whose language is to be reconciled with the law of England and Scotland alike, and the chosen words " perquisite or profits whatsoever " are as wide and general as they well could be. I can concede no E relevant limitation of their meaning except in the oft-cited words of LORD WATSON in *Tennant* v. *Smith* (2) that they denote

> " something acquired which the acquirer becomes possessed of, and can dispose of to his advantage, in other words money, or that which can be turned to pecuniary account."

How, then, can it be said that an option to take up shares at a certain price F is not a valuable or at least a potentially valuable right? Its genesis is in the desire of the company to give a benefit to its employees, and at the same time, no doubt, to enhance their interest in its prosperity. It is something which the employee thinks it worth his while to pay for; not a large sum truly, but £20 deserves a second thought. And it is something which can assuredly be turned to pecuniary account. G This was challenged, because the option was itself not transferable, but this objection is without substance. There was no bar, express or implied, to a sale of the shares as soon as the option was exercised, and there could be no difficulty in the grantee arranging with a third party that he would exercise the option and transfer the shares to him. It was further challenged on the ground (to quote the language of SELLERS, L.J., in the Court of Appeal (3)) that " A notional use of the option or a use unintended and undesired by the H company, unrealised and unvalued " does not have the quality required by the accepted standard set by LORD HALSBURY, L.C., and LORD WATSON in *Tennant* v. *Smith* (4) " to make it a taxable perquisite, if indeed it was a perquisite at all at that date ". With great respect to the learned lord justice and to counsel who put it in the forefront of his argument, I find great difficulty in giving any weight at all to this consideration. I It is mere guess work what use of the option was intended or desired. I would not, myself, assume that the company intended that the grantee of an option should for ever, or for a day longer than he wished, hold the shares that he took up, or that he should not at once, if he wished, reap the benefit of a rise in price. But, guess right or wrong, there is nothing to prevent him doing so; that is his legal right, and, if he could so

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(2) 3 Tax Cas. at p. 167. (3) [1959] 3 All E.R. at p. 602; [1960] Ch. at p. 50.
(4) 3 Tax Cas. at pp. 164, 167.

A deal with the shares when acquired, nothing could prevent him so using his option by arrangement with a third party as to secure for himself a similar advantage. Two other adjectives are used by the lord justice (5), "unrealised" and "unvalued". But the fact that there was no realisation in the sense of actual turning into money is irrelevant. The test is whether it is something which is, by its nature, capable of being turned into money. Nor is it relevant B that it is "unvalued". I have little doubt that, if the Revenue authorities had addressed their minds to the proper question, they could have ascertained whether it had any and what value. But, again, I must say that it is really irrelevant whether a value could be ascribed to it or not. If it had no ascertainable value, then it was a perquisite of no value—a conclusion difficult to reach since £20 was paid for it. In my opinion, the Crown cannot succeed in this C essential aspect of the case unless it is established as a general proposition that an option to acquire shares at a fixed price in such circumstances as those of the present case is not a perquisite of office. It must be shown that, even if at the date of the option being granted the market price is higher than the option price, the option is not a perquisite which falls within the Schedule. This appears to me an impossible proposition. What distinguishes such a right from that D commonly given to a shareholder in a commercial company, when, on an issue of shares, he is given in the form of a provisional allotment letter the right to take up new shares at a certain price? He can exercise his right and take up the shares, or he can sell his right to do so, or he can do neither and let the offer go by default. But, from the moment he has the letter, he has a right of more or less value according to the circumstances. So, too, the grantee of such an E option as that which we are considering has a right which is of its nature valuable and can be turned to pecuniary account. He has something at once assessable to tax.

My Lords, as I have said, the argument for the Crown appeared to demand for its success that the grantee of the option did not acquire a perquisite at the date of the grant. There could not be one perquisite at the date of the grant F and a second perquisite when the shares were taken up. Therefore, the Crown's case, in my opinion, fails at the initial step. But there are other grave difficulties in the way of its success. The taxable perquisite must be something arising "therefrom", i.e., from the office, in the year of assessment. I do not want to embark on the notoriously difficult problem as to the year to which for the purpose of tax a payment should be ascribed, if it is not expressly ascribed to any G particular year. But I do not find it easy to say that the increased difference between the option price and the market price in 1956 or, it might be, in 1964 in any sense arises from the office. It will be due to numerous factors which have no relation to the office of the employee, or to his employment in it. The contrast is plain between the realised value, as it has been called, of the option when the shares are taken up (though the realisation falls short of money in H hand) and the value of the option when it is granted. For the latter is nothing else than the reward for services rendered or, it may be, an incentive to future services. Unlike the realised value, it owes nothing to the adventitious prosperity of the company in later years. On this ground also I should reject the claim of the Crown.

My Lords, as I have said, the Court of Appeal were constrained to decide I this case in favour of the Crown in deference to the decision of the Court of Session in *Forbes'* case (6). I agree that the two cases are not in any material respect distinguishable, and think that they took the proper course in following it. The single fact on which ROXBURGH, J., appeared to rely, that, in that case, unlike this, the grant of the option was gratuitous, cannot, in my opinion, affect the issue. The reasoning by which the learned judges in *Forbes'* case (6) supported the conclusion to which they came is that which formed the basis of the argument for the Crown on this appeal, and I have already dealt with it. It treats the option as a thing of no value until it has been exercised, and places an importance, in my opinion unjustified, on the non-transferability of the option. But, as I have pointed out, though that feature may reduce the value of the option, it cannot alter its character so that it is no longer something which can of its nature be turned to pecuniary account. Nor, even if it be the fact, can I accept the view clearly entertained by the Court of Session that, if in the year of grant the option had no value, it, therefore, became a taxable perquisite when in later years it was exercised. It was, in my opinion, a perquisite at the date of grant and, if it had no value, there was nothing to tax and that is the end of the matter.

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(5) [1959] 3 All E.R. at p. 602; [1960] Ch. at p. 50.

(6) 38 Tax Cas. 12.

Reference was also made to *Salmon* v. *Weight* (7). This case does not assist the Crown. The taxpayer, Salmon, was a managing director of a limited company at a fixed salary. In addition, the directors in each year gave him the privilege of applying for certain unissued shares of the company at their par value which was less than the market value. He accordingly applied for shares, and they were issued to him. He was assessed to tax on the difference between the par and market values, and the assessment was upheld in the High Court and the Court of Appeal. The taxpayer appealed to this House and his appeal was dismissed. LORD ATKIN, with whom the other learned Lords agreed, pointed out (8) that, while the board had expressed their willingness to entertain an application for shares, nobody was bound and no right was given and no profit was received of any kind by the appellant until the application had been accepted and the shares in question had been allotted to him. It is by no means a decision that, if the company had vested in him a right to have the shares allotted to him instead of allotting them forthwith, that right would not have been a taxable perquisite or profit.

The facts in *Tait* v. *Smith* (9) are somewhat obscure, but the decision of WYNN-PARRY, J., in that case appears, if anything, to be favourable to the appellant.

In *Bridges* (*Inspector of Taxes*) v. *Hewitt*, *Bridges* (*Inspector of Taxes*) v. *Bearsley* (10), there are to be found observations of DANCKWERTS, J., and JENKINS, L.J., which support the contention of the Crown. But the substantial issue in that case was whether shares which had been issued to the taxpayer were, or were not, profits of his office. The question whether the profit lay in the right to acquire shares or in the shares when acquired was a subsidiary issue which, in the event, did not arise. If, as I think they probably were, the relevant facts of that case were undistinguishable from those of the present case, I must with respect decline to follow them.

On a consideration of the whole case I am of opinion that this appeal should be allowed with costs here and below.

LORD REID: My Lords, in 1954 the company of which the appellant is secretary offered to its executives options to buy a number of its unissued shares at 68s. 6d., which was then the market price. The options were not transferable, and were to endure for ten years if the purchaser remained so long in the company's service. The price of the option was £1 per one hundred shares and, in October, 1954, the appellant acquired an option on 2,000 shares for which he paid £20. The market price rose, and in March, 1956, when the price was 82s., the appellant exercised his option to the extent of 250 shares and acquired them at 68s. 6d. If he had immediately sold those shares, he would have made a profit of £166, and he has been assessed in this sum under Sch. E to the Income Tax Act, 1952, in the year 1955-56. Rule 1 of the Rules applicable to Sch. E is as follows:

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(7) [1935] All E.R. Rep. 904; 19 Tax Cas. 174.

(8) [1935] All E.R. Rep. at p. 910; 19 Tax Cas. at p. 193.

(9) 35 Tax Cas. 79.

(10) [1956] 3 All E.R. 789; [1957] 2 All E.R. 281; 37 Tax Cas. 289, 306.

> "Tax under Sch. E shall be annually charged on every person having or exercising an office or employment of profit mentioned in Sch. E, or to whom any annuity, pension or stipend chargeable under that Schedule is payable, in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment, after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament, where the same have been really and bona fide paid and borne by the party to be charged."

The parties agree that the appellant received something which comes within the words "perquisites or profits whatsoever". The question in this case is what it was. The appellant says that the option was the perquisite, and he admits that he was liable to be assessed for the year 1954-55 in respect of the value of the option when it was granted minus the price he paid for it. He maintains that the subsequent appreciation of its value is not taxable. On the other hand, the Crown maintains that he received no perquisite in 1954, the perquisite being the shares which were allotted to him when he exercised his option; if that is right, the shares when allotted were worth £166 more than he paid for them and he has been properly assessed.

The first observation which I would make is that, on the Crown's view, the granting of the option in 1954 might result in ten different perquisites being received by the appellant in ten different years if he chose to exercise his option piecemeal. He was entitled to do this and, in fact, in 1955-56, he only exercised it to the extent of 250 out of 2,000 shares, and the company retained no control over the times at which or the extent to which he might exercise the option. If he did not exercise the last of his option until 1964-65, he would then, in the Crown's view, be receiving a perquisite taxable in that year in consequence of an irrevocable act of grace of the company ten years earlier. If, in 1965, he held 2,000 shares which he had acquired in ten different parcels under his option, he would have made precisely the same profit on each share—the difference between 68s. 6d., the price under the option, and the then market price. But he would have been taxed very differently in respect of each parcel, the tax depending on the market price at the date when he had acquired it—for it is not suggested that further appreciation after shares have been allotted can be taxed. Moreover let me suppose that the option had been exactly the same, except that it was to last for ten years whether the appellant remained in the service of the company or not. It could hardly be that that change so completely altered the nature of the option as to change the basis of taxation and make the granting of the option and not the issue of the shares the perquisite. If, then, it was exercised years after the servant had retired what would the position be: would the issue of shares then be the perquisite and for what year of assessment would it be a perquisite? There would be no asessment under Sch. E for the year in which the shares were issued because the servant had retired. I realise that one ought not to be surprised at anything that happens under the Income Tax Acts but, nevertheless, all this does seem a little strange.

Both parties rely on *Tennant* v. *Smith* (11) and, in particular, on the familiar passage in the speech of LORD WATSON (12):

> "Is it then a perquisite or a profit of his office? I do not think it comes within the category of profits, because that word in its ordinary acceptation appears to me to denote something acquired which the acquirer becomes possessed of, and can dispose of to his advantage, in other words money, or that which can be turned to pecuniary account."

I agree that the question is whether this option was a right of a kind which could be turned to pecuniary account. I do not use these words as a definition, but it is undesirable to invent a new phrase if an old one of high authority fits this case, and the parties agree that it does. But the test must be the nature of the right, and not whether this particular option could readily have been turned to pecuniary account in October, 1954. Whether this option could then have been turned to pecuniary account is a question of fact, and there is no finding about it. It is true that the option was not transferable, but there are other ways of turning such a right to pecuniary account than assigning it or calling for immediate performance of the obligation to allot the shares. Even taking this particular option, I find nothing to indicate that there would have been much difficulty in finding someone who would have paid a substantial sum for an undertaking by the appellant to apply for the shares when supplied with the purchase money and called on to exercise the option and thereupon to transfer the shares. It is not an unreasonable inference from the whole circumstances that both the appellant and his employers must have thought the option worth a good deal more than £20, and others may have thought the same. No doubt a person who wished to acquire an option on the shares would pay less for an undertaking such as I have indicated than he would pay for an assignable option because of the risks involved, but that only goes to valuation of the right which the appellant acquired. And, if it is asked why buy such an undertaking instead of buying shares on the market, the answer is that people often do prefer buying options to buying shares. I am not prepared to assume in the absence of a finding that this option could not have been turned to pecuniary account when it was granted. But, if there is any doubt about that, let me assume that the option had been to acquire shares at 10s. below the then market price. I cannot doubt that that could have been turned to immediate pecuniary account, and surely it could not be said that an option to buy at 58s. 6d. is itself a perquisite but an option to buy at 68s. 6d. is not. And that was not argued.

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(11) 3 Tax Cas. 158.

(12) 3 Tax Cas. at p. 167.

The argument for the Crown was not based on any special difficulty in turning the particular option to pecuniary account. It was based on the nature of the right; it was said that a right of option does not have the necessary qualities to make it a perquisite. I must confess that I do not understand that. If, in fact, this type of option is a kind of right which can be turned to pecuniary account, what more is necessary to make it a perquisite? I have not been able to find any clear answer to that question in the authorities cited or from the argument in this case. It appears to me that, if a right can be turned to pecuniary account, that in itself is enough to make it a perquisite.

Then it is said that, if the appellant had attempted in any way to raise money on his option before he exercised it, he would have been acting contrary to the tenor of his agreement with his employers. It was not argued that he would have been acting in breach of his contract with them—plainly he would not—nor was it said that there was any " gentleman's agreement " that he should not do this, or even that he would have incurred his employers' displeasure if he had done it. There is no finding to that effect. I am willing to assume that it would not be irrelevant to show that a servant could only exercise his full legal rights at the risk of impairing good relations with his employers, but I do not stop to consider what the position would then be. In this case, it was not suggested that his employers would have thought it in any way improper if the appellant had sold shares immediately they were alloted to him, and I cannot assume that they would have had any objection to his raising money on his option before he exercised it.

Then there appears to me to be another difficulty in the way of the Crown. Rule 1 taxes a person exercising an office or employment of profit " in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom *for* the year of assessment ". It does not say salaries or perquisites received during the year of assessment. It may be difficult to relate a perquisite strictly to a particular year. But if a reward is given in the form of an option and the option is itself the perquisite, it would generally be sufficiently related to the year in which it is given to be properly regarded as a perquisite for that year. If, on the other hand, the option is not the perquisite—if there is no perquisite until the option is

A exercised and shares are issued, it may be many years later—in what sense would the shares be a perquisite *for* the year when they were issued. There would be no relation whatever between the service during that year and the giving of the option many years earlier or the exercise of the option during the later year. I do not wish to express any concluded opinion on this point, but it does seem to lend support to the conclusion which I have reached on other grounds.

B In the present case, the Court of Appeal, though not bound to do so, very properly followed the decision of the Court of Session in *Forbes' Executors* v. *Inland Revenue Comrs.* (13). I say very properly because it is undesirable that there should be conflicting decisions on revenue matters in Scotland and England. So I must now examine the reasons for that decision. In that case, Mr. Forbes, having been appointed manager, was granted by his company an option in 1938 C which was repeated in a further agreement in 1944. This option was in all essentials similar to the option in the present case. The only distinction which I need note is that the option in the 1944 agreement was to purchase a large number of shares at par, though the market price was then above par; and it was argued that the option gave Mr. Forbes an immediately enforceable right to the shares and that right could have been converted immediately into cash. Mr. Forbes D exercised his option in 1946, and he was assessed under Sch. E as in this case on the difference between the value of the shares when they were allotted to him and the price which he paid for them. This assessment was upheld by the First Division. The Lord President's (LORD CLYDE) grounds of judgment appear from two passages which I shall quote from his opinion (14):

> E "In my opinion the right which Mr. Forbes obtained on signing the agreement in 1944 was a right merely to apply for the shares: it gave him no right in or to any shares, for this could only emerge when he exercised his right and when he delivered to the company the par value of the shares he demanded. Moreover—and this appears to me to be fatal to the appellants' contention—there was no pecuniary value in the mere right which he got by virtue of the agreement. For it was not a right to any shares and could not F be disposed of or sold by him . . . For the option itself could not be turned to pecuniary account",

and on the next page (15):

> "The argument for the appellants was that in 1944 a legally enforceable right had vested in Mr. Forbes when he signed the agreement, which he G could have converted into cash forthwith by securing an allotment of shares which he could sell in the market. From this it follows that his benefit should be assessed to tax as a benefit accruing in the year 1944. But this argument appears to me to involve two fallacies. In the first place, the right which Mr. Forbes got under the agreement was not a right to shares which sounded in money but a mere right to apply for shares which he never exer- H cised in that year and which in itself had no market value at all. But in the second place the right which he obtained under the agreement was not an unconditional one. He could not effectively exercise it unless he complied with its conditions, one of which was the payment to the companies of the par value of the shares applied for. These two considerations appear to me to point necessarily to the year 1946 when the right was effectively exercised I as the year in which the profit accrued."

The Lord President also derived some assistance from *Salmon* v. *Weight* (16) and *Bridges* (*Inspector of Taxes*) v. *Hewitt, Bridges* (*Inspector of Taxes*) v. *Bearsley* (17).

The essence of the first passage which I have quoted appears to be that, because the option could not be sold or assigned, therefore it could not be turned to pecuniary account. I have already given my reasons for not accepting that. The argument that a right could be turned to pecuniary account by raising money on it without assigning it does not appear to have been put forward, no doubt because the argument that it could be turned to pecuniary account by exercising it and taking up shares worth more than the option price may have seemed even stronger. That argument is dealt with in the second passage which I have quoted. In the second passage, the Lord President finds two fallacies in the argument for the taxpayer, but I am afraid I have been unable to see the force of his objections. If you get a share, it is capable of being turned to pecuniary account because you can immediately sell it. There is generally no difficulty about that and, if there is any difficulty, there are other ways of raising money on it though you have to remain on the register. Similarly, if you get an option to buy shares below the market price, it seems to me that the option is capable of being turned to pecuniary account by exercising it, acquiring the shares, and immediately selling them. It is true that that involves an extra step, but why should that matter? I can see no difficulty unless it be in financing the transaction. But, if the whole operation will yield a substantial profit, I would not assume that that would be difficult.

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(13) 38 Tax Cas. 12. (14) 38 Tax Cas. at p. 17. (15) 38 Tax Cas. at p. 18.

(16) [1935] All E.R. Rep. 904; 19 Tax Cas. 174.

(17) [1957] 2 All E.R. 281; 37 Tax Cas. 306.

The second fallacy appears to be a variant on the first. If the condition is one with which the taxpayer can easily and immediately comply, it does not, in my opinion, form an obstacle to turning the option to pecuniary account. If the condition is one which cannot immediately be complied with, that may make a difference. In *Bridges* (*Inspector of Taxes*) v. *Hewitt*, *Bridges* (*Inspector of Taxes*) v. *Bearsley* (18), the taxpayer still had to earn his perquisite by a further four years' service, and it may well be that, in such a case, an agreement to confer a future benefit gives no immediate perquisite. *Salmon* v. *Weight* (19) seems to me to be entirely different. There the servant had no enforceable right at all until he got his shares. He got his shares because the company chose to give him something then, to give him a perquisite when the shares were issued. But, in this case, the appellant getting his shares did not flow from any voluntary act of the company when the shares were issued. It flowed from the company's voluntary act in the previous year when they gave him an option by which they were thereafter bound. It would, I think, require some peculiar circumstances to make a mere expectation capable of being turned to pecuniary account.

Lord Carmont regarded the option as an open offer. I would not dispute about words. But, if it can be regarded as an offer, it was an offer which the company had no power to withdraw and which conferred a valuable contractual right on Mr. Forbes. Lord Carmont then (20) dealt with the restrictions and conditions to which the option was subject, and pointed out their material bearing on the value of the option and the difficulty there would be in valuing it. I agree with those observations. But, if I am right that the question whether a particular option is in itself a perquisite does not depend on these factors but rather on whether rights of that class are perquisites and capable of being turned to pecuniary account, then I do not think that these observations necessarily lead to his conclusion.

Lord Russell clearly stated his grounds of judgment in the following passage (21):

> " In my opinion, whatever may be the rights vested in the holder of an option in the abstract, it is essential to have regard to the nature and the quality of the right created in Mr. Forbes's favour in 1944. As previously stated, that right was personal and unassignable and was qualified by the condition that he must tender cash in payment, while still remaining managing

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(18) [1957] 2 All E.R. 281; 37 Tax Cas. 306.

(19) [1935] All E.R. Rep. 904; 19 Tax Cas. 174.

(20) 38 Tax Cas. at p. 19.

(21) 38 Tax Cas. at p. 21.

A director, before being in a position to enforce compliance by the companies with their conditional obligation to allot. It appears to me that the latter contingency coupled with the personal and unassignable nature of the right prevents it from being something which could be 'turned to pecuniary account' . . ."

B I think that I have already dealt with the reasons which he gives, but I can sum up my view by saying that conditions and restrictions attached to or inherent in an option may affect its value but are only relevant on the question whether the option is a perquisite if they would, in law, or in practice, effectively prevent the holder of the option from doing anything when he gets it which would turn it to pecuniary account. I am, therefore, of opinion that *Forbes' Executors* v. *Inland Revenue Comrs.* (22) C was wrongly decided, and should be overruled, and that this appeal should be allowed.

LORD RADCLIFFE: My Lords, on Mar. 28, 1956, the appellant applied for and received from E. S. & A. Robinson, Ltd. 250 of its ordinary shares. He paid the company £856 5s. for them, a subscription at the rate of 68s. 6d. per share, although the current market price was then 82s. per share. He was enabled D to obtain this advantage because, in October, 1954, he and other officials and employees of the company had been offered by it options to take up stated amounts of ordinary shares at the market price then ruling, 68s. 6d. per share, and he had thus acquired at the cost of £20, which he then paid for an option on 2,000 shares, the right to make this call at the date which he selected. The Inland Revenue claim that he is assessable under Sch. E to the Income Tax Act, E 1952, for 1955-56 on the difference between what he paid and the value of what he got, on the ground that this calculated amount is a profit or perquisite from his office. I do not think that he is. Oddly enough, however, the argument that took place before us was concentrated almost exclusively on a different point, whether he was assessable under the same Schedule on the value of the option itself in the year when he acquired it, 1954-55, the Crown maintaining with much F persuasive force that he was not, the appellant conceding that he was, provided always that it could be shown that a monetary value could fairly be placed on the option at the date of its acquisition.

It is a natural enough assumption for the tax gatherer that, if a transaction does not attract tax in one year, it must in another. I do not, myself, however, regard that as a good general principle on which to found the construction of the G income tax code. Considering that, at any rate since the decision of this House in *Tennant* v. *Smith* (23), it has been necessary to put a somewhat restricted meaning on the words "all salaries, fees, wages, perquisites or profits whatsoever" which now appear in Sch. 9 to the Income Tax Act, 1952, I should not be surprised to find that neither an option to take up shares at a price, more particularly, perhaps, if the option is made non-assignable, nor the advantage obtained later H from exercising the option comes within the range of those words. On the whole, however, I do not think that that is the situation, because, in my opinion, the appellant is right in saying that what taxable receipt there is lies in the acquisition of the option and that, if it had a monetary value when received, it is that value that represents the profit or perquisite of the office. The difficulty in dealing with this point lies wholly in relating words used by several members of the House in I *Tennant* v. *Smith* (23), apparently of general import, to circumstances that they were not dealing with. The benefit of a right of occupation of part of bank premises which the occupier could only enjoy for the service of the bank is not very like the benefit of an option to take up freely transferable shares at a fixed price. The basis of the Revenue's claim in *Tennant* v. *Smith* (23) was really to tax the bank manager on expenditure which he was saved, not on any money that he got or could get, while tax on the full annual value of the premises was taken from the bank itself. It was not, however, the view of the House that profits or perquisites, to be taxable, could consist only of money paid. It was accepted that they could include objects or things of value received, payments in kind, so long as they were " capable of being turned into money " (LORD HALSBURY, L.C. (24)), " money, or that which can be turned to pecuniary account " (LORD WATSON (25)), " money payment or payments convertible into money " (LORD MACNAGHTEN (26)), " that which could be converted into money " (LORD HANNEN (27)).

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(22) 38 Tax Cas. 12.

(23) 3 Tax Cas. 158.

I think that it has been generally assumed that this decision does impose a limitation on the taxability of benefits in kind which are of a personal nature, in that it is not enough to say that they have a value to which there can be assigned a monetary equivalent. If they are by their nature incapable of being turned into money by the recipient they are not taxable, even though they are, in any ordinary sense of the word, of value to him. It is obvious that this conception raises many attendant uncertainties which are not, so far as I know, cleared up except where some particular class of benefit in kind has offended the eye of the legislator and has been dealt with by special legislation. Must the inconvertibility arise from the nature of the thing itself, or can it be imposed merely by contractual stipulation? Does it matter that the circumstances are such that conversion into money is a practical, though not a theoretical, impossibility; or, on the other hand, that conversion, though forbidden, is the most probable assumption?

I do not think that the decision of this case can go very far, if any distance, to clear up such points as these. I think that the Crown are right in saying that a line has to be drawn somewhere between convertible and non-convertible benefits and that, somehow, we have to put a general meaning on the not very precise language used in *Tennant* v. *Smith* (28). What I do not think, however, is that a non-assignable option to take up freely assignable shares lies on that side of the line which contains the untaxable benefits in kind. The option, when paid for, was thereafter a contractual right enforceable against the company at any time during the next ten years so long as the holder paid the stipulated price and remained in its service. That right is, in my opinion, analogous for this purpose to any other benefit in the form of land, objects of value or legal rights. It was not incapable of being turned into money or of being turned to pecuniary account within the meaning of these phrases in *Tennant* v. *Smith* (28) merely because the option itself was not assignable. What the option did was to enable the holder at any time, at his choice, to obtain shares from the company which would themselves be pieces of property or property rights of value, freely convertible into money. Being in that position, he could also at any time, at his choice, sell or raise money on his right to call for the shares, even though he could not put anyone he dealt with actually into his own position as option holder against the company. I think that the conferring of a right of this kind as an incident of service is a profit or perquisite which is taxable as such in the year of receipt, so long as the right itself can fairly be given a monetary value, and it is no more relevant for this purpose whether the option is exercised or not in that year than it would be if the advantage received were in the form of some tangible form of commercial property.

The claim to tax the advantage obtained in the year 1955-56 is not claimed by the Crown if the right view is that the option itself was taxable in 1954-55. Even if there were no taxable subject in the earlier years, I should regard the 1955-56 claim as failing on its own terms. The advantage which arose by the exercise of the option, say £166, was not a perquisite or profit from the office during the year of assessment; it was an advantage which accrued to the appellant as the holder of a legal right which he had obtained in an earlier year and which he exercised as option holder against the company. The quantum of the benefit, which is the

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(24) 3 Tax Cas. at p. 164. (25) 3 Tax Cas. at p. 167. (26) 3 Tax Cas. at p. 170.
(27) 3 Tax Cas. at p. 172. (28) 3 Tax Cas. 158.

A alleged taxable receipt, is not, in such circumstances, the profit of the service; it is the profit of his exploitation of a valuable right. Of course, in this case, the year of acquiring the option was only the year immediately preceding the year in which, pro tanto, it was exercised. But, supposing that he holds the option for, say, nine years before exercise? The current market value of the company's shares may have changed out of all recognition in that time, through retention B of profits, expansion of business, changes in the nature of the business, even changes in the market conditions or the current rate of interest or yield. I think that it would be quite wrong to tax whatever advantages the option holder may obtain through the judicious exercise of his option rights in this way as if they were profits or perquisites from his office arising in the year when he calls the shares.

C I agree that the appeal must be allowed. As to previous authorities, I am of opinion that, for the reasons I have given, *Forbes' Executors* v. *Inland Revenue Comrs.* (29) was decided in error. I do not regard either the decision of or any observations in *Bridges* (*Inspector of Taxes*) v. *Hewitt*, *Bridges* (*Inspector of Taxes*) v. *Bearsley* (30) as being of any significance to the point we have to decide.

D **LORD KEITH OF AVONHOLM:** My Lords, this case may be presented so as to raise some interesting and possibly fine legal points. I think that it does. But I have come to the view that these arise by considering certain aspects of the case in isolation, and that this is not the proper approach to the question at issue. The object of the option under consideration was to afford certain selected "executives" of the company and of its subsidiary companies "an opportunity E of obtaining an interest in, or increasing an existing interest in, the capital of the company", as stated in the company's letter of Oct. 6, 1954. There is nothing novel in such an idea and, as the authorities show, the issue of shares to employees of a company may, in certain cases, attract tax, under Sch. E to the Income Tax Act, 1952, as being a perquisite or profit from the employment. The simplest case would be a free bonus issue or transfer of fully paid shares, unless this could F be related, as in *Bridges* (*Inspector of Taxes*) v. *Hewitt*, *Bridges* (*Inspector of Taxes*) v. *Bearsley* (30), to some cause other than remuneration for service in the company.

The specialty in the present case is that the matter started with the grant of an option to subscribe at 68s. 6d. a share for 2,000 ordinary shares of £1 each in the capital of the company. For this the appellant paid the sum of £20, a somewhat G illusory price of rather less than 2½d. per share on the number of shares over which the option extended. The option was subject to certain terms and conditions., Among others, it was not transferable and, so long as the appellant was in the company's service, it would last for ten years. As LORD CARMONT pointed out in *Forbes' Executors* v. *Inland Revenue Comrs.* (31), in my opinion correctly, such an option is no more than a standing personal offer. An offer open for ten years is certainly something unusual, but, in Scots law, if expressed in writing, H it could not be challenged and would not be revocable. In English law, it may be that some element of consideration is required to prevent such an offer being withdrawn, and this may be the reason for the offer in the present case taking the form of an option for which a nominal payment was made. In my opinion, no element of consideration should make any difference, in applying a taxing statute common to the two countries, to the determination of the nature and effect I of the right granted.

The argument for the appellant is that, though the option is not transferable, it left it open to him to turn it to account by agreeing with some third party, in return for a payment, to exercise the option and to transfer the shares, or some part of them, obtained as a result of that exercise to the third party. Clearly the same could be done in the case of a simple irrevocable offer of shares made on the same terms and conditions. But, in my opinion, the argument introduces a quite irrelevant consideration. Whatever happens, the appellant has got to apply for shares before any benefit or transferable right emerges. Whatever value the option has comes only from its exercise, and on its exercise the benefit offered to him arises. The option is an offer, to be accepted or not as and when the appellant pleases, but, until it is accepted, the transaction is not complete, nor has any profit been realised. The company has no concern with third parties, before the appellant gets his shares. When he gets his shares, it will be seen what profit he has got from his acceptance of the company's offer. Even if he has made some advance arrangement with a third party, it is what he has got from the company in shares that, in my opinion, determines the profit to which he is taxable under Sch. E. It is conceivable, although I should think unusual, that a company should offer its employees shares, in the form of bonus shares fully paid or for payment on favourable terms, which offer was freely transferable or renounceable in favour of third parties before allotment. That would merely emphasise the favourable nature of the offer, and would in no way impinge on the principles to which I have referred. No one can be put on the share register of a company without his consent. If an employee failed to take up the shares offered or to renounce them in favour of a third party, he could not, in my opinion, be said by virtue of the mere offer to have obtained a profit from his employment. If he renounces his shares in favour of a third party, he has accepted, or taken advantage of, an offer made to him by his employer and, by selling his rights, has, in effect, secured a benefit equivalent to what he would have received if he had applied for the shares to be registered in his own name. I assume always that the renunciation would be for a genuine and not for a fictitious price. The result, in my opinion, assuming it could be regarded as a profit of the employment, would be in no way different in principle from that of *Salmon* v. *Weight* (32). Though that case was presented as a case of a privilege given to the servant of applying for shares, it is clear from LORD ATKIN's speech in this House, concurred in by all their other Lordships, that it was only on the application being granted by the issue of shares that a profit was regarded as having been received by the servant. Nor is it material, in my opinion, that the offer of shares is at a price which, if accepted, will show an immediate profit, as where the market value of the shares is higher than the offer price. Until accepted, or otherwise dealt with in accordance with the terms of the offer, the offer cannot, for the reason I have given, be regarded as securing for the servant a profit from his employment. It follows, also, that the same option offered to a number of employees at the same time may have different results in the case of individual employees, if it is, as here, a continuing option, according to the respective dates when it is accepted. That follows from the nature and terms of the offer and the action that the particular servant takes on it. The result is entirely consistent with a general rule of income tax law that there can be no profit until it is realised, or can be quantified.

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(29) 38 Tax Cas. 12.

(30) [1957] 2 All E.R. 281; 37 Tax Cas. 306.

(31) 38 Tax Cas. at p. 19.

I find it unnecessary to speculate on the precise scope or effect of the references by LORD HALSBURY, L.C., and LORD WATSON in *Tennant* v. *Smith* (33) to a benefit received by an employee from his employer capable of being " turned to pecuniary account " in order that it should be assessable to income tax. Their application must be considered in relation to the kind of benefit received in specific cases. They were made in a context which does not make their scope easily definable. They cannot be confined to tangible or corporeal benefits, otherwise a share in a company would not come within their scope. The dicta are not, however, in my opinion, of any help to the appellant, because the normal and, I think, in a case like this, the only way of turning an option, or offer, to pecuniary account is by exercising or accepting it. If it is exercised, as it was here, the benefit then accrues and if capable of being valued in terms of money is assessable to tax.

Under Sch. E, no difficulty arises in the matter of relating a profit to a particu-

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(32) [1935] All E.R. Rep. 904; 19 Tax Cas. 174. (33) 3 Tax Cas. at pp. 164, 167.

A lar fiscal year. Under r. 1 of Sch. 9 it is the year of assessment in which the profit is received that determines the rate of tax. It is common ground here that there has been a profit of the employment, and the only question is whether that profit is to be extracted from the grant of the option per se or from the exercise of the option. On either view, it is impossible to relate the profit to any year other than the year of receipt. The benefit, however it is estimated, was, no doubt, given in B respect of past services, and possibly in the expectation of future services, but further than that it is impossible to say.

The situation, as I see it, is shortly summarised by SELLERS, L.J., in words which I would adopt (34).

> "If the option was never exercised, it seems axiomatic that there would be C no profit and no accrued benefit. The contractual right given by the company to the servant, the taxpayer, in this case could not be transferred, and the view that I should be inclined to take of the case, which, I think, is in harmony with *Forbes' Executors* v. *Inland Revenue Comrs.* (35), is that that merely set up the machinery for creating a benefit—that was its intention—which benefit ultimately accrued."

D I would only add that a transferable option, if transferred, might produce corresponding results, for the reasons which I have endeavoured to explain, though it is unnecessary so to decide for the purposes of this appeal.

I would dismiss the appeal.

LORD DENNING: My Lords, when I asked counsel for the appellant in E the course of the argument whether there was any special virtue in the sum of £20 which the appellant paid for this option, he said there was no particular merit in it. If the sum had been one shilling or one penny, the result would be the same. It was a nominal sum, he said, which was paid so as to provide consideration for the contract and make it legally enforceable. But it soon appeared that it was essential to his argument that there should be some consideration given for the F option, even if it was only, what SIR GEORGE JESSEL once suggested, a tomtit or a canary. For counsel acknowledged that, if no consideration had been given, then, unless the option were granted under seal, it would have been unenforceable at law; with the result that the case would have been governed by *Salmon* v. *Weight* (36). Now in *Salmon* v. *Weight* (36), as your Lordships will recall, the directors of a company passed a resolution that each of the three managing G directors "be permitted to make application for and to take up at par one thousand 'A' ordinary shares in the capital of the company". The managing directors, in pursuance of that resolution, acquired for £1 apiece shares which were worth £3 or £4 each in the market. It was held by this House that, when the directors received those shares, and not before, they received profits in the nature of money's worth as remuneration for their services. The shares, when received, H were "profits" on which they were taxable under Sch. E. That case shows decisively that the *expectation* of receiving a benefit, no matter how well founded, is not itself a perquisite or profit. It must be reduced into possession. A bird in the hand is taxable, but a bird in the bush is not. So, here, if nothing had been paid for the option, the letters that passed would have been nothing more than a standing offer by the company to allot shares to the appellant at 68s. 6d. a share. I That offer could have been withdrawn by the company, at any time before acceptance, with impunity. The offer itself would not be a perquisite or profit; for it conferred only the expectation of profit, not any profit itself. But, when it was accepted and shares worth 82s. apiece were allotted to the appellant for 68s. 6d., he would then receive "profits" which would be taxable in his hands. No difficulty would arise about the year of assessment. The profits would accrue to him in the year they were received.

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(34) [1959] 3 All E.R. at p. 601; [1960] Ch. at p. 50.

(35) 38 Tax Cas. 12.

(36) [1935] All E.R. Rep. 904; 19 Tax Cas. 174.

My Lords, I ask myself, what is the difference, for tax purposes, between the case I have just put, where nothing is paid for the option, and the case we have before us, where a nominal sum is paid? The difference is that in the one case he has only an *expectation* of profit; whereas in the other he has a *right* to make profits in the future, if the opportunity arises. But in either case, until the option is exercised, he has not the *profits* themselves. And, as I read the Act, it is not the *expectation* to make profits, nor the *right* to make profits, which is taxable, but only the *profits* themselves. Just as it is not the expectation to salary nor the right to salary which is taxable, but only the salary itself. A bird in the bush is not taxable, even if you have the right to get it in the future, if it is still there. You must have it in hand before you can be taxed for it. And when you come to consider what " profits " the servant receives from his employment by virtue of the option, surely it makes no difference whether he pays a nominal sum or not. In either case the employer grants him the option as a reward or return for his services; and the profits he makes out of it are the same save for this: if he paid nothing, it is all profit; if he paid a peppercorn, it is all profit less the value of a pepper berry; if he paid 1s., less a 1s.; if he paid £20, less £20.

There is, moreover, a very compelling reason why no distinction should be drawn according to whether a nominal sum is paid or not: for it would mean that " profits " in the Income Tax Acts would have a different meaning in Scotland from what it has in England. In Scotland, as your Lordships well know, it is unnecessary to have consideration to support a promise. The option would be legally binding in Scotland, even though nothing was paid for it; whereas it would not be binding in England unless some nominal sum was paid for it. It would not be right, I suggest, for the tax payable to depend on the technical requirements of English law as to consideration. The Income Tax Acts apply to England and Scotland alike, and there is the highest authority for saying that they must, if possible, be so interpreted as to make the incidence of taxation the same in both countries: see *Income Tax Special Purposes Comrs.* v. *Pemsel* by LORD HALSBURY, L.C. (37), and by LORD WATSON (38), *Income Tax Comrs.* v. *Gibbs* by VISCOUNT SIMON, L.C. (39), by LORD MACMILLAN (40), and by LORD WRIGHT (41).

My Lords, the point which I am now making can be tested by taking an illustration which is suggested by what LORD ATKIN said in *Salmon* v. *Weight* (42). Suppose that a colliery company made an *offer* to supply a director, who was in the coal trade, with 1,000 tons of coal at a price which was one-third of the market price of the day. No profit of any kind would be made by the director until he gave an order for coal. But, as and when he ordered the coal and got it, he would receive a profit in the nature of money's worth. It would be assessed, said LORD ATKIN, at the difference between the price he could get for it, and the price he had actually paid. Now take the same illustration but suppose that, instead of the company making an *offer* to the director, a clause was inserted in his *service agreement* giving him the right of obtaining coal at a price which was one-third of the market price of the day. Surely his profit would be just the same as before. It would arise as and when he ordered the coal and got it; and it would be assessed at the difference between the price he could get for it and the price he actually paid. It would not be assessed differently simply because in the one case he made the profit as a result of a standing offer and in the other he made it under a service agreement. It will be noticed that, just as LORD ATKIN's illustration corresponded very closely in substance to the facts in *Salmon* v. *Weight* (43), so my illustration of a service agreement corresponds very closely

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(37) 3 Tax Cas. at p. 71.

(38) 3 Tax Cas. at p. 77.

(39) [1942] 1 All E.R. at p. 422; 24 Tax Cas at p. 243.

(40) [1942] 1 All E.R. at p. 424; 24 Tax Cas at p. 247.

(41) [1942] 1 All E.R. at p. 430; 24 Tax Cas at p. 254.

(42) [1935] All E.R. Rep. at p. 910; 19 Tax Cas. at p. 193.

(43) [1935] All E.R. Rep. 904; 19 Tax Cas. 174.

A in substance to the facts in *Forbes' Executors* v. *Inland Revenue Comrs.* (44); and it leads me to the conclusion that that case was correctly decided. And it is indistinguishable from the present case, as everyone agrees.

But counsel for the appellant took a further point. He likened the grant of this option to the gift of a physical thing, such as a diamond, or a chose in action, such as an issue of shares, to a servant as a reward for his services. The value of B it has to be assessed, he said, for tax purposes at the time of the grant, and it is immaterial that its value should rise or fall afterwards. But I would point out those are all interests in property, and they are very different from purely personal rights such as this option. Take the issue of shares on which counsel so much relied. It is clearly an interest in property. PARKE, B., said that

> C "... the shareholder acquires, on being registered, a vested interest of a permanent character, in all the profits ... of the company, and, when registered, may be deemed a purchaser in possession of such interest ...":

see *North Western Ry. Co.* v. *M'Michael, Birkenhead* v. *Lancashire & Cheshire Junction Ry. Co.* v. *Pilcher* (45); and shares are now, by statute, personal estate: see s. 73 of the Companies Act, 1948. So, also, with any other right which is by its D nature assignable, such as a bill of exchange or a "rights" issue of shares. It is in the nature of an interest in property. It can be valued at the time it is given to the servant and assessed accordingly. But a purely personal right stands on a very different footing. The right of a servant to his salary or wages is a purely personal right. So is his right to a bonus or commission. Suppose that a company in a service agreement agrees to pay the servant a bonus of ten per cent. of the net E profits whenever the net profits overtop £10,000. The servant, before he gets the bonus, may be able to turn it to pecuniary account in just the same way as it is suggested that he can turn this option to pecuniary account; for he might get someone to pay him something for it; by means of the simple expedient of undertaking to hand the bonus over to him when he gets it. But, nevertheless, he is only taxable on the bonus when he receives it. And, if this be so, what is the F difference, I ask, between giving a servant a right to a share of the profits when profits rise, and giving him a right to take up new shares when shares rise? for, after all, shares rise with profits. I can see no difference in principle at all.

There remains to consider *Tennant* v. *Smith* (46). That case showed that a right or privilege which *cannot* be turned to pecuniary account is not taxable at all. It does not prove the converse. It does not prove that a right or privilege G which *can* be turned to pecuniary account is taxable. In any case, I doubt, myself, whether this option could be turned to pecuniary account, at any rate, at the moment when it was given. There was no evidence that it could be done. The option, as I have said, was purely a personal right. The appellant could not sell it. But it was suggested that he could agree with a third person that he would exercise it for his benefit on his request; and, in return, the third person would H give him money. I should have thought it very difficult to get a third person to do this. There is, so far as I know, no market in options which are purely personal to the holder. But, even if the option could be turned to pecuniary account in such a devious way, I do not think it should be regarded as taxable. It was, as I have said, only a right to make profits in the future, if the opportunity arose. It was not itself a perquisite or profit.

I My Lords, in all the cases hitherto when a servant has been granted by his employer a purely personal right to receive in the future a benefit during his service, the judges have with one accord held that he receives the "perquisite" or "profit" when the thing is actually transferred to him and not before. So said DANCKWERTS, J., in *Bridges* (*Inspector of Taxes*) v. *Hewitt, Bridges* (*Inspector of Taxes*) v. *Bearsley* (47), and both JENKINS and SELLERS, L.JJ., agreed with him on this point (48). So said all the judges in *Forbes' Executors* v. *Inland Revenue Comrs.* (49). And I must say that I agree with them. It is the same point as I have insisted on throughout. Tax is not payable on the right in the future to receive " salaries, fees, wages, perquisites or profits " but only on those things when received.

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(44) 38 Tax Cas. 12. (45) (1850), 5 Exch. at p. 125. (46) 3 Tax Cas. 158.

(47) [1956] 3 All E.R. at p. 798; 37 Tax Cas. at p. 306.

I would, therefore, dismiss this appeal.

Appeal allowed.

Solicitors: *Allen & Overy* (for the appellant taxpayer); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

IMPERIAL TOBACCO CO. (OF GREAT BRITAIN AND IRELAND), LTD. *v.* PIERSON (VALUATION OFFICER).

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Cohen and Lord Denning), April 27, June 23, 1960.]

Rates—Advertising stations—Valuation—Rights let out by agreement are hereditament for rating purposes—Neon sign—Grant of rights of fixing and exhibiting a flashing neon advertising sign to be erected by the grantee—Sign erected—Basis of valuation—Local Government Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 26), *s.* 56.

By an agreement made on June 21, 1955, the B. corporation granted to the appellant ratepayers for three years the exclusive right of fixing and exhibiting on premises of the corporation " a flashing neon advertising sign reading ' Player's Please ' ", which was to be erected in a certain position and was " to be operated by an automatic time switch ", together with the necessary rights to connect the sign to the main electricity supply and to " erect and maintain a permanent scaffold and iron ladder ". The sign and apparatus were to remain the property of the appellants, who were to remove it within fourteen days of the termination of the agreement. The rent payable by the appellants was £150 per annum. The appellants duly affixed the sign on the wall of the premises. By a proposal for the alteration of the valuation list made on Apr. 12, 1956, at which date the advertising station was erected, the respondent valuation officer proposed to assess the right at £165 rateable value under the Local Government Act, 1948, s. 56. This assessment was confirmed by the local valuation court. The Lands Tribunal held that the assessment should be £150 rateable value on the basis that the right conferred on the appellants was the right to use the premises and a sign to be erected but not actually erected. The Court of Appeal restored the original assessment. On appeal,

Held (LORD DENNING dissenting): by s. 56 of the Local Government Act, 1948, the separate hereditament for rating purposes was the " right " that was " let out " by the agreement of June 21, 1955, not the corporeal structure that was created by erecting the advertising station in exercise of that right; no new right was " let out " by the agreement on the erection of the advertising station being completed, and the net annual value of the rights originally let out by the agreement (ascertained in accordance with s. 22 (1) (b) of the Rating and Valuation Act, 1925) was £150, as in the present case there was no reason to depart from the amount of the rent reserved by the agreement.

Decision of the COURT OF APPEAL ([1959] 3 All E.R. 313) reversed.

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(48) [1957] 2 All E.R. at pp. 294, 304; 37 Tax Cas. at pp. 317, 327.

(49) 38 Tax Cas. 12.

[**Editorial Note.** By reason of the wording of s. 56 of the Act of 1948 the essential question is the net annual value of the right " let out " by the agreement granting advertising station rights. The question what is the true rateable value of the right to use the advertising station when erected can arise only, it seems, if the advertising station is in existence at the time when the right to use it is let out (see per LORD MORTON OF HENRYTON at p. 784, letter C, post, and per LORD DENNING at p. 787, letter E, post).

For the rating of advertising stations, see 32 HALSBURY'S LAWS (3rd Edn.) 28, para. 35; and for cases on the subject, see 38 DIGEST 458, *227-229*.

For the Local Government Act, 1948, s. 56, see 20 HALSBURY'S STATUTES (2nd Edn.) 257.]

Appeal.

Appeal by the ratepayers from an order of the Court of Appeal (LORD EVERSHED, M.R., ROMER and SELLERS, L.JJ.), dated July 28, 1959, and reported [1959] 3 All E.R. 313, reversing a decision of the Lands Tribunal (ERSKINE SIMES, Q.C.), dated Aug. 1, 1958, allowing the ratepayers' appeal against the decision of a local valuation court of the West Riding of Yorkshire (North) Local Valuation Panel, dated Sept. 13, 1957. The facts are set out in the opinion of VISCOUNT SIMONDS.

Lionel Edwards, Q.C., and *G. F. Peter Mason* for the appellant ratepayers.

Maurice Lyell, Q.C., and *J. R. Phillips* for the respondent valuation officer.

Their Lordships took time for consideration.

June 23. The following opinions were read.

VISCOUNT SIMONDS: My Lords, on Sept. 13, 1957, the Valuation Court for the West Riding of Yorkshire confirmed the assessment of a certain hereditament described in the valuation list for the Bradford County Borough Rating Area as "Advertising Right" with a rateable value of £165. The appellants, the Imperial Tobacco Co., had proposed that it should be reduced to £150. From this decision, the appellants appealed to the Lands Tribunal, which allowed the appeal, reducing the rateable value to £150. The respondent, the valuation officer, appealed to the Court of Appeal, which restored the original assessment. A final appeal is brought to your Lordships' House, which is asked once again to reduce the assessment. The sum involved in the present case is trifling, but it is said that the principle involved is important and affects a great number of other cases. That the question is one of some difficulty may be inferred from the fact that your Lordships are in favour of reversing the unanimous decision of the Court of Appeal.

My Lords, I have already said that the hereditament in question is described as " Advertising Right ". It is correctly so described, and I think that, if that description is firmly kept in mind, the difficulty in the case disappears. What, then, was the right which fell to be rated? It was created by an agreement made on June 21, 1955, between the Corporation of Bradford and the appellants, under which the former granted to the latter

> " the exclusive right of fixing and exhibiting upon the premises of the corporation at the junction of Forster Square Canal Road and Bolton Road in the city of Bradford . . . a flashing neon advertising sign reading ' Player's Please ' ",

which was to be erected in a certain position and

> " to be operated by an automatic time switch together with all necessary rights (a) to connect such sign to the switchboards and meters and to the main electric cable in the street (b) to erect and maintain a permanent scaffold and iron ladder."

The agreement contained a number of ancillary provisions, including a provision that the sign and apparatus were to remain the property of the appellants who were to remove it within fourteen days of the termination of the agreement.

It was to remain in force for three years, and thereafter until determined by either party giving three months' notice. The rent payable by the appellants was £150 per annum.

This, then, was the right and, since the rent was fixed by parties bargaining at arm's length, there could be no apparent reason for saying that £150 was not the rateable value of the hereditament for the purpose of s. 22 (1) (b) of the Rating and Valuation Act, 1925. How, then, does it come about that the Court of Appeal has rejected this figure and admitted an assessment of £165? My Lords, I must confess that I find the argument and even the form of question to which it is directed somewhat elusive. The appellants duly entered on the land of the corporation and, as they were entitled to do, affixed on a wall, the property of the corporation, their neon sign reading " Player's Please ". It appears to have been in neon tubing fixed to mahogany letters, which were mounted on runner bars, themselves fixed to the wall by heavy channel brackets. They also erected a scaffold and ladder for the purpose of servicing the sign. In fact, to put it shortly, they exercised the right conferred by the agreement in the manner that they found convenient, and it is the fact that they did so that has led us to this contest and dictated the form of question which was stated for the decision of the court by the Lands Tribunal. It was whether the tribunal came to a correct decision in law in determining that the rateable value to be ascertained under s. 56 of the Local Government Act, 1948, and s. 22 (1) (b) of the Rating and Valuation Act, 1925, was that of the right granted by the agreement of June 21, 1955, without taking into account work done subsequent to that date.

The tribunal, in so deciding this question, had first to consider the terms of s. 56 of the Act of 1948 to which I now call attention. Into the law of rating advertising stations, which had always been a matter of some difficulty, s. 56 introduced a new concept. It provided so far as material as follows:

> " Where the right to use any land (including any hoarding, frame, post, wall or structure erected or to be erected on the land, and including also any wall or other part of a building) for the purpose of exhibiting advertisements is let out or reserved to any person other than the occupier of the land, or, when the land is not occupied for any other purpose, to any person other than the owner of the land, that right shall be deemed for rating purposes to be a separate hereditament in the occupation of the person for the time being entitled to the right, and shall be included in the valuation list as a separate hereditament accordingly . . ."

Nothing, I think, could be clearer than that it is the right let out or reserved to a person other than the occupier which is deemed to be a separate hereditament in the occupation of the person for the time being entitled to the right or, applying the general to the particular, than that, from the moment that the agreement of June, 1955, became operative, the right thereby created was deemed to be, and, therefore, was, a separate hereditament in the occupation of the appellants. Whether it was exercised or not, and, if exercised, whether on a mean or lavish scale, it was the same right, no more and no less, and fell to be valued accordingly. That is why I said, at the outset of this opinion, that it was essential to look only at the right, and turn one's eye from the physical aspect of the method of its exercise. In particular, it seems to be wholly irrelevant whether the apparatus by means of which the sign is exhibited can properly be called a " structure ". Some concession or admission to this effect appears to have caused some confusion in the Court of Appeal. I am prepared to say it might be so described. It does not, in my opinion, touch the issue.

My Lords, the view that I have tried to express was put so cogently by the tribunal that, at the risk of repetition, I will quote two sentences from an admirable judgment. Mr. Erskine Simes, Q.C., says (1):

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(1) (1958), 5 R.R.C. at p. 90.

> A “ It is I think clear from the use of the word ‘ that ’ that the right which is to be deemed for rating purposes to be a separate hereditament is the right to use any land in its extended meaning for the purpose of exhibiting advertisements which is let out or reserved and to ascertain what that right is one must I think look at the terms of the document by which the grant is made or reserved, and that the value of the hereditament is the value of the right B so granted or reserved. While it is of course true that the value must be ascertained as at the date of the proposal, it is the value of the grant and not of some other grant. The grant has its value irrespective of whether it is in fact exercised, and it is the grant which is the rateable hereditament, not the exercise of the grant.”

C I agree. A different view was taken in the Court of Appeal by the learned Master of the Rolls (LORD EVERSHED) with great doubt and hesitation, but firmly by ROMER and SELLERS, L.JJ. My Lords, I think that the error of their judgment flows from the failure to observe the nature of the right that was created by the agreement. Thus SELLERS, L.J., says (2):

> “ In my opinion these factors and considerations establish that the D ratepayers were in occupation of a separate hereditament used as of right consisting of the whole structure as erected and they are therefore liable to be rated thereon at the agreed figure of £165.”

But the appellants are not for rating purposes in occupation of a hereditament consisting of a structure. Whether there is a structure there or not, they are rateable in respect of a right which is deemed to be a separate hereditament in E their occupation. ROMER, L.J., too, as I think, has allowed his mind to be diverted from the right itself to the manner in which it may for the time being be exercised. Thus he says (3):

> “ If I am correct in thinking that the right which, on Apr. 12, 1956, was to be deemed for rating purposes to be a separate hereditament was the right F to use for the purpose of exhibiting advertisements the structure which the ratepayers were then using, it follows that the question in the Case Stated must be answered in favour of the valuation officer.”

But the right does not vary from day to day according to the apparatus which is used by the appellants for their advertisment. It is irrelevant what was the structure which the appellants were “ then using ”, and it is, I think, with G the greatest respect, this fundamental error which runs through the judgments of the Court of Appeal.

I do not doubt that the result at which I have arrived marks a departure from the usual course of rating law, but the language of the relevant section is unambiguous, and I do not feel justified in ascribing to it any other than its natural meaning. It is some satisfaction to me that the very experienced tribunal H (Mr. ERSKINE SIMES, Q.C.), before which the case first came, being fully aware of the anomalies to which his decision might give rise, nevertheless saw no reason for departing from the plain meaning of the language of the Act.

In my opinion, the appeal should be allowed, and the decision of the tribunal affirmed. The respondent must pay the appellants’ costs here and below.

I **LORD MORTON OF HENRYTON:** My Lords, I entirely agree with the speech which has just been delivered by my noble and learned friend, VISCOUNT SIMONDS, and I desire only to add a few words.

Section 56 of the Local Government Act, 1948, has already been read. It is to be noted that the only right dealt with by that section is a right which is “ let out or reserved ”, and the relevant words for the present purpose are “ let out ”. Now, the right which was “ let out ” by the Corporation of Bradford to the appellants, by the agreement of June 21, 1955, was a right of fixing and exhibiting on the corporation's premises an advertising sign, to be erected in a certain position and to be operated by an automatic time-switch, together with all necessary rights to connect the sign to sources of electricity and to erect and maintain a permanent scaffold and iron ladder. No other right was " let out " to the appellants. In particular, no new right was " let out " to the appellants when they erected the " structure " which has already been described. In erecting that " structure ", they merely exercised the right which had already been let out to them. That right, and that right only, is within the terms of s. 56. As my noble and learned friend has said, it remained the same right throughout, whether it was exercised or not, and fell to be valued accordingly.

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(2) [1959] 3 All E.R. at p. 318; 5 R.R.C. at p. 97.
(3) [1959] 3 All E.R. at p. 318; 5 R.R.C. at p. 96.

Counsel for the respondent endeavoured to persuade your Lordships that the question to be determined is " what is the rateable value of the right to *use* the structure? " My Lords, in my opinion, that question does not arise. It could only arise if the structure had been in the ownership or control of the corporation at the time of the " letting out ", and the corporation had " let out " the right to use it.

I would allow the appeal.

LORD REID: My Lords, in 1955, the appellants made an agreement with Bradford Corporation under which they became entitled for a rent of £150 per annum to fix an advertising sign on the wall of a building occupied by the corporation and thus to exhibit their advertisement. The appellants had to provide the materials and components, and to erect and fix the sign at their own expense. When erected and fixed, the sign was admitted to be a structure. By s. 56 of the Local Government Act, 1948, the appellants' right under this agreement, being a right to use land for the purpose of exhibiting advertisements, is deemed for rating purposes to be a separate hereditament in the occupation of the appellants. The question for decision in this case is the value of that hereditament, i.e., the rent at which it might reasonably be expected to let.

Hereditaments are normally corporeal land; and such hereditaments must be valued in the physical condition in which they are at the relevant date. If that principle were applicable to this case, the respondent would have to take into account not only the value of the use of the wall, £150, but also the letting value of the structure erected by the appellants, which is admittedly £15. So the rateable value would be £165, and this appeal would have to be dismissed. But this is not an ordinary hereditament. The hereditament created by s. 56 is not land, but a right to use land and, therefore, what has to be valued is not land but the appellants' right to use land. The only right to use land which is let out or reserved to the appellants is that given to them by their agreement with the corporation and, therefore, it appears to me that the sole question is what is the value of that right. There is no suggestion that the rent payable under the agreement, £150, is not the true value of the right which the appellants got from the corporation, and, as that is the only right to use land let out to them, it seems necessarily to follow that the rateable value of their hereditament is £150.

But, says the respondent, the appellants' agreement entitles them to use property the annual value of which is £165. So be it. The appellants' first answer is that it is not the agreement which entitles them to use the structure: it is the fact that the structure is their own property. I do not think it necessary to determine that question, and I am content to assume that their right to use the structure for exhibiting advertisements flows from their agreement with the corporation. The better answer to the respondent's argument is, I think, that s. 56 does not require the valuation of the property which is being used; it requires the valuation of the appellants' right. The right to use the wall and the structure put up by the appellants would be worth £165 if both the wall and the structure were supplied by the occupier, the corporation, free of expense to the user. But that is not the right which has to be valued. The right of the appellants is to use the wall, and supply and use the structure, and that is obviously a less valuable right than a right to have the structure provided by the corporation; the appellants' right is only worth £150.

No doubt it is unusual—possibly it is unique in rating law—that we do not have to look at the property which is being used. But, in my opinion, that is the result of the provisions of s. 56, under which it is the user's incorporeal right which is to be valued. In valuing corporeal hereditaments, land, one takes the land as one finds it. So, also, in valuing an incorporeal hereditament, a right, one must take the right as one finds it. On that basis, the appellants' right is only worth £150 per annum. I am, therefore, of opinion that this appeal must be allowed.

LORD COHEN: My Lords, I agree that this appeal should be allowed for the reasons given by the noble and learned lord on the Woolsack.

I only desire to add that I think there is a great deal to be said for the view expressed by the Master of the Rolls (Lord Evershed) (4) that the formula in brackets in s. 56 of the Local Government Act, 1948, only means that "land" covers whatever is there or is to be put there as a wall, structure or otherwise, as part of the grantor's property, but does not include something (albeit in some sense a "structure") added by the grantee temporarily as a means of exercising the right granted, and intended to be removed by the grantee when the grant determines. The Master of the Rolls thought that he was precluded from giving effect to this view by an admission made in the course of the argument by counsel who then appeared for the appellants. That admission is stated by Romer, L.J. (5), as being an admission that the flashing neon advertising sign reading "Player's Please", referred to in the agreement, is a structure within the meaning of, and for the purposes of, s. 56. But I do not think counsel intended to admit more than that the advertising sign was a "structure" within the meaning of that word in s. 56. He did not, I think, intend to preclude the appellants from presenting the argument advanced by counsel for the appellants at the hearing which has found favour with your Lordships. As I read the agreement of June 21, 1955, the right thereby let out was the right to erect a physical thing on the premises of the Corporation of Bradford (a thing which was to remain throughout the property of the appellants), and to use it for the purpose of advertising. It is this right, and only this right, which had to be assessed as a separate hereditament at the date of the proposal made by the respondent on Apr. 12, 1956, and it is, in my opinion, immaterial that, at that date, the sign had been erected and may have been a structure within the meaning of that word in s. 56. The annual value of that right had been fixed at £150 per annum by agreement between the parties, bargaining at arm's length, and I can see no justification for substituting some other figure for that sum.

LORD DENNING: My Lords, the Master of the Rolls (Lord Evershed) said (6) that it was conceded that the framework, which had on it the sign "Player's Please", was, when erected, a "structure" within the meaning of s. 56 of the Local Government Act, 1948; and this concession forms the basis of his judgment. I think the concession was rightly made, and that your Lordships should proceed on the same basis. This framework with its sign was clearly a structure. It was just as much a structure as an advertisement hoarding. And it was just as firmly fixed. The only difference is that this framework and sign were fastened by bolts to a wall; whereas an advertisement hoarding is supported by posts in the ground. Such being conceded, it seems to me that we are here concerned with two pieces of "land" within the meaning of s. 56. First, with the *wall* of the building itself which is clearly included in the word

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(4) [1959] 3 All E.R. at p. 317; 5 R.R.C. at p. 94.
(5) [1959] 3 All E.R. at p. 317; 5 R.R.C. at p. 95.
(6) [1959] 3 All E.R. at p. 316; 5 R.R.C. at p. 93.

" land " within the parenthesis in s. 56; secondly, with this *structure* which is also included in the word " land " as being a structure erected or to be erected on the land. And, when we speak of the right to use any " land " in this case, we must be careful to see whether we are speaking of the right to use the *wall* or the right to use the *structure*, for it must be one or other.

The crucial question to my mind is what is the hereditament which falls to be rated? The appellants say it is only the right to use the *wall*. They say:

> " We ought only to be rated on the right to use the wall. That was the only right which was ' let out ' to us. The rateable value of that right was £150 a year. We should not be rated on the right to use the structure, because it was our own structure. We erected it at our own cost. It belonged to us. It was not ' let out ' to us."

But the respondent says that the rateable hereditament is the right to use the *structure*. He says:

> " The date for taking the valuation is Apr. 12, 1956. At that date the structure was completely erected and it was so attached to the building that it was part of it. It was part of the building of the Bradford Corporation. The right to use it can properly be said at that date to be ' let out ' to the appellants. The rateable value of that right was £165 a year. That is, £150 for the wall and £15 (five per cent. on £300) for the structure, making £165 altogether."

If the words of the section are taken literally, the appellants would, I think, be right. But I am a little suspicious of a literal interpretation in this case, because it leads to such surprising results. It means that the appellants would be liable to pay rates on the right to use the wall, even though they never exercised the right and never erected a structure at all. They do not shrink from this result. They admit it. It suits them to do it. But just see what it means. Under the agreement of June 21, 1955, the Bradford Corporation granted to the appellants the exclusive right of fixing and exhibiting on the premises of the corporation a flashing neon advertising sign; but the appellants were not bound to exercise that right; and no rent was payable unless and until they did exercise it. The £150 a year was only payable from the date that the sign was erected and ready for use. Suppose that the appellants changed their minds and never erected a sign at all. Could anyone seriously suggest that they had to pay rates on a right which they never exercised and for which they paid no rent? Surely not. Such a suggestion would be so novel and so alien to every concept hitherto entertained about rating that your Lordships should pause long before attributing to Parliament an intention to introduce it. Another result of the literal interpretation which surprises me almost as much is this: It means that the rateable value of the hereditament depends on who paid the cost of erecting the structure. If the Bradford Corporation put up this structure, the rateable value of the right to use it would be £165, whereas, if the appellants put it up, the rateable value would be £150. I must say this is quite contrary to all I have understood about the law of rating. I would associate myself with what SELLERS, L.J., said about it (7):

> " In assessing the right to use any land and structure it does not seem to me to matter whether any hoarding or structure is erected and paid for by the occupier of the land or the person deemed under the section to be in occupation of a separate hereditament."

Seeing these surprising results of the argument for the appellants, I have sought to inquire whether Parliament really intended them; and, in this search, I have found much assistance from another observation of SELLERS, L.J. He said (7):

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(7) [1959] 3 All E.R. at p. 318; 5 R.R.C. at p. 97.

A

> "The purpose of the section is to place the liability to rates in respect of the exhibition of advertisements on land, as defined, directly on the person enjoying the right to advertise instead of on the occupier of the land."

In order to test the validity of this observation, I would like to remind your Lordships that, shortly before 1889, the rating authorities had run into great difficulties about the rating of advertisement hoardings. It was never doubted B that such a structure was capable of being rated, provided that it was so attached to the land that it was not a chattel but part of the hereditament itself. But the difficulty was to say: *Who* was liable to pay the rates on it? *Who* was in occupation? Was it the advertising contractor who erected it? or the occupier of the land who permitted him to put it up? In 1889, Parliament resolved this difficulty (8) by declaring that the occupier of the land was liable to pay rates C on the whole hereditament, both the land and the structure as well. He had to pay rates on the increased value of the land. It did not matter who erected the structure. No matter whether it was the occupier or advertising contractor, the increase in rateable value was the same. The method of calculation was described in RYDE ON RATING (8th Edn.), p. 97, in these words:

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> "if the advertising contractor erects the hoarding for himself, the rent which he pays is of the same nature as a ground rent, and something may fairly be added for interest on the cost of erecting the hoarding, if that hoarding is (as must often be the case) so fixed to the ground as to form part of the rateable hereditament; for it is obvious that an advertising contractor would give a higher rent for an advertising station if the hoarding were E already erected, than he would give if he had to erect the hoarding himself at his own expense."

So, if this structure had been erected before 1948, the Bradford Corporation would have been liable to pay the rates in respect of it; and the increase in the rateable value would have been calculated by regarding the £150 as in the nature of a ground rent, and adding something for interest on the cost of erecting F the structure, say five per cent. on £300; thus giving the increase in rateable value as £165. Such being the position before 1948, the question is: What was the object of Parliament in enacting s. 56? Reading the section as a whole, it seems to me plain that the object was only to alter the incidence of liability; so as to place the liability for rates directly on the advertising contractor instead of the occupier of the land; but not to alter the basis of assessment. That is, G indeed, how the valuation officer treated it. In this very case, he assessed the rateable value just as it would have been assessed before 1948. He took the rent payable for the site, namely, £150 a year and added on £15, representing interest at five per cent. on £300, the cost of erecting the structure. But, instead of this assessment being made on the occupier of the land, as it would have been before 1948 as being the increased value of it, the assessment was now H made directly on the person enjoying the right to advertise.

It is said, however, that, whatever be the object of Parliament, the words are clear. Whereas in the past the rateable hereditament was the *structure*, now it is the *right*. And this, it is said, has the effect of altering the basis of assessment. My Lords, I do not myself think there is much difference between rating "the structure" and rating "the right" to use the structure. It seems to me more I a matter of words than anything else. Under the general law of rating, you never rate the physical thing. You rate the occupier in respect of his right to use it. There are many cases in the books where a contractor has been granted the right to erect a structure on another person's land, and to use it for his own exclusive purposes such as bookstalls on railway stations or huts on building sites. In such cases, the contractor has been held to be in rateable occupation,

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(8) In the Advertising Stations (Rating) Act, 1889, s. 3; 20 HALSBURY'S STATUTES (2nd Edn.) 85.

no matter whether the right is let out to him under a lease, a licence or an easement. A
In one sense, the rateable hereditament may be said to be " the structure "; but, more accurately, it is " the right to use " it, for that is all the contractor has. The structure must, of course, have ceased to be a chattel. It must have become part of the principal hereditament to which it is attached. Else it could not be rated at all. But once so attached, the right to use it is properly said to be " let out " to the contractor, and it becomes rateable in his B
hands. In these circumstances, it seems to me that all that Parliament did by s. 56 was to place advertisement structures on the same footing as other structures on the land.

I turn, therefore, to the ultimate question in this case, which is—what is the rateable value of this structure, or, to put it more accurately, " the right to use " this structure. My Lords, the method of ascertaining the rateable value is laid C
down by statute. It is " the rent at which the hereditament might reasonably be expected to let from year to year ". You must assume that a hypothetical tenant was negotiating for a tenancy on the date of the proposal, Apr. 12, 1956, and determine what rent he would pay *at that date* for a yearly letting. The date to my mind is crucial, and for this reason. If you assume that a hypothetical tenant was negotiating on June 21, 1955, when the agreement was made, before D
this structure was erected, he would only be negotiating for the right to use the *wall* of the building. He could not negotiate for the right to use the structure because it was not erected. He would have to reckon that he would himself have to pay the cost of erecting it. On this footing, he could reasonably be expected to pay £150 a year, and no more. But, if you assume that the hypothetical tenant was negotiating on Apr. 12, 1956, after the structure was erected, E
he would then be negotiating for the right to use not merely the wall of the building, but the *structure* which was erected on it. He would, of course, pay more, because it was already there, and the hypothetical landlord might reasonably expect more because he would have had to bear the expense of erecting it. The cost of erecting the structure, we are told, was £300. The hypothetical tenant might reasonably be expected to pay interest at five per cent. on that F
sum, namely, £15. Adding this £15 to £150, the rent which he might reasonably be expected to pay would be £165. Assuming, therefore, as we must, that the hypothetical tenant was negotiating *on Apr.* 12, 1956, for *the right to use the structure*, it seems to me clear that the rateable value of that right was £165, and I am of opinion that that is the proper figure to take. The contrary view seems to me to place an undue emphasis on the literal meaning of the words of G
s. 56 and to give too little weight to the previous state of the law and the object which Parliament intended to achieve. The true interpretation of a statute can only be achieved by a correct appreciation of its wording, its history, and its purpose; and I think that the Court of Appeal achieved it in this case.

I would, therefore, dismiss this appeal.

Appeal allowed.

Solicitors: *Trower, Still & Keeling*, agents for *A. W. Martin*, Bristol (for the appellant ratepayers); *Solicitor of Inland Revenue* (for the respondent valuation officer).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

WEBB *v.* TIMES PUBLISHING CO., LTD.

[QUEEN'S BENCH DIVISION (Pearson, J.), May 27, 30, 31, June 2, 1960.]

Libel—Privilege—Qualified privilege—Foreign judicial proceedings—Report of criminal trial abroad of British subject in which he confessed to crimes in England, including murder of which he had previously been acquitted by English court—Whether report protected by qualified privilege—Scope of such privilege—Whether extending to report of statement concerning murdered man having been father of child of the murderer's wife.

There is in the common law of defamation no qualified privilege *of a general character* for a fair and accurate contemporaneous report of foreign judicial proceedings (see p. 800, letter E, post).

Risk Allah Bey v. *Whitehurst* ((1868), 18 L.T. 615); *Riddell* v. *Clydesdale Horse Society* ((1885), 22 Sc.L.R. 657) and *Pope* v. *Outram & Co., Ltd.* (1909 S.C. 230) considered.

If, however, a fair and accurate contemporaneous report of foreign judicial proceedings is published by a newspaper in England without malice, the report is privileged, if it is of appropriate subject-matter, viz., matter of legitimate and proper interest to the English public, not merely matter that is of an interest due to idle curiosity or a desire for gossip (see p. 802, letter B, p. 804, letter G, and p. 805, letter C, post).

Wason v. *Walter* ((1868), L.R. 4 Q.B. at pp. 93, 94); *Cox* v. *Feeney* ((1863), 4 F. & F. 13); *Allbutt* v. *General Council of Medical Education & Registration* ((1889), 23 Q.B.D. 400) and *Perera* v. *Peiris* ([1949] A.C.1) considered.

QUAERE whether a report of foreign proceedings must have appropriate status, as well as appropriate subject-matter, if it is to be protected by qualified privilege (see p. 804, letter E, post).

In 1950 an English court found Brian Donald Hume not guilty of murdering Stanley Setty but guilty of being an accessory after the fact to murder for which offence Hume was sent to prison. At the trial the plaintiff, who was then Hume's wife, gave evidence that she had never in her life met Setty. Hume was released from prison in 1958 and in that year the " Sunday Pictorial " newspaper published an article written by Hume in which he referred to secret meetings between the plaintiff and Setty. As a result of that publication the plaintiff brought a libel action against the " Sunday Pictorial " but in May, 1959, the action was settled on the terms of a statement made in open court whereby the " Sunday Pictorial " undertook not to republish the passages in the article complained of by the plaintiff and agreed to pay her damages. The statement was published in " The Times " newspaper. In 1959 Hume was wanted by the English police on charges of attempted murder of a bank clerk and armed robbery of a bank which were alleged to have been committed in England by Hume after his release from prison. Later in 1959, in September, Hume was tried by a Swiss court, at Winterthur, for attempted murder and armed robbery alleged to have been committed in Switzerland. In the issue of " The Times " newspaper of Sept. 25, 1959, the defendants, the printers and publishers of " The Times," published the following report of the proceedings before the Swiss court:

> " Hume admits killing Stanley Setty. Body dismembered and thrown from aircraft. Winterthur, Switzerland, Sept. 24. Donald Brian Hume, who is on trial on a charge of murdering a Swiss taxi driver, told the court here today that he robbed the Midland Bank in Brentford, London, and shot a clerk. He also admitted killing Stanley Setty, a car dealer, out of jealousy, sawing off his limbs and making them into parcels to be dropped from an aircraft. Asked if he was married and had a child, Hume replied ' Yes, but it was not mine. The father was Stanley Setty '."

The report was a contemporaneous report. In an action by the plaintiff for libel alleging that the words of the report meant that she had committed adultery with Setty and had given perjured evidence at the trial of Hume, in 1950, the defendants claimed that qualified privilege attached to the report as a fair and accurate report of foreign judicial proceedings. On a preliminary issue whether (assuming the report to be fair and accurate) the report was protected by qualified privilege,

Held: the report was protected by qualified privilege within the principle stated at p. 789, letter C, ante, because

(i) the subject-matter of the report was of legitimate and proper interest to the English public as being matter much connected with the administration of justice in England (see p. 805, letter G, post); and

(ii) the reference to the father of the child being Stanley Setty, of which the plaintiff mainly complained, was a matter germane to Hume's confession of having killed Setty, as it explained the alleged motive of jealousy, and so was not extraneous matter outside the protection of the qualified privilege (see p. 806, letter A, post).

[**Editorial Note.** The common law qualified privilege protecting reports of judicial proceedings is not confined either to reports in newspapers or to reports that are contemporaneous. Since, however, the proceedings in the present case were concerned with a contemporaneous newspaper report, and the judgment is directed to the issue arising in relation to such a report, the propositions stated in the headnote (see p. 789, letters B to D, ante) are confined within the limits of the decision.

As to the common law qualified privilege attaching to reports that are fair and accurate, see 24 HALSBURY'S LAWS (3rd Edn.) 63, para. 109.

As to what constitutes public interest in relation to alleged defamatory statements, see 24 HALSBURY'S LAWS (3rd Edn.) 72, para. 126.]

Cases referred to:

Allbutt v. *General Council of Medical Education & Registration*, (1889), 23 Q.B.D. 400; 58 L.J.Q.B. 606; 61 L.T. 585; 54 J.P. 36; 32 Digest 128, *1597*.

Andrews v. *Chapman*, (1853), 3 Car. & Kir. 286; 21 L.T.O.S. 108; 175 E.R. 558; 32 Digest 140, *1707*.

Bromage v. *Prosser*, (1825), 4 B. & C. 247; 1 C. & P. 673; 3 L.J.O.S.K.B. 203; 107 E.R. 1051; 32 Digest 154, *1857*.

Cox v. *Feeney*, (1863), 4 F. & F. 13; 176 E.R. 445; 32 Digest 148, *1793*.

Curry v. *Walter*, (1796), 1 Bos. & P. 525; 1 Esp. 456; 126 E.R. 1046; 32 Digest 135, *1655*.

Davison v. *Duncan*, (1857), 7 E. & B. 229; 26 L.J.Q.B. 104.

Harrison v. *Bush*, (1856), 5 E. & B. 344; 25 L.J.Q.B. 25, 99; 25 L.T.O.S. 194; 23 L.T.O.S. 196; 20 J.P. 147; 119 E.R. 509; 32 Digest 123, *1550*.

Lewis v. *Levy*, (1858), E.B. & E. 537; 27 L.J.Q.B. 282; 31 L.T.O.S. 194; 120 E.R. 610; 32 Digest 136, *1667*.

Oliver v. *Bentinck*, (1811), 3 Taunt. 456; 128 E.R. 181; 39 Digest 331, *167*.

Perera v. *Peiris*, [1949] A.C. 1; [1949] L.J.R. 426; 2nd Digest Supp.

Pope v. *Outram & Co., Ltd.*, 1909 S.C. 230; 46 Sc.L.R. 61; 16 S.L.T. 457; 32 Digest 139*h*.

R. v. *Rule*, [1937] 2 All E.R. 772; [1937] 2 K.B. 375; 106 L.J.K.B. 807; 157 L.T. 48; Digest Supp.

R. v. *Wright*, (1799), 8 Term Rep. 293; 101 E.R. 1396; 32 Digest 110, *1422*.

Richardson v. *Wilson*, (1879), 7 R. (Ct. of Sess.) 237.

Riddell v. *Clydesdale Horse Society*, (1885), 12 R. (Ct. of Sess.) 976; 22 Sc.L.R. 657; 28 Digest (Repl.) 868, *552*.

Risk Allah Bey v. *Whitehurst*, (1868), 18 L.T. 615; 32 Digest 142, *1734*.

Salmon v. *Isaac*, (1869), 20 L.T. 885; 32 Digest 155, *1872*.

Taylor v. *Hawkins*, (1851), 16 Q.B. 308; 20 L.J.Q.B. 313; 16 L.T.O.S. 409; 117 E.R. 897; 32 Digest 160, *1931*.

Wason v. *Walter*, (1868), L.R. 4 Q.B. 73; 38 L.J.Q.B. 34; 19 L.T. 409; 33 J.P. 149; 32 Digest 144, *1754*.

Woodgate v. *Ridout*, (1865), 4 F. & F. 202; 176 E.R. 531; 32 Digest 137, *1681*.

Preliminary Point of Law.

This was an action for damages for libel by Cynthia Mary Webb, widow, the plaintiff, against the Times Publishing Co. Ltd., the defendants. By an order of Master LAWRENCE, dated Jan. 15, 1960, made pursuant to R.S.C., Ord. 25, r. 2, it was ordered that there be a preliminary determination of a point of law namely whether para. 6 of the defence to the action disclosed a defence in law. The statement of claim read as follows:—

> " 1. At all material times in the years 1948, 1949 and 1950 the plaintiff was lawfully married to Brian Donald Hume. [This was admitted in para. 1 of the defence.]
>
> " 2. In the month of January, 1950, Brian Donald Hume was tried at the Central Criminal Court for the murder of Stanley Setty. The plaintiff gave evidence for Hume at his trial and in the course of giving her evidence swore as the fact was that she had never met Setty in her life. Hume was not convicted of murder. [This paragraph was also admitted in para. 1 of the defence.]
>
> " 3. On June 5, 1958, the plaintiff brought an action for libel against among others Sunday Pictorial Newspapers (1920), Ltd., in respect of the publication in the ' Sunday Pictorial ' newspaper of Hume's ' confession ' of how he had murdered Setty, in which Hume said that Setty had been meeting the plaintiff and himself socially and that he had heard stories of secret meetings between the plaintiff and Setty.
>
> " 4. On May 15, 1959, it was stated in open court before the Hon. Mr. Justice FINNEMORE that Sunday Pictorial Newspapers (1920), Ltd., and the editor of the ' Sunday Pictorial ' had undertaken not to republish the passages complained of and had agreed to pay a sum by way of damages to the plaintiff and to pay her costs, and that the plaintiff was content that the action against them should be stayed on those terms. The said statement in open court was published in ' The Times ' newspaper and received wide publicity in other newspapers.
>
> " 5. The defendants are and were at all material times the printers and publishers of ' The Times ' newspaper. [This was admitted in para. 3 of the defence.]
>
> " 6. In the issue of ' The Times ' newspaper for Sept. 25, 1959, the defendants falsely and maliciously printed and published of the plaintiff the following words:
>
> > ' Hume admits killing Stanley Setty. Body dismembered and thrown from aircraft. Winterthur, Switzerland, Sept. 24. Donald Brian Hume, who is on trial on a charge of murdering a Swiss taxi driver, told the court here today that he robbed the Midland Bank in Brentford, London, and shot a clerk. He also admitted killing Stanley Setty, a car dealer, out of jealousy, sawing off his limbs and making them into parcels to be dropped from an aircraft. Asked if he was married and had a child, Hume replied " Yes, but it was not mine. The father was Stanley Setty ".'
>
> " 7. By the said words the defendants meant and were understood to mean that the plaintiff had committed adultery with Setty and had given perjured evidence at the trial of Hume for the murder of Setty at the Central Criminal Court.

> " 8. The plaintiff will rely on the facts set out in paras. 1-4 hereof inclusive and on the natural meaning of the words complained of in para. 6 hereof in support of the meaning alleged in para. 7 hereof.
>
> " 9. By reason of the premises the plaintiff has been brought into hatred scandal and contempt. The plaintiff claims damages."

By the defence it was pleaded:

> " 2. The defendants admit that in the issue of ' The Times ' for May 16, 1959, they published a report of the proceedings before the Honourable Mr. Justice FINNEMORE referred to in para. 4 of the statement of claim and they will refer to the said report for its full terms and effect. Save as aforesaid no admissions are made in respect of the allegations contained in paras. 3 or 4 of the statement of claim."

By para. 4 of the defence publication of the words complained of was admitted but it was not admitted that the words were published " of the plaintiff ". By para. 5 it was not admitted that the words complained of meant what was alleged in the statement of claim or had any defamatory meaning.

> " 6. On Sept. 24, 1959, before a criminal court of competent jurisdiction sitting at Winterthur, Zurich, in the Republic of Switzerland the trial commenced of one Donald Brian Hume, a British citizen of the United Kingdom, on five indictments including charges of murdering a taxi driver, attempted murder of a bank official and armed robbery of a bank. The said Hume had, in or about January, 1950, been tried at the Central Criminal Court in the City of London on an indictment charging him with the murder of one Setty whose dismembered body had been found in Essex in or about October, 1949. The jury had failed to agree upon a verdict upon such indictment and subsequently the prosecution accepted a plea of guilty by the said Hume to being an accessory after the fact to the murder of the said Setty and the said Hume was sentenced to a term of twelve years' imprisonment. On his release after serving the said sentence Hume wrote an article for publication in the press in which he admitted having murdered the said Setty. At the time of his arrest in Switzerland on the charges above referred to, the said Hume was wanted by the police in the United Kingdom on charges of attempted murder and armed robbery of a bank in Brentford, in the County of Middlesex. The said words complained of in para. 6 of the statement of claim formed part of a fair and accurate report of the aforementioned judicial proceedings publicly heard before the said court of competent jurisdiction sitting at Winterthur, Zurich, and were published contemporaneously with such proceedings. In and by reason of the premises the occasion of the said publication complained of was privileged.
>
> " 7. Each and every allegation contained in para. 9 of the statement of claim is denied.
>
> " 8. In the body of the said report in ' The Times ' containing the said words complained of and immediately following the words ' The father was Stanley Setty ', the defendants printed and published in the form of a sub-title in large print the words ' Former wife's denial ' and then the following words:—
>
> > ' Mr. David Jacobs, of M. A. Jacobs & Sons, Solicitors, of Pall Mall, London, last night issued the following statement—" I have been asked by Mrs. Cynthia Webb, formerly the wife of Mr. Brian Donald Hume, who is at present on trial in Switzerland for murder, to say that the statement alleged to have been made by Hume during the course of his trial to the effect that Setty is the father of his child is completely untrue and Mrs. Hume, as she then was, gave evidence at the Central Criminal Court, when in 1950 Hume was on trial for the murder of Stanley

> Setty, that she had never met Setty in her life. In 1951 Mrs. Webb's marriage with Hume was dissolved on the ground of her husband's cruelty and he is the father of her child " '."

By her reply the plaintiff joined issue on the defence and alleged that para. 6 of the defence disclosed no defence in law.

T. G. Roche, Q.C., and *P. H. R. Bristow* for the plaintiff.
Gerald Gardiner, Q.C., and *H. P. J. Milmo* for the defendants.

Cur. adv. vult.

June 2. **PEARSON, J.**, having referred to the pleadings, read the following judgment: Returning to para. 6 of the defence, I find that there are certain inferences which can reasonably be drawn: (1) At the second trial of Hume, the charge of murder must have been disposed of somehow, and presumably the prosecution offered no evidence on this charge, and the jury returned a formal verdict of not guilty. (2) Hume was sentenced in the year 1950 to twelve years' imprisonment for being an accessory after the fact to murder, but he was again at liberty for some time before the Swiss trial in September, 1959, and presumably he received remission of approximately one-third of his sentence, and was therefore released in the year 1958. (3) The charges of attempted murder and armed robbery of a bank in England, and the charges of murdering a taxi driver, attempted murder of a bank official, and armed robbery of a bank in Switzerland, should be understood as referring to recent offences alleged to have been committed by Hume after his release from prison in the year 1958. Those inferences do not materially alter the effect of para. 6 of the defence, but they make it possible to summarise the effect more shortly, bringing out the most material factors as follows: (a) Hume was at all material times a British subject of the United Kingdom. (b) He was in the year 1950 put on trial in an English court for the murder of Setty, and was eventually found not guilty. (c) He had, however, pleaded guilty to a charge of being an accessory after the fact to murder, and was sentenced to twelve years' imprisonment, and, after receiving a remission of sentence, was released in the year 1958. (d) In the year 1959 he was wanted by the English police on charges of attempted murder and armed robbery alleged to have been committed by him in England after his release. (e) In September, 1959, he was put on trial in a Swiss court on charges of murder, attempted murder, and armed robbery, alleged to have been committed by him in Switzerland in or about the year 1959. (f) His own answers given at the trial in the Swiss court in response to the judge's interrogation purported to show that he had in fact committed the murder of Setty, and also that, since his release, he had committed the crimes for which he was wanted by the English police. (g) The words complained of in para. 6 of the statement of claim formed part of a fair and accurate report of a public trial in the Swiss court of competent jurisdiction, and the report was published contemporaneously.

Owing to the form of the proceedings, which are in lieu of demurrer, counsel for the plaintiff had to open the argument, seeking to establish the negative proposition that para. 6 of the defence does not disclose any defence in law. Counsel for the defendants had the positive proposition that the paragraph does disclose a defence in law. It is common ground that we are not at all concerned in this case with the absolute privilege which attaches at common law to anything said by parties, witnesses, counsel, solicitors, judges or jurors in the course of judicial proceedings; nor are we concerned at all with the statutory privilege (whether it be qualified or absolute) conferred by s. 3 of the Law of Libel Amendment Act, 1888, as elucidated by s. 8 of the Defamation Act, 1952, on a fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority within the United Kingdom, if such report is published contemporaneously with such proceedings. Also we are not concerned in this case, except indirectly for the purposes of one particular argument, with the statutory qualified privilege conferred by s. 7 of the Defamation Act, 1952, and Part 1 of the Schedule to that Act on reports of judicial proceedings in any international court or any court exercising jurisdiction throughout any part of Her Majesty's Dominions outside the United Kingdom. The question with which we are concerned is whether there is qualified privilege at common law for this report of a foreign judicial proceeding.

The primary contention of counsel for the defendants is that the publication of the words complained of is protected by qualified privilege simply by virtue of the facts stated in the sentence in para. 6 of the defence:

> " The said words complained of in para. 6 of the statement of claim formed part of a fair and accurate report of the aforementioned judicial proceedings publicly heard before the said court of competent jurisdiction sitting at Winterthur, Zurich, and were published contemporaneously with such proceedings."

For this primary contention he does not bring in any of the other facts stated in para. 6 of the defence. He claims thus qualified privilege of a general, comprehensive character for any such report, whatever the subject-matter of the judicial proceedings may be. Counsel for the plaintiff coined the convenient phrase " blanket privilege " for this claim. Counsel for the defendants did, however, say that this claim does not necessarily cover courts in all foreign countries, and that it might be limited to courts in Western European countries, or limited in some other way to some class of courts which would include the Swiss courts.

Counsel for the defendants also has a secondary contention, which is of much less general interest to his clients, that, if his primary contention is too wide, nevertheless on all the particular facts of the case as set out in para. 6 of the defence there is qualified privilege for this report of these foreign judicial proceedings.

Surprisingly, there is no direct authoritative decision—indeed no decision of an English court—on the question or questions arising for decision in this case. In England there was *Risk Allah Bey* v. *Whitehurst* (1). I will read the first paragraph of the headnote:

> " The plaintiff was tried in Brussels for murder and acquitted. A correspondent of an English journal wrote letters which were inserted in such journal, containing incorrect statements of the evidence, independent comments of the writer upon the character and bearing of the prisoner, and expressions impugning the verdict of acquittal, and implying that the prisoner should have been found guilty of murder and was certainly guilty of forgery and fraud. A leading article was also published adopting the same tone."

The plaintiff brought an action for libel. Evidently the plaintiff had a strong case on the merits, and, in the event, the jury returned a verdict in his favour for £960, which was a very large sum in those days. The trial in Brussels seems to have had no English feature except that the trial was for the murder of a young Englishman. It appears, however, that counsel for the plaintiff agreed with counsel for the defendants that the qualified privilege attaching to fair and accurate reports of judicial proceedings would apply to the report in the defendants' newspaper of the trial in Brussels, if that report were fair and accurate. The court was content to proceed with the trial and to direct the jury on that basis. I will read a passage from the summing-up of Cockburn, C.J. (2):

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(1) (1868), 18 L.T. 615.

(2) (1868), 18 L.T. at p. 618.

> "Now, I am glad to think that all parties are agreed as to what is the law on the subject. Whatever may have been thought in past times, nowadays we are agreed on this, that fair and impartial reports of the proceedings in courts of justice, although incidentally those proceedings may prejudice individuals, are of so great public interest and public advantage, that the publishing of them to the world predominates so much over the inconvenience to individuals as to render these reports highly conducive to the public good; but the conditions on which the privilege can be maintained are, that the report shall be fair, truthful, honest, and impartial. It need not be a report of every word that passes upon a trial. No newspaper, however large, could report the proceedings in the full extent to which, upon a long trial, these proceedings necessarily extend. You may either have it to the utmost possible extent the limits of the paper will allow it to be given, or in the more condensed form of a summary or epitome, but you must have the report honest and fair. A paper may give a report of the proceedings of courts of justice properly condensed and fair, but it is not entitled, under pretence of giving a report, to add comments of its own, or to display facts not brought forward in the proceedings, but coming out of the reporter's own head. This is admitted on all hands to be the state of law. Whether the British public has a legitimate interest or curiosity in the proceedings of a foreign tribunal, or in a British subject brought before a foreign tribunal, is another matter, and I am glad that this question does not arise today. They all agree that that which a wise law applies to a report of proceedings in English courts of justice shall apply to the court at Brussels."

Clearly there was no decision of the court on the question of law. The most that can be said is that, plaintiff's counsel having for good tactical reasons conceded the point of law, the court was willing to proceed on that basis, and therefore presumably did not consider that the concession was manifestly wrong. There is no implication of a decision by the court that the concession was right in law.

Next there is a Scottish case, *Riddell* v. *Clydesdale Horse Society* (3). I will read the headnote in the Scottish Law Reporter (4), which is fuller than the headnote in the Sessions Cases.

> "A society incorporated to aid in preserving the purity of a breed of horses proposed to publish and circulate among its members for their information a report of proceedings taken before a court in America for the extradition of a party charged with forging false pedigrees to be inserted in their stud book. In these proceedings letters had been read which were the property of a person in Scotland. These letters with the other proceedings had been reported in the American newspapers at the time. He sought interdict against the publication of the letters and the report. Held that the letters as well as the proceedings having been published already in reports of what took place in a public court, and it not being averred that the report complained of was unfair or inaccurate, interdict could not be granted. Observed that the publication of the report along with an averment of malice might give rise to an action of damages."

The respondent claimed in effect qualified privilege for the report of the American judicial proceedings, in the course of which the material letters had been put in evidence and read. There was no argument on the question whether such privilege was applicable to foreign judicial proceedings. The court assumed and said that it was. I will read a passage from the Lord President's judgment. He said (5):

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(3) (1885), 22 Sc.L.R. 657; 12 R. (Ct. of Sess.) 976.
(4) (1885), 22 Sc.L.R. 657.
(5) (1885), 22 Sc.L.R. at p. 659.

> "The only question, therefore, turns upon this, whether the report of the proceedings in the United States is such a document or such a compilation as the respondents are entitled to publish. That depends upon whether it is a fair and accurate report of proceedings before a public court. I gather from the commencement of the report itself that the proceedings took place before the commissioner specially authorised by an order of the circuit court for the district of Illinois to hear extradition cases. It appears very clearly that the court in which these commissions proceeded is a public court to all intents and purposes—a court at which the proceedings are conducted in the public interest, and at which the public are entitled to be present. That being so, the only remaining question is whether the report of these proceedings which it is proposed to publish is an accurate and a fair report, and certainly there is no relevant averment to the contrary."

That is persuasive authority—not, in my view, binding authority—in favour of the defendants' contention that qualified privilege attaches to a fair and accurate report of, at any rate, some foreign judicial proceedings. However, as there was no argument on the other side, the weight of the decision as a persuasive authority is diminished. Also, there was no discussion or consideration as to what might be the proper scope or requisite conditions of the application of such privilege to foreign judicial proceedings. There is also another Scottish case of *Pope* v. *Outram & Co., Ltd.* (6). In this case also it was assumed, without any argument to the contrary having been advanced, that qualified privilege would attach to a fair and accurate report of judicial proceedings. The Scottish proceedings, however, were of an interlocutory character, concerned with points of pleading and the settlement of issues to be tried. These Scottish cases are relevant and have to be taken into account in favour of the defendants' contention, but they are not conclusive.

On the plaintiff's side there is an argument based on certain provisions of the Defamation Act, 1952. If the defendants' main contention is right, fair and accurate reports of judicial proceedings in dominion and colonial courts or in international courts already had qualified privilege at common law. Why then did the Act purport to confer such privilege on such reports? Plainly this would not have been done if there had been a confident opinion in government and legal circles that the reports already had the privilege. There are, however, two points to be noticed: First, there is s. 7 (4) which says:

> "Nothing in this section shall be construed as limiting or abridging any privilege subsisting (otherwise than by virtue of s. 4 of the Law of Libel Amendment Act, 1888) immediately before the commencement of this Act."

That would preserve any common law privilege that there might be. Secondly, s. 7 and the Schedule to the Act of 1952 refer to a great many classes of proceedings other than and in addition to judicial proceedings. In my opinion, this argument based on the provisions of the Act of 1952 does carry some weight in favour of the plaintiff's contention, but it is not conclusive.

Counsel for the plaintiff also sought to use paras. 106, 107 and 108 of the report of the Porter Committee on the Law of Defamation (7) as a persuasive authority in his favour. The committee included very eminent lawyers with wide experience of the law of defamation. Paragraphs 106, 107 and 108 give the committee's reasons for not recommending legislation to confer privilege on reports of foreign judicial proceedings. Counsel for the defendants took the objection that the report was not admissible as authority to show what the law is. In general, his objection is well-founded, but if and in so far as the present question has an aspect of public policy, the committee's reasons can be taken into account, but only as having some bearing on that policy aspect.

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(6) 1909 S.C. 230.

(7) Report of the Committee on the Law of Defamation (Cmd. 7536) of October, 1948.

There is thus no short way to a decision in this case. I propose, in the first instance, to consider a number of cases in which qualified privilege has been held to apply to fair and accurate reports of judicial proceedings in this country, with a view to seeing whether the reasons that are given would lead to a similar ruling in relation to foreign judicial proceedings. That will be for the purpose of deciding whether the defendants' primary contention, the so-called " blanket " contention, can be accepted. If not, the secondary contention will have to be considered afterwards.

There is *Wason* v. *Walter* (8). The first paragraph of the headnote says this:

> " A faithful report in a public newspaper of a debate in either house of parliament, containing matter disparaging to the character of an individual which had been spoken in the course of the debate, is not actionable at the suit of the person whose character has been called in question. But the publication is privileged on the same principle as an accurate report of proceedings in a court of justice is privileged, viz., that the advantage of publicity to the community at large outweighs any private injury resulting from the publication."

Then in the judgment of COCKBURN, C.J., there is a passage which is of particular interest as showing both the historical and highly technical explanation of the plea of privilege and also the broader principle to which it can be ascribed. He says (9):

> " It is now well established that faithful and fair reports of the proceedings of courts of justice, though the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible. The immunity thus afforded in respect of the publication of the proceedings of courts of justice rests upon a twofold ground. In the English law of libel, malice is said to be the gist of an action for defamation. And although it is true that by malice, as necessary to give a cause of action in respect of a defamatory statement, legal, and not actual malice, is meant, while by legal malice, as explained by BAYLEY, J., in *Bromage* v. *Prosser* (10), is meant no more than the wrongful intention which the law always presumes as accompanying a wrongful act without any proof of malice in fact, yet the presumption of law may be rebutted by the circumstances under which the defamatory matter has been uttered or published, and, if this should be the case, though the character of the party concerned may have suffered, no right of action will arise. 'The rule ', says LORD CAMPBELL, C.J., in the case of *Taylor* v. *Hawkins* (11), ' is that, if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of malice '. It is thus that in the case of reports of proceedings of courts of justice, though individuals may occasionally suffer from them, yet, as they are published without any reference to the individuals concerned, but solely to afford information to the public and for the benefit of society, the presumption of malice is rebutted, and such publications are held to be privileged. The other and the broader principle on which this exception to the general law of libel is founded is, that the advantage to the community from publicity being given to the proceedings of courts of justice is so great, that the occasional inconvenience to individuals arising from it must yield to the general good. It is true that with a view to distinguishing the publication of proceedings in parliament from that of proceedings of courts of justice, it has been said that the immunity accorded to the reports of the proceedings of courts of justice is grounded on the fact of the courts being open to the public, while the houses of parliament are not; as also that

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(8) (1868), L.R. 4 Q.B. 73.

(9) (1868), L.R. 4 Q.B. at pp. 87, 88.

(10) (1825), 4 B. & C. 247 at p. 255.

(11) (1851), 16 Q.B. 308 at p. 321.

> by the publication of the proceedings of the courts the people obtain a knowledge of the law by which their dealings and conduct are to be regulated. But in our opinion the true ground is that given by LAWRENCE, J., in *R.* v. *Wright* (12), namely, that 'though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings.' In *Davison* v. *Duncan* (13), LORD CAMPBELL says, 'A fair account of what takes place in a court of justice is privileged. The reason is, that the balance of public benefit from publicity is great. It is of great consequence that the public should know what takes place in court; and the proceedings are under the control of the judges. The inconvenience, therefore, arising from the chance of injury to private character is infinitesimally small as compared to the convenience of publicity.' And WIGHTMAN, J., says (14): 'The only foundation for the exception is the superior benefit of the publicity of judicial proceedings which counterbalances the injury to individuals, though that at times may be great'."

Counsel for the defendants gave a very interesting historical survey of the cases relating to this privilege for reports of judicial proceedings, and I have collected from them five reasons assigned for that privilege. First, it is said that court proceedings are open to the public, and it follows that reports of them should be freely permitted. I have already referred to the passage in *Wason* v. *Walter* (15). There is also an older case called *Curry* v. *Walter* (16). Then there is *Andrews* v. *Chapman* (17) and *Lewis* v. *Levy* (18). Then there is a Scottish case, *Richardson* v. *Wilson* (19) where there is a convenient statement of this reason by the Lord President. He said (20):

> "The publication by newspapers of what takes place in court at the hearing of any cause is undoubtedly lawful; and if it be reported in a fair and faithful manner the publisher is not responsible though the report contain statements or details of evidence affecting the character of either of the parties or of other persons; and whatever takes place in open court falls under the same rule, though it may be before or after the proper hearing of the cause. The principle on which this rule is founded seems to be that, as courts of justice are open to the public, anything that takes place before a judge or judges is thereby necessarily and legitimately made public, and, being once made legitimately public property, may be re-published without inferring any responsibility."

That reason is not readily transferable to reports of foreign judicial proceedings. I do not know whether an English tourist on holiday in Switzerland would be allowed to enter a Swiss court and listen to the proceedings, but I assume that he would be. Owing to his unfamiliarity with the language and the law and the procedure he would probably understand very little of what was going on.

Secondly, it is said in *Woodgate* v. *Ridout* (21):

> "The reason why comments upon the proceedings of courts of justice are privileged is that the administration of justice concerns us all, and that it is well that the conduct of the judge or jury should, if necessary, be brought to the bar of public opinion, like all other matters of public concern."

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(12) (1799), 8 Term Rep. 293 at p. 298.
(13) (1857), 7 E. & B. 229 at p. 231.
(14) See *Davison* v. *Duncan*, (1857), 7 E. & B. at p. 232.
(15) (1868), L.R. 4 Q.B. at pp. 87, 88.
(16) (1796), 1 Bos. & P. 525.
(17) (1853), 3 Car. & Kir. 286.
(18) (1858), E.B. & E. 537.
(19) (1879), 7 R. (Ct. of Sess.) 237.
(20) (1879), 7 R. (Ct. of Sess.) at p. 241.
(21) (1865), 4 F. & F. at p. 217.

A That refers to comment, but the same point is mentioned in relation to reports in *Andrews* v. *Chapman* (22) where LORD CAMPBELL, C.J., said:

> "The courts are open to all, but they are of limited extent, and only a small number of persons can be present in them; but by means of the press the whole nation is informed of what takes place, and is put in a position to form an opinion upon the conduct of the jury, the judge and the B witnesses."

That reason is not transferable at all to foreign judicial proceedings. The conduct of judges and of juries, if any, in Switzerland cannot usefully be brought before the bar of public opinion in England, and the British public has no concern with it, or responsibility for it, or power to take action with regard C to it.

Thirdly, there is the education of the public as to the details of the administration of justice. It is of benefit to the public to learn about the administration of the law under which they live in the courts in which some of them will have to appear from time to time and play their parts as parties or witnesses or jurors. I have already read a passage from *Wason* v. *Walter* (23) in which D this point was taken. In *Salmon* v. *Isaac* (24) HANNEN, J., said:

> "It is for the public interest that facilities should be afforded to the public for acquainting itself with the details of the administration of the law. Accordingly, anyone is at liberty to publish a fair report of proceedings in a court of justice, although such report may contain matter damaging the character of individuals. A newspaper has no greater privilege in E such a matter than any ordinary person—any person is privileged in publishing such a report if he does so merely to inform the public."

This reason has very little force in relation to foreign judicial proceedings. The average British citizen is not likely to encounter the Swiss law in any way, nor to appear in any capacity in a Swiss court.

Fourthly, it is pointed out that even the persons affected may well be better F off with fair and accurate reports than with rumours circulating: *Oliver* v. *Bentinck* (25); *Lewis* v. *Levy* (26). That reason has much less force in relation to foreign judicial proceedings than it has in relation to English judicial proceedings, as the rumours would have to travel to England.

Fifthly, and most important, there is what may be called the balancing operation—balancing the advantages to the public of the reporting of judicial pro-G ceedings against the detriment to individuals of being incidentally defamed. I have already read the passage in *Wason* v. *Walter* (27) in which there are citations from other cases. There is also a passage in the judgment of LORD CAMPBELL, C.J., in *Lewis* v. *Levy* (28). He said:

> "The case of *Curry* v. *Walter* (29) has been often criticised, but never overturned, and often acted upon. And in *R.* v. *Wright* (30) it received H the unqualified approbation of that great judge, LAWRENCE, J., who observed that, though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveni-I ences to the private persons whose conduct may be the subject of such proceedings."

It is at this point that the sum total of the differences between English and foreign judicial proceedings becomes crucial and decisive. As regards English proceedings, it is desirable to have a simple rule, and it is not unreasonable to say that all persons living in England have a real interest in, and are concerned with, anything that happens in any part of the country in the administration of their law in any of their courts. But it would be extravagant to say that the citizens of England have a real interest in, and are concerned with, the adjudication of some trivial and purely personal dispute in some minor court on the other side of the world. In carrying out the balancing operation due regard should be had to the interests of the individuals who may be incidentally defamed in a report of a judicial proceeding. It is one thing to take for the public benefit the risk of incidental defamation in the report of any English judicial proceedings. It would be quite another thing, much more serious, to take the risk of being defamed by the reporting of any judicial proceeding in any court in any part of the world. Moreover, there are special matters which may increase the risk. Subject to certain exceptions, the general rule of English procedure, especially criminal procedure, is that the evidence is confined, so far as possible, to matters relevant to the issues in the case. But there is in some countries a different procedure, under which in criminal trials the accused is questioned about his past life and in particular his previous offences, as is shown by the matters complained of in this case. That procedure extends considerably the risk of incidental defamation of third parties.

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(22) (1853), 3 Car. & Kir. at p. 289.
(23) (1868), L.R. 4 Q.B. at p. 88.
(24) (1869), 20 L.T. at p. 886.
(25) (1811), 3 Taunt. at p. 459.
(26) (1858), E.B. & E. at pp. 561, 562.
(27) (1868), L.R. 4 Q.B. at pp. 87, 88.
(28) (1858), E.B. & E. at p. 559.
(29) (1796), 1 Bos. & P. 525.
(30) (1799), 8 Term Rep. at p. 298.

Next, there is the possibility that the government of some country might misuse its courts of justice by staging a propaganda trial, in which the prosecutor and witnesses and perhaps even the accused after suitable drilling, would vilify and defame the characters of the internal and external enemies of the government. That involves a large extension of the risk of incidental defamation.

Having regard to the matters that I have mentioned, which have a cumulative effect, and in the absence of any binding authority, I decide that there is no qualified privilege of a general or " blanket " character for fair and accurate reports of foreign judicial proceedings in any courts in any country.

As stated above, counsel for the defendants said that his preliminary contention (that is, that there was qualified privilege of a general or " blanket " character) does not necessarily cover courts in all foreign countries; and it might be limited to courts in Western European countries or limited in some other way to some class of courts which would include the Swiss courts. Counsel for the plaintiff in reply was able to show very convincingly that any geographical limitation was impracticable. It is not necessary to explain that at length. I suggested to counsel for the plaintiff that the privilege might be confined in some way to genuine trials or properly conducted trials, but I was readily convinced by his answer to the effect that it would be impracticable and perhaps not in accordance with international comity for the courts of this country to embark on the task of inquiring into and deciding whether or not some trial in a foreign country was a genuine trial and properly conducted. In my judgment, the defendants' primary contention that there is for fair and accurate reports of foreign judicial proceedings qualified privilege of a general or " blanket " character must be rejected.

That conclusion, however, is not decisive of this case, because the defendants' secondary contention, based on the particular facts of the case, remains to be considered.

In my view, it was established by counsel for the defendants' historical examination of the decided cases that originally and in principle there are not many different kinds of privilege, but rather for all privilege there is the same foundation of the public interest. The elasticity of this branch of the law was emphasised in *Wason* v. *Walter* (31). I have already cited that case, but not this passage. It was there said (32):

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(31) (1868), L.R. 4 Q.B. 73.

(32) (1868), L.R. 4 Q.B. at pp. 93, 94.

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> "Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the B generation to which it is immediately applied. Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognised. Comments on governments, on ministers and officers of state, on members of both houses of parliament, on judges and other public C functionaries, are now made every day, which half a century ago would have been the subject of actions or ex officio informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, D the nation profits by public opinion being thus freely brought to bear on the discharge of public duties? Again, the recognition of the right to publish the proceedings of courts of justice has been of modern growth. Till a comparatively recent time the sanction of the judges was thought necessary even for the publication of the decisions of the courts upon points of law. Even in quite recent days judges, in holding publication of E the proceedings of courts of justice lawful, have thought it necessary to distinguish what are called ex parte proceedings as a probable exception from the operation of the rule. Yet ex parte proceedings before magistrates, and even before this court, as, for instance, on applications for criminal informations, are published every day, but such a thing as an action or indictment founded on a report of such an ex parte proceeding is unheard F of, and, if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is, not whether the report was or was not ex parte, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected."

G In *Allbutt* v. *General Council of Medical Education & Registration* (33) there is a sentence to the same effect saying:

> "The court must adapt the law to the necessary condition of society, and must from time to time apply, as best it can, what it thinks is the good sense of rules which exist to cases which have not been positively decided to come within them."

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An example was suggested in argument. Suppose that in some American shipping case there had been, or was alleged to have been, wilful default of the master and crew in failing to make the ship seaworthy, and consequently a question of great difficulty and commercial importance arose under some clause of the charterparty, and suppose that the action eventually went on I appeal to the Supreme Court of the United States, and they gave judgment on it. If English newspapers reported the judgment of the Supreme Court of the United States to the benefit of the English shipping and commercial community, would they be liable in damages to the master and crew for the incidental defamation? The answer should be "No". If it is in the public interest that some foreign judicial proceeding should be reported in the English newspapers, they ought to have qualified privilege for reporting it. Could there be a plea of "fair information on a matter of public interest" which would be co-ordinate with the familiar plea of "fair comment on a matter of public interest"? The need for something on these lines arises because, if the defendant has published a statement "A says that B is dishonest", the defendant, in order to succeed on a plea of justification, has to prove that B is dishonest and not merely that A said so. A report of a judicial proceeding may contain many defamatory remarks by one party or witness about another party or witness. Privilege is required if there is to be any effective protection of a newspaper publishing reports of judicial proceedings when such reports are of public interest. In my view, there not only ought to be, but there is such privilege.

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(33) (1889), 23 Q.B.D. at p. 410.

There are three cases which afford some guidance. First there is *Cox* v. *Feeney* (34). The headnote says:

> "In an action for libel, consisting of a publication in a newspaper of a report of an inspector of charities under the Charitable Trusts Act, containing a letter, written some years before, reflecting on the plaintiff in his management of a college: Held, that as the matter was one of public interest, the defendant was not liable, provided he published it fairly, from an honest desire to afford the public information, and that comments on it were only material as evidence of malice."

Cockburn, C.J., said (35):

> "Information, though old, may be valuable. And if the publication was with a view to give the public information on a subject of public interest it would be a ground of defence. It will be for the jury whether that was the object or motive; but as to that it is very material that it is admitted the letter was part of the report, and that it was not singled out for publication, but that the whole of the report was published."

In summing-up to the jury Cockburn, C.J., said (36) that

> "the publication was prima facie libellous, and it would be for [the jury] to say whether, under the circumstances, it was privileged. They would have to say—first, whether this was a matter which it interested the public to know; and, secondly, whether the defendant published it with the honest desire to afford the public information. If they answered both those questions in the affirmative, they should find a verdict for the defendant; if otherwise, for the plaintiff."

Then he went on to deal at length with the question whether the affairs of the institution concerned were matters of public interest.

Secondly, there is *Allbutt* v. *General Council of Medical Education & Registration* (37). The headnote says:

> "By the Medical Act . . . the General Council of Medical Education and Registration were established, one of their duties being to keep a register of medical practitioners. By s. 29, 'if any registered medical practitioner shall after due inquiry be judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register':—Held, that if the council, acting bona fide and after due inquiry, have adjudged a medical practitioner to have been guilty of infamous conduct in a professional respect, the court has no jurisdiction to review their decision . . . Held, also, that the publication of the minutes of the council, containing a report of their proceedings, comprising a statement that the name of a specified medical practitioner has been removed from the register on the ground

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(34) (1863), 4 F. & F. 13.

(35) (1863), 4 F. & F. at p. 15.

(36) (1863), 4 F. & F. at p. 19.

(37) (1889), 23 Q.B.D. 400.

A that, in the opinion of the council, he has been guilty of infamous conduct in a professional respect, is, if the report be accurate, and published bona fide and without malice, privileged, and the medical practitioner cannot maintain an action of libel against the council in respect of the publication."

B LOPES, L.J., delivering the judgment of the Court of Appeal, said (38):

> "The council are not a private association. They are a public corporation, invested with large powers and privileges and charged with important duties —duties in which not only the profession, but the public at large, are interested."

Then he goes on to explain why that is so, and then he said (39), in particular,

> C "There is no appeal from their decision, and the influence of public opinion is no small safeguard against the abuse of the powers intrusted to them. This influence cannot be exercised if they keep secret the grounds on which they act. The public are clearly interested in knowing these grounds."

D Then he said (40):

> "It would be stating the rule too broadly, in our opinion, if it was held, that, to justify the publication of proceedings such as these, the proceedings must be directly judicial, or had in a court of justice. We can find the law nowhere so broadly stated, nor do we think that in these days it would be so laid down. The court must adapt the law to the necessary condition of E society, and must from time to time apply, as best it can, what it thinks is the good sense of rules which exist to cases which have not been positively decided to come within them."

That last sentence is the one which I have already read for a slightly different purpose (41).

Then thirdly there is *Perera* v. *Peiris* (42). I think that I must read part of F the headnote:

> "The respondents, the proprietor and the printer of the 'Ceylon Daily News', on various dates in May, 1943, published in the newspaper a number of extracts from the Official Report of the Bribery Commission—a commission set up under statutory powers by the Governor of Ceylon in August, 1941, to inquire into questions relating to allegations that gratifications had been G paid to certain members of the then existing State Council of Ceylon for the purpose of influencing their judgment and conduct in transactions in which they, as members of the Council, were concerned. The report was issued by the Government of Ceylon as a sessional paper and was on sale to the public, copies being sent free to all newspapers in Ceylon. Among the extracts from the sessional paper, which were published in the 'Ceylon Daily News' H without any comment and, as found by the courts below, without any malice express or implied was [a particular comment on the plaintiff in the action. The headnote then states, I think correctly] Held, applying the wide general principle which underlies the defence of privilege in all its aspects—that the requirements of public interest are served by publication—that the immunity afforded by privilege attached to the publication by the respondents of the I report considered as a whole. In considering whether reports of proceedings of bodies which are not judicial or parliamentary are privileged the status of those bodies taken alone is not conclusive to establish that the public interest is forwarded by publication, and it is necessary to consider the subject-matter dealt with in the particular report. If it appears that it is to

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(38) (1889), 23 Q.B.D. at p. 408
(39) (1889), 23 Q.B.D. at p. 409.
(40) (1889), 23 Q.B.D. at p. 410.
(41) See p. 801, letter G, ante.
(42) [1949] A.C. 1.

> the public interest that it should be published privilege will attach. If malice in the publication is not present and the public interest is served by the publication, the publication of the report must be taken for the purposes of Roman-Dutch law as being in truth directed to serving that interest, and animus injuriandi, which is an essential element in proceedings for defamation in that law, is negatived. In the present case the due administration of the affairs of Ceylon required that the report in light of its origin, contents and relevance to the conduct of the affairs of Ceylon and the course of legislation should receive the widest publicity."

Having read the headnote, I need read only the following short passage from the judgment (43):

> " Reports of judicial and parliamentary proceedings and, it may be, of some bodies which are neither judicial nor parliamentary in character, stand in a class apart by reason that the nature of their activities is treated as conclusively establishing that the public interest is forwarded by publication of reports of their proceedings. As regards reports of proceedings of other bodies, the status of those bodies taken alone is not conclusive and it is necessary to consider the subject-matter dealt with in the particular report with which the court is concerned. If it appears that it is to the public interest that the particular report should be published privilege will attach. If malice in the publication is not present and the public interest is served by the publication, the publication of the report must be taken for the purposes of Roman-Dutch law as being in truth directed to serving that interest. Animus injuriandi is negatived."

It was on that passage mainly that the headnote was founded.

Counsel for the plaintiff has argued that, in such cases there has to be both appropriate status and appropriate subject-matter to confer privilege on the publication. He pointed out that in each of those three cases the report was made under statutory powers, and that was the relevant status in those cases. If one accepts that counsel for the plaintiff is right in saying that there must be appropriate status for the report, there is in the present case and its class of case the ready-made status of a fair and accurate report of foreign judicial proceedings, and there is no need to look further for a status.

There is, however, undoubtedly the need for an appropriate subject-matter which must be of interest to the public concerned, in this case the English newspaper-reading public. Counsel for the plaintiff has pointed out that the word " interest " is of several meanings, and the relevant meaning for the present purpose has to be ascertained. He cited *R.* v. *Rule* (44). There the appellant wrote to the member of Parliament for his constituency two letters containing defamatory statements about a police officer and a justice of the peace for the place where he resided. He was charged with publishing defamatory libels and pleaded that the libels were published on a privileged occasion. The trial judge ruled that the occasion was not privileged and the appellant was convicted. The Court of Criminal Appeal held that a member to whom a written communication is addressed by one of his constituents, asking for his assistance in bringing to the notice of the appropriate Minister a complaint of improper conduct on the part of some public official acting in that constituency in relation to his office, had sufficient interest in the subject-matter of the complaint to render the occasion of such a publication a privileged occasion, and that in the absence of evidence of malice on the part of the appellant the conviction could not stand. The judgment of the Court of Criminal Appeal was read by LORD HEWART, C.J., who said (45) that, on a certain assumption, the case would fall

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(43) [1949] A.C. at p. 21.

(44) [1937] 2 All E.R. 772; [1937] 2 K.B. 375.

(45) [1937] 2 All E.R. at p. 776; [1937] 2 K.B. at p. 379.

> "within the legal canon adopted by the Court of Queen's Bench in *Harrison* v. *Bush* (46): 'A communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which, without this privilege, would be slanderous and actionable'."

Then he said (47):

> "The meaning of the word 'interest' in this context is stated in a passage in the book on the law of libel and slander (48) of the late FRASER, J., where the learned author summarises the effect of many decisions: 'This common interest may be in respect of very varied and different matters; indeed, the only limitation appears to be that it should be something legitimate and proper, something which the courts will take cognizance of, and not merely an interest which is due to idle curiosity or a desire for gossip'".

One has to look for a legitimate and proper interest as contrasted with an interest which is due to idle curiosity or a desire for gossip. There is not necessarily anything wrong with a newspaper publishing news items which appeal only to idle curiosity or the desire for gossip. But, if they do so, there is not in the subject-matter any such legitimate and proper interest as is needed to confer privilege for an incidental defamation that may be involved. There is thus a test available for deciding whether the subject-matter is appropriate for conferring privilege. A report of the decision of the United States Supreme Court on an important question of commercial law has legitimate and proper interest. On the other hand, a report of a judicial proceeding wholly concerned with an alleged scandalous affair between Mrs. X and Mr. Y is unlikely to have such interest and is likely to appeal only to idle curiosity or a desire for gossip.

Sometimes a report of foreign judicial proceedings will have intrinsic world-wide importance, so that a reasonable man in any civilised country, wishing to be well-informed, will be glad to read it, and would think he ought to read it if he has the time available. Sometimes a report of foreign judicial proceedings will not have such intrinsic world-wide importance, but will have special connexion with English affairs, so that it will have a legitimate and proper interest for English readers, and the reasonable man in England will wish to read it or hear about it. For instance, a report of foreign judicial proceedings may throw light on, or be related to or connected with, the administration of justice in England.

That is the present case. The report in "The Times" of Sept. 25, 1959, of the judicial proceedings in the Swiss court is much connected with the administration of justice in England. Not only does it show a British subject being prosecuted in the Swiss court; it purports to show in the proceedings in the Swiss court that he confessed to having committed both the murder of Setty, of which he had been found not guilty in previous English proceedings, and also the serious recent offences in England for which he was wanted by the English police. As the administration of justice in England is a matter of legitimate and proper interest to English newspaper readers, so also is this report, which has so much connexion with the administration of justice in England. In general, therefore, this report is privileged.

There is, however, one point remaining. The sentence of the report mainly complained of by the plaintiff is the sentence:

> "Asked if he was married and had a child Hume replied 'Yes, but it was not mine. The father was Stanley Setty'."

If that had no bearing on the confession, it might be said to be an extraneous matter, not germane to the issue and not covered by the privilege. But the confession was, as stated in the report:

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(46) (1856), 5 E. & B. 344 at p. 348.
(47) [1937] 2 All E.R. at p. 777; [1937] 2 K.B. at p. 380.
(48) See FRASER'S LAW OF LIBEL AND SLANDER (7th Edn.), p. 152.

"He also admitted killing Stanley Setty, a car dealer, out of jealousy."

The statement that Stanley Setty was the father of the child was the explanation of the jealousy. It may not have been a true explanation, and the motive may not have been as stated, but that was the explanation given of the stated motive.

In my view, it was not extraneous, but germane to the issue and covered by the privilege.

Accordingly, my determination of the point of law is that para. 6 of the defence discloses a defence in law.

Judgment for the defendants.

Solicitors: *M. A. Jacobs & Sons* (for the plaintiff); *Charles Russell & Co.* (for the defendants).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

WILLIAMS *v.* SETTLE.

[COURT OF APPEAL (Sellers, Willmer and Harman, L.JJ.), May 26, 27, 30, 1960.]

County Court—Transfer of action to, from High Court—Consent order—Whether transfer under s. 43 *or s.* 45 *of County Courts Act,* 1934*—Action for damages for breach of copyright—No limit on claim stated—Summons for directions requesting trial at named county court—Agreement by letters of solicitors to transfer—No statement of enactment under which action transferred—Agreement not filed before trial—County Courts Act,* 1934 (24 *&* 25 *Geo.* 5 *c.* 53), *s.* 43, *s.* 45*—C.C.R., Ord.* 16, *r.* 10 (2) (*b*).

Damages — Exemplary damages — Copyright — Infringement — Photographer supplying customer's wedding group photographs to Press—Publication in connexion with murder of customer's father-in-law—Copyright Act, 1956 (4 *&* 5 *Eliz.* 2 *c.* 74), *s.* 17 (3).

Following a murder, a professional photographer supplied in 1958 for £15 Press reporters with photographs of the murdered man among a wedding group which the photographer had taken in 1956 at the wedding of the murdered man's daughter and of which the copyright was in his son-in-law. The publication of the photographs in two daily newspapers, which the photographer knew was intended, caused distress to the murdered man's daughter and son-in-law. In 1958 the son-in-law brought an action for damages for breach of copyright against the photographer in the High Court. By his summons for directions in the action the son-in-law applied for a transfer of the action to a named county court, and, by letter of his solicitors, sending the summons to the photographer's solicitors, asked their client's consent to the transfer of the action. The photographer's solicitors replied, agreeing, and by consent an order was made in April, 1959, transferring the action to the county court. It was not stated whether the transfer was under s. 65 and s. 43 of the County Courts Act, 1934, or under s. 45 (under which latter section the jurisdiction in the transferred action would be limited to claims not exceeding £400). The agreement was not filed before trial as required by the County Court Rules, Ord. 16, r. 10 (2) (b) for a transfer pursuant to s. 43, though it was filed subsequently; and the claim was not stated in the pleadings or elsewhere to be limited to £400, nor was there any recorded abandonment of excess, so as to bring the transfer within s. 45. The son-in-law was awarded £1,000 punitive damages, for breach of the copyright.

Held: (i) the transfer to the county court should be regarded as having been made under s. 65 of the County Courts Act, 1934, pursuant to agreement under s. 43, conferring on the county court unlimited jurisdiction in the action, viz., jurisdiction to award more than £400 damages, for the following reasons—

(a) the memorandum signed by the parties' solicitors, which s. 43 predicated, did not need to be contained in a single document and the solicitors' letters subsequent to the summons for directions constituted a sufficient memorandum.

(b) though the letters were written after the summons for directions was issued, it was sufficient that the consent was given before the order for transfer was made, as consent was validly given for the purposes of s. 43 if it was in existence when the county court judge heard the case.

Dictum of Lord Goddard, C.J., in *R.* v. *Judge Willes, Ex p. Abbey National Building Society* ([1954] 1 W.L.R. 136) applied.

(c) the facts that there had been agreement between the solicitors and that the transfer was by consent were appropriate to the transfer being under s. 65 and s. 43 rather than under s. 45; moreover, an abandonment of any excess damages over £400 would have been necessary if a transfer were to be ordered under s. 45, and there was no evidence of such an abandonment nor should abandonment be inferred in the present case.

(d) the failure to file the agreement to transfer the action was a procedural defect, not going to the jurisdiction of the court, and it had been waived by failure to object to it at the trial.

(ii) the case was a proper one for an award of exemplary damages, and, apart from the general jurisdiction of the court, statutory power to award them was conferred by s. 17 (3) of the Copyright Act, 1956; in assessing them the county court judge was justified in taking into consideration the distress caused to the plaintiff's wife, as well as to the plaintiff, and, having regard to the flagrant infringement of the plaintiff's right, to the intrusion into his life and disregard of his feelings, the court would not interfere with the amount of damages awarded.

Appeal dismissed.

[**Editorial Note.** The County Courts Act, 1959, which superseded the Acts of 1934 and 1955, came into operation on Oct. 1, 1959. The provisions of the Act of 1959 corresponding to s. 43, s. 45 and s. 65 of the Act of 1934 are s. 42, s. 45 and s. 67.

As to High Court actions triable by a county court by agreement, see 9 Halsbury's Laws (3rd Edn.) 158-160, paras. 309-312, and 165, para. 323; and for cases on the subject, see 13 Digest (Repl.) 398, *263-267* and 403-407, *308-337*.

As to damages for breach of copyright, see 8 Halsbury's Laws (3rd Edn.) 447, para. 812; and for cases on the subject, see 13 Digest (Repl.) 128, 129, *675-687*.

For the Copyright Act, 1956, s. 17 (3), see 36 Halsbury's Statutes (2nd Edn.) 103.]

Cases referred to:

Butterworth v. *Butterworth & Englefield*, *Collins* v. *Collins & Harrison*, *Barratt* v. *Barratt & Fox*, *Howell* v. *Howell & Walker*, *Adams* v. *Adams & Ward*, *Ellworthy* v. *Ellworthy & Ledger*, [1920] P. 126; 89 L.J.P. 151; 122 L.T. 804; 17 Digest (Repl.) 76, *12*.

Loudon v. *Ryder*, [1953] 1 All E.R. 741; [1953] 2 Q.B. 202; [1953] 2 W.L.R. 537; 17 Digest (Repl.) 76, *13*.

R. v. *Judge Willes, Ex p. Abbey National Bldg. Soc.*, [1954] 1 W.L.R. 136; (1953), 98 Sol. Jo. 44; 13 Digest (Repl.) 395, *243*.

Appeal.

The defendant appealed against an order of His Honour Judge Blagden, sitting in Westminster County Court, made on Dec. 17, 1959, awarding the plaintiff £1,000 damages against the defendant in an action for damages for breach of copyright. The grounds of appeal were, among others, that the judge had no jurisdiction to award the plaintiff damages in excess of £400, that the damages awarded were in all the circumstances excessive and that the judge was wrong in law in all the circumstances in awarding vindictive damages.

Neil Lawson, Q.C., and *T. I. Payne* for the defendant.
Dimitry Tolstoy, Q.C., and *L. J. Belcourt* for the plaintiff.

SELLERS, L.J.: On Dec. 17, 1959, His Honour JUDGE BLAGDEN, sitting in Westminster County Court, awarded the plaintiff £1,000 damages against the defendant. The defendant appeals, alleging, first of all, that the judge, sitting in the county court, had no jurisdiction to award damages in excess of £400 and, if he had, that they were excessive, because they were too much in themselves for the wrong done and because they had also an element in them of what is described in the notice of appeal as vindictive damages. It was said, too, in the course of argument that in what I will describe as some minor matters the learned judge misdirected himself on the evidence.

The defendant is a photographer carrying on business in Southport. In the course of that business, which may not have been a very extensive one, he took some photographs of the plaintiff's wedding on Aug. 22, 1956, and, indeed, he produced quite a handsome album of photographs of that occasion. These photographs were taken at the request of the plaintiff made through the agency of his present wife, his then fiancée, and it appears that they were ultimately paid for by the wife's father, a Mr. Baker. It is not contested that the copyright of those photographs was in the plaintiff.

Most unfortunately, in June of 1958, the bride's father, Mr. Baker, was missing from his home in the course of his business excursions, and was some little time after found to have been murdered. It is that most untoward incident that has given rise to this litigation. Somehow some members of the Press learned of these photographs taken by the defendant of the wedding, and no doubt they thought that they might include a photograph of the bride's father, Mr. Baker, who had then become a matter of public interest. The defendant was approached—I might say he was besieged—by some Press reporters, in order to get a photograph of Mr. Baker. What they in fact obtained from the defendant was, amongst other things, a wedding group including the plaintiff. The defendant seems to have produced prints of several photographs, for which he was paid some £15, which seems rather a lot of money just for a few prints from negatives which had come into existence some time before.

The use made of one of the photographs, and complained of by the plaintiff, who holds the copyright, was that it appeared in two separate daily papers on June 25, 1958. The learned judge made strong, but by no means too strong, comments about at least the distaste and lack of consideration in those two papers producing this photograph in those circumstances. It was of considerable size, 5½ inches by 4½ inches, and I think in both papers there were captions which did not remove any of the sting of the photographs, and, certainly in one of the papers, the names were given of those who were depicted on the photographs. As the learned judge found, the publication of the photographs in those distressing circumstances was calculated to wound and hurt the plaintiff as well as members of his family who were concerned with it. The plaintiff had the copyright and was entitled to have it safeguarded and not broken in that way. The matter was aggravated in the course of the trial by letters written on behalf of the defendant at one time trying to justify his conduct, and it was revealed at the trial that, if all the reporters wanted was a photograph of Mr. Baker, there was one negative where he was so detached from the others in a group that his picture could well have been removed from that photograph and utilised separately.

The defendant at the time knew what use was going to be made of the prints which he was supplying in breach of his duty, and he must be held responsible for the hurt to the plaintiff through that use, as the photographs were distributed widely through the medium to which he had supplied them. The judge regarded this as a shocking case and awarded the sum of £1,000 damages, as he said as punitive damages, i.e., damages increased above what would be reasonable compensation for the hurt feelings by an element of punitive damages as well.

Various points have been taken to show that the damages were excessive. The first was that, this being an action tried in the county court, the county court jurisdiction admittedly being limited to £400, that was the limit of damages which could have been awarded in any event. It was further said that even £400 would have been excessive. But this action was not commenced in the county court and therefore, on the face of it, was not limited by the county court's limits on jurisdiction. It was commenced by a writ in the High Court on Aug. 13, 1958, and the pleadings (the statement of claim and defence, further and better particulars and various interrogatories) all followed under the procedure of the High Court. Then there came a time when the plaintiff desired to transfer the action from the High Court to the county court. The summons for that purpose was dated Jan. 15, 1959. It was the common form of a summons for directions and by the material paragraph requested that the place of the trial should be Westminster County Court. On the next day, Jan. 16, that summons of Jan. 15 was sent to the solicitors for the defendant with a letter which contained this sentence:

> "We shall be pleased to hear that you are willing to give the particulars and agree to the action being transferred to the Westminster County Court as otherwise it will be necessary for us to put the summons in counsel's list."

On Jan. 23, 1959, the defendant's solicitors replied:

> "We have heard today from our professional clients that they have no objection to this action being transferred to the Westminster County Court."

In due course the summons came up for hearing and an order was made by the master at the request of the parties to this effect (it being dated Apr. 2, 1959):

> "It is ordered that the action be by consent transferred to Westminster County Court and the costs of this application be in the discretion of the county court judge."

It has been argued for the defendant before this court that the transfer to the county court must be held to have taken place under s. 45 of the County Courts Act, 1934, which was in force at the material time. It is submitted on behalf of the plaintiff that the transfer took place under s. 43, and was a transfer of a High Court action for trial in the county court, being a claim for an unliquidated amount with unlimited jurisdiction. Various matters have been discussed to ascertain what was in the minds of the parties when they agreed to transfer this action to the county court. It does not seem to me very profitable to try to resolve what they respectively had in mind and whether either of them applied his mind to which was the appropriate section for the transfer. Having looked at the two sections, I am ready without hesitation to accept the submission made by counsel for the plaintiff that, on the facts of this case, s. 45 is not appropriate, that the terms of s. 43 have been fulfilled by what took place, and that that is the section under which this High Court action was transferred to the county court.

Section 45 relates to transfers where the amount in the High Court action remaining in dispute is within the county court jurisdiction or has fallen within its jurisdiction by reason of what has taken place, so that it would come under the present total sum of £400. Section 43 is of a different character and it reads as follows:

> "If, with respect to any action assigned for the time being to the King's Bench Division of the High Court, the parties to the action agree, by a memorandum signed by them or by their respective solicitors, that a county court specified in the memorandum shall have jurisdiction in the action,

> that court shall have jurisdiction to hear and determine the action accordingly."

That, excluding as it does proceedings in the Chancery Division and proceedings in the Probate, Divorce and Admiralty Division, applies clearly to those actions which fall within the jurisdiction of the Queen's Bench Division, as an action for copyright in fact does.

Has there, then, been an agreement? Have the parties agreed by a memorandum signed by them or by their respective solicitors? The point was taken by counsel for the defendant, and has been advanced still further by his junior, that that section requires a memorandum of the agreement to be in one document only. Recognising that that has not been a requirement for a note or memorandum in writing under the kindred requirements for writing (1) in the Statute of Frauds or formerly in the Sale of Goods Act, 1893, it has been argued that s. 43 of the County Courts Act, 1934, should be construed strictly and that there has not been a fulfilment of the requirements of that section in the circumstances of this case where an agreement is contained in writing by the solicitors but in two documents.

I can see no justification for so holding. It would seem to be wholly unreasonable and I can see no reason whatsoever for arriving at that conclusion. The essential thing is that the parties should agree. Once the action is transferred, a certain procedure is to be followed, and, in respect of a transfer under s. 43, C.C.R., Ord. 16, r. 10 (2) (b) requires that, where a transfer is ordered under what was s. 65 of the Act of 1934 (now s. 67 of the Act of 1959) the agreement that the county court shall have jurisdiction in the proceedings shall be filed. It seems to me that, if the argument stressed by junior counsel for the defendant that the agreement must be in one document is right, it would at least be more appropriate if that rule had said that one memorandum should be filed rather than that the agreement should be filed; but I can see no substance in that interpretation at all.

Therefore one has within the four corners of s. 43 an action in the Queen's Bench Division of the High Court and the agreement of the letters and the memorandum. The agreement is as to an agreed county court, Westminster County Court. That gives the county court jurisdiction. Jurisdiction for what? " The court shall have jurisdiction to hear and determine the action accordingly ". In my view those final words mean that it is not a curtailed action reduced by the amount of damages but it is a High Court action, unlimited and unrestricted, which falls for hearing in the county court. Indeed, it is not the only circumstance in which an action of the High Court can be tried with unlimited jurisdiction, because that also arises under at least one other section of this Act, to which I need not refer.

Once the order has been made, then s. 74 of the County Courts Act, 1934 (now s. 77 of the County Courts Act, 1959) comes into play, under which, where an action, counterclaim or matter is ordered to be transferred from the High Court, provision is made for the party to lodge with the registrar various documents; and the officer in the Supreme Court does what is necessary to transfer the action to the county court. That took place. What did not take place by the time of the trial (and this is relied on) was the filing of the agreement, the two letters, under the County Court Rules, Ord. 16, r. 10 (2) (b). This is taken as an answer to the jurisdiction of the court as alleged by the plaintiff.

Another point taken was that the agreement had not come into existence by

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(1) By the Statute of Frauds, 1677, s. 4, as amended by the Law Reform (Enforcement of Contracts) Act, 1954, s. 1, a note or memorandum in writing is required in the case of a contract of guarantee; by the Sale of Goods Act, 1893, s. 4, which was repealed by s. 2 of the Act of 1954 such a note or memorandum might be required in the case of a contract for the sale of goods of the value of £10. A memorandum for these purposes might consist of two documents; see 8 HALSBURY'S LAWS (3rd Edn.) 96, 97, para. 167.

A the time when the summons was taken out on Jan. 15 but only came into existence afterwards. To my mind neither point goes to the jurisdiction. The point with regard to the summons, I think, has been answered by authority, because it is sufficient if the consent is in existence at the time the order was made; and that clearly was the case here.

The question of the jurisdiction of a county court judge arose in *R.* v. *Judge* B *Willes, Ex p. Abbey National Bldg. Soc.* (2), where LORD GODDARD, C.J., sitting in the Divisional Court, having read s. 43, said (3):

> "That section deals with common law matters, and s. 53 also gives jurisdiction by agreement in equity proceedings; so that the parties, being quite willing for the judge to proceed with the case and give judgment, had only to put their agreement into writing to confer ample jurisdiction on the C judge. But the judge did not give the parties a chance of putting their agreement into writing but proceeded to give a judgment saying that he had no jurisdiction to hear the case."

LORD GODDARD'S judgment was the judgment of the court, the other two members, of which I was one, agreeing with what he said. I would agree again, as I D did there, that it is sufficient if the consent is in existence at the time when the judge took the case, and I think that has been followed in practice within my own experience; the consent has been signed and put into writing even on the threshold of the court itself.

With regard to the failure to file the agreement with the court, that, I understand, was rectified after the trial. The failure was not objected to by the defend- E ant in the course of the trial, although this point of jurisdiction was taken, and, to my mind, whilst it was a procedural blemish, it was not one which undermines the jurisdiction. It was waived by the defendant, as it could be in the circumstances.

The matter of jurisdiction was not dealt with in any detail in the decision of the learned judge, although apparently it was taken before him. How far it was argued F I do not know, but he seems to have dealt with it quite shortly by saying that he had considered the matter, that he had had it in some previous case and that he was satisfied that he had jurisdiction. Under what section he was proceeding is not made clear, but to my mind, as I have indicated, the section which does apply is s. 43 and no other. It is perhaps unfortunate that the learned judge did not look to see what the agreement in writing was, because then no doubt it would G have been put before the court and the rule would have been complied with.

So much, then, for the contention that the county court judge had no jurisdiction to award damages in excess of £400. I think that in the circumstances of this case he had.

Then it is said that the damages are in any case excessive on two grounds, (i) because they are too much in any case for the wrong done to the plaintiff and H (ii) because they include something over and above ordinary compensatory damages. We were referred to some observations on vindictive or punitive damages in a judgment of MCCARDIE, J., in *Butterworth* v. *Butterworth & Englefield* (4). That judge reviewed the law at considerable length. In the course of his judgment, given with his customary thoroughness, he cited (5) from SEDGWICK ON DAMAGES, and he says (6):

> I "The meaning of the phrase 'exemplary damages' is aptly put in SEDGWICK ON DAMAGES (9th Edn.) (1913), s. 347, where that distinguished author says: 'In actions of tort where gross fraud, wantonness, malice or oppression appears, the jury are not bound to adhere to the strict line of compensation, but may, by a severe verdict, at once impose a punishment on the defendant and hold him up as an example to the community . . . damages

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(2) [1954] 1 W.L.R. 136.

(3) [1954] 1 W.L.R. at p. 138.

(4) [1920] P. 126.

(5) [1920] P. at p. 136.

(6) [1920] P. at p. 135.

> assessed on this principle are called exemplary, punitive or vindictive damages '. The origin of the doctrine of exemplary damages is ably dealt with by Sedgwick in the treatise just mentioned. The illustrative English decisions are neatly and fully collected in Halsbury's Laws of England (7). There it is well said: ' Where the wounded feeling and injured pride of a plaintiff, or the misconduct of a defendant, may be taken into consideration, the principle of restitutio in integrum no longer applies. Damages are then awarded not merely to recompense the plaintiff for the loss he has sustained by reason of the defendant's wrongful act, but to punish the defendant in an exemplary manner and vindicate the distinction between a wilful and an innocent wrongdoer '."

Perhaps so far as this case is concerned some justification for heavy damages, amongst others, is that they might well hold the defendant up as an example to the community, i.e., act as a deterrent to others who are willing to supply to the Press information which they know is going to be used in a manner which will be so hurtful and distressing to the people involved.

We were referred also to *Loudon* v. *Ryder* (8), which was a case with a jury tried before Devlin, J., and which came before this court for consideration on damages. Objection was there taken by the appellant to the item of punitive damages which Devlin, J., had put before the jury as being damages rather like imposing a fine. Singleton, L.J., referred to that objection, and, whilst he may not have upheld fully the similarity with a fine, he did say it was no objection to the summing-up that the learned judge had put the matter in that way. He said (9):

> " . . . the judge was entitled to direct the jury that they could give damages of an exemplary or punitive kind."

In the circumstances in which the defendant handed these photographs to the Press in breach of the plaintiff's copyright and having regard to the defendant's knowledge of the use to which they were going to be put, I think that the learned judge was clearly justified in awarding substantial and heavy damages of a punitive nature. Quite apart from the ordinary law of the land, the power so to do is expressly given by statute. By the Copyright Act, 1956, s. 17 (3), it is provided:

> " Where in an action under this section an infringement of copyright is proved or admitted, and the court, having regard (in addition to all other material considerations) to—(a) the flagrancy of the infringement, and (b) any benefit shown to have accrued to the defendant by reason of the infringement, is satisfied that effective relief would not otherwise be available to the plaintiff, the court, in assessing damages for the infringement, shall have power to award such additional damages by virtue of this subsection as the court may consider appropriate in the circumstances."

It seems that this is not a case in which there is any effective relief which could be otherwise given. The benefit which can be shown to have accrued to the defendant is meagre—so much so that the judge made some references to the £15 to which exception was taken by the defendant here. It is the flagrancy of the infringement which calls for heavy damages, because this was a scandalous matter in the circumstances, which I do not propose to elaborate and about which I do not propose to express a view. It is sufficient to say that it was a flagrant infringement of the right of the plaintiff, and it was scandalous conduct and in total disregard not only of the plaintiff's legal rights of copyright but of his feelings and his sense of family dignity and pride. It was an intrusion into his life, deeper and graver than an intrusion into a man's property.

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(7) See, now, 11 Halsbury's Laws (3rd Edn.) 223, para. 391.
(8) [1953] 1 All E.R. 741; [1953] 2 Q.B. 202.
(9) [1953] 1 All E.R. at p. 745; [1953] 2 Q.B. at p. 209.

In the course of the argument reference was made to an old case which concerned an intrusion into property. This seems to me something much more serious, as I say. I cannot think that this court is called on to reduce the damages, high as they are, for they are damages which this judge thought to be appropriate, having seen the witnesses and heard the case. Whether I should have given so much I do not know, but, having seen the figure, I am not prepared to say that it is too high.

One or two other matters ought to be mentioned, though I think that they have no real bearing on the quantum of damages which the judge ordered. It is said that the judge took into consideration the feelings of the wife and the family and not only the feelings of the plaintiff, that he did not realise the anguish which the murder itself would entail and that it was really the Press publication which caused the trouble and not the conduct of the defendant. When one looks at the setting of this case, it seems to me that the defendant ought to have realised its consequences at the time when he did what he did, and that in the circumstances his conduct did aggravate all that anguish which no doubt would be present without the publication of photographs, and therefore it only added to the distress and great hurt. It is bad enough to be subjected to such distress without having further injury imposed on top of it. A very minor matter is something which the judge said about the defendant being a school friend of the plaintiff. That again, I think, is not strictly right. They were not contemporaries but they were members of the same school, and there really is no criticism of the judgment which the learned judge has given. I would dismiss this appeal.

WILLMER, L.J.: I have come to the same conclusion. At the time when this action was tried, the County Courts Act in force was the County Courts Act, 1934, as amended in 1955. I should like to make it clear at the outset that I am proposing to follow the lead given by counsel for the plaintiff, and to refer to the sections as they were numbered in the Act then in force, and not as they are now numbered in the Act of 1959.

The first and most important question which has absorbed our attention is whether the judge ever had jurisdiction to award more than £400. In my judgment, that depends on the section under which the transfer was made; for I am satisfied that the judge would have unlimited jurisdiction if the transfer was made under s. 65, i.e., if it was made on the basis that the action was one to which s. 43 applied. The contrary was, somewhat faintly, argued, but no authority was cited, and it seems to me that we ought to follow the very clear expression of view in the case to which my Lord has referred, *R.* v. *Judge Willes, Ex p. Abbey National Bldg. Soc.* (10), to the effect that where the parties consent to the case being heard in the county court no question of jurisdiction arises.

The substantial question is whether s. 43 is the section applying to this action or whether, on the contrary, the transfer ought to be regarded as having been made in pursuance of s. 45. The plaintiff contends that the case falls within s. 43: the defendant argues for s. 45. It must be one or the other, because there is no other section under which the transfer could have been made in this case. So far as s. 45 is concerned, the transfer could only be made if the amount claimed or remaining in dispute did not exceed £400. Here the action started as a High Court action, and on the face of the pleadings the claim was for unliquidated damages without any stated limitation. There is machinery under s. 42, which enables a plaintiff, if he so desires, to abandon the excess of his claim over £400. But if he does that the County Court Rules provide, by Ord. 7, r. 1 (2), that the abandonment of the excess shall be entered at the end of the particulars. It is said that the "particulars" there referred to are not the same thing as the statement of claim delivered in a High Court action.

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(10) [1954] 1 W.L.R. 136.

I think that that is an unnecessarily subtle point. Certainly the fact is that no note of the abandonment of the excess was ever made in this case, and neither the defendant nor anybody else has suggested that the plaintiff ought to have entered in the pleadings a statement as to the abandonment of the excess.

The power to transfer under s. 45 is a discretionary power; the court or a judge may, if it thinks fit, order that the claim or counterclaim be transferred. It is perfectly true that in this case there was no contest with regard to the order, the parties both being agreeable to the transfer; but, even so, one might have thought that, if it was sought to make the transfer under s. 45, the master before making the order would have made some inquiry as to the abandonment of the excess, seeing that there was nothing on the face of the pleadings to show that the excess was being abandoned by the plaintiff. I am bound to say that, having regard to the failure to use the machinery available under s. 42 for abandoning the excess, and having regard to the absence of any inquiry at the time of the hearing of the summons for directions, I find it difficult to accept the argument that the plaintiff, by applying for the transfer, must be taken as impliedly abandoning the excess. So much for s. 45.

With regard to the other possibility, Mr. Tolstoy has presented a formidable argument in support of his contention that the transfer in this case must be regarded as having been made under s. 65 of the County Courts Act, 1934, i.e., on the basis that the action was one falling within s. 43. As he pointed out, three requirements have to be satisfied under that section: first, the action must not be one which is of a kind assigned to the Chancery Division or to the Probate, Divorce and Admiralty Division; secondly, there must be an agreement between the parties; and, thirdly, there must be a memorandum signed by them or by their respective solicitors.

The first requirement is clearly satisfied. The action is undoubtedly one of the type which s. 43 envisages. Secondly, the parties undoubtedly did agree. As to the question whether there was a memorandum, that which is relied on is the exchange of letters between the solicitors. Notwithstanding the powerful argument addressed to us this morning by Mr. Payne, I can see no reason why the memorandum required by the section must necessarily be contained in one document, and why an exchange of letters between the solicitors cannot be held to amount to a sufficient memorandum within the section.

Two objections have been put forward, however, as militating against the view that this was a transfer of an action falling within s. 43. In the first place it is objected that the memorandum was not in existence at the time when the summons for directions was issued, viz., Jan. 15, 1959. The letters relied on are in fact dated respectively Jan. 16 and Jan. 23. In my judgment, there is no substance in that point. The memorandum, in the shape of the letters, was certainly in existence at the time when the summons for directions was heard. viz., Apr. 2, 1959. I can see no warrant for the suggestion that the memorandum referred to by the section must necessarily be in existence at the time when the summons is taken out. Indeed, there is good authority for the proposition that a memorandum prepared and put in at the time of the trial is sufficient. That was the view expressed by LORD GODDARD, C.J., in *R.* v. *Judge Willes, Ex p. Abbey National Bldg. Soc.* (11) and concurred in by the other members of the court. In my view, therefore, there is no substance in that first objection taken on behalf of the defendant.

The other objection is that, according to the C.C.R., Ord. 16, r. 10 (2)(b), where a transfer is ordered under s. 65, which is what the plaintiff contends for here, the agreement that the county court shall have jurisdiction must be filed in the county court office at the time when the other documents are lodged as required by s. 74 of the County Courts Act, 1934. Admittedly nothing of the sort was done in this case. The letters relied on were not filed at all before the hearing, but we have been informed since the hearing, and since the judgment of the learned judge, that they have been filed. The omission to file the letters in accordance with the rule has been relied on as showing that the transfer cannot possibly have been a transfer made in pursuance of s. 43 and s. 65.

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(11) [1954] 1 W.L.R. 136.

In my judgment, the answer to that point is that furnished by counsel for the plaintiff, viz., that the provisions of Ord. 16, r. 10, are merely procedural requirements which can be waived; they are not requirements which go to the question of jurisdiction. No doubt if objection had been taken, an order to file the documents could have been obtained, and such order might possibly have been coupled with a stay to operate until the order was complied with. But it is impossible to argue from that that this requirement goes to the question of jurisdiction. Moreover, as I have pointed out, there is good authority for the proposition that it is sufficient if the memorandum is actually filed in court at the time of the trial.

One other observation falls to be made, I think, as tending to assist the plaintiff's rather than the defendant's argument. That is that under s. 65 no discretion is conferred on the court, but it is mandatory to make the order if the application is made in a proper case arising under s. 43. For what it is worth, it seems to me that the fact that nothing was said and no inquiry was made at the time when the order was made on the summons for directions, either by the master or by either of the parties, goes rather to show that s. 65 must have been regarded as applying rather than s. 45, which, as I have said, is a section calling for the exercise of discretion.

In those circumstances I am satisfied, as a result of Mr. Tolstoy's argument, that in this case we must regard the transfer as having been made under s. 65, i.e., on the basis that the action fell within s. 43; and accordingly I am satisfied that the judge had unlimited jurisdiction with regard to the damages to be awarded.

On the other matters I have but little to add to what my Lord has already said. The second question that arises is whether this is an appropriate case for the award of exemplary as opposed to compensatory damages. I am abundantly satisfied, for the reasons already stated by my Lord which I need not repeat, that this was a proper case in which to award exemplary damages.

The third question is with regard to the quantum of damages awarded. It has been suggested that the judge misdirected himself, in that he took into consideration in awarding the damages matters which he should not have taken into consideration. For instance, in one passage in his judgment, the judge himself said that the real villains in this case were the newspapers rather than the defendant. In those circumstances it is said that it was wrong to award heavy damages against the defendant, whose act merely created the occasion for the newspapers' behaviour. I think it is to be emphasised that the judge did not accept the defendant's evidence with regard to what the Press representatives who called on him said. In particular he did not believe the defendant when he said he was told that the photographs were required to assist in the discovery of the murderer; nor did he believe the defendant's evidence that he was told that only the photograph of Mr. Baker, the father-in-law, would be published. The learned judge was entitled to take that view of the defendant's evidence, and it is not a view with which we can interfere. If he did take that view, it seems to me that he was abundantly justified in coming to the conclusion, as he did, that the defendant must be regarded as being in the position of an accessory before the fact, so as to share with the newspapers the guilt for what was done.

Another matter objected to was that the judge wrongly took into consideration the suffering of the plaintiff's family, and in particular the plaintiff's wife, in awarding the damages which he did. I think that there can be no doubt that the publication must have come as a terrible shock to the plaintiff's wife, because it appears that, by a terrible mischance, these events happened to coincide with the time of her own confinement. But with regard to that point it seems to me that, assuming, as I think we are entitled to assume, that the plaintiff and his wife were a normally affectionate married couple, there is no reason why the distress caused to the wife should not be regarded as part of the injury suffered by her husband. The mere fact that injury was caused to the wife is itself distressing and injurious, I should have thought, to the husband. I am unable therefore to say that the judge fell into any error with regard to that aspect of the case.

If the judge is not to be criticised for having taken into consideration matters which he ought not to have done, then the only question remaining is one of pure quantum. This was a case in which the damages were very much at large. I, or any one of us, had we been sitting at first instance, might have arrived at some quite different figure; but this much can surely be said, that, having regard to the conduct of the defendant, it was clearly a case which did call for heavy damages. The learned judge has arrived at his figure, and, whatever figure I might have arrived at for myself, I am quite unable to say that the learned judge's figure is so far wrong that we ought to interfere. In those circumstances I agree with my Lord that this appeal must be dismissed.

HARMAN, L.J.: I, too, agree. The procedural question of county court jurisdiction was nicely poised. It may well arise out of the fact that neither party paid particular attention at the time when the transfer was agreed to which section it was that was being used as the vehicle of transfer. When this court is appealed to on the subject, however, the court must make up its mind which section is pointed at. Neither was exactly complied with, but, if the transfer is looked at as being under s. 45 of the County Courts Act, 1934, one must limit or imply an agreement by the plaintiff to limit his damages. That seems to be a very big implication to make. On the other side, if one is looking at s. 43, one is met with the fact that there was a procedural defect in that the memorandum was not filed as it should have been when the other papers were filed with the county court. That, no doubt, is not only a procedural defect but is also some evidence that the solicitors who had charge of the matter did not think that they were pursuing a remedy under s. 43. As my Lords have pointed out, a procedural defect is not fatal to the action in which it happens. It may be waived, and one finds it stated in the High Court Annual Practice (12) (and I have no doubt it is the same in the county court) that a non-compliance with the rules never makes the proceedings void unless the court or a judge so directs. Therefore I am in agreement with my brethren in coming down on the side of s. 43 as opposed to s. 45. It seems to me that it would be a salutary practice that orders for transfer should state se facie the section under which the transfer is being made. If then s. 43 be here the operative one, the damages are unlimited, as the judge thought, and on that footing I should be very far from interfering with what the learned judge has done. The Copyright Act, 1956, specifically provides by s. 17 (3) that punitive damages may be awarded. If ever there was a copyright case in which that was appropriate it is this one. Indeed, if the blow which has fallen on the defendant comes as a shock it may be a salutary one, and possibly act as a deterrent to other persons, who hold similar documents in which the copyright is not in them, against yielding to the craving for sensation of the Press. If it has that effect I for one should agree that the result though severe is salutary.

Appeal dismissed.

Solicitors: *Blundell, Baker & Co.*, agents for *Brighouses*, Southport (for the defendant); *Michael Kramer & Co.* (for the plaintiff).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

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(12) See R.S.C., Ord. 70, r. 1 and compare 30 Halsbury's Laws (3rd Edn.) 399, 400, para. 748.

BARCLAYS BANK, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[House of Lords (Viscount Simonds, Lord Reid, Lord Cohen, Lord Keith of Avonholm and Lord Denning), May 10, 11, 12, June 21, 1960.]

Estate Duty—Company—Shares—Valuation—Control of company—Shares held by deceased in fiduciary capacity—Whether permissible to look beyond company's articles and register—Finance Act, 1940 (3 *&* 4 *Geo.* 6 *c.* 29), *s.* 55 (1), (3), *s.* 58 (4), (5).

The issued share capital of a company consisted of 8,350 ordinary shares of £1 each. The estate of the deceased, who died on Dec. 15, 1955, included eleven hundred shares of the company, and 3,650 shares were the subject of a settlement made by the deceased in 1936. The deceased took no beneficial interest under the settlement, but he had been a trustee thereof since 1936 until his death. The shares were registered in the company's register of members in the names of the deceased and the other three trustees, and the deceased's name appeared first of the four registered holders. By the company's articles of association, on a poll every member had one vote for each share of which he was the holder, and, in the case of joint holders, the vote of the senior who tendered a vote was to be accepted to the exclusion of the votes of the other joint holders, seniority for this purpose being determined by the order in which the names stood in the register of members. On a summons by the executors to determine whether the principal value of the eleven hundred shares comprised in the deceased's estate should be estimated, for the purposes of estate duty, in the manner prescribed by the Finance Act, 1894, s. 7 (5), or in the manner prescribed by the Finance Act, 1940, s. 55*, which would apply if the deceased had control of the company at any time during the five years ending with his death,

Held (Lord Reid dissenting): the method of valuation prescribed by s. 55 (2) of the Finance Act, 1940, applied for the following reasons—

(i) (per Viscount Simonds and Lord Cohen) the testator "had the control" of the company within s. 55 (1), since the question whether he had it must be determined by reference to the constitution of the company (viz., the voting power in accordance with the articles of association), it being irrelevant that a shareholder who had the apparent control was amenable to some sort of outside control; accordingly, as the testator was entitled to vote in respect of 1,100 ordinary shares in his own right and 3,650 ordinary shares as trustee (making together more than half the total 8,350 issued ordinary shares), he had the control of the company.

B. W. Noble, Ltd. v. *Inland Revenue Comrs.* ((1926), 12 Tax Cas. 911) and *Inland Revenue Comrs.* v. *J. Bibby & Sons, Ltd.* ([1945] 1 All E.R. 667) applied.

John Shields & Co. (*Perth*), *Ltd.* v. *Inland Revenue Comrs.* (1950 S.C. 441) approved.

(ii) (per Lord Keith of Avonholm) the testator had the control of the company for the purpose of s. 55 (1) because voting power conferred by shares held in a fiduciary capacity was not to be disregarded (by virtue of s. 58 (5)) in ascertaining his total voting power for that purpose.

Inland Revenue Comrs. v. *J. Bibby & Sons, Ltd.* ([1945] 1 All E.R. 667) applied.

(iii) (per Lord Denning) the testator had control of the company within s. 55 (1) by virtue of s. 58 (4)† of the Finance Act, 1940, though not for any other reason, since the relevant effect of s. 58 (4) was that a control by means of shares held jointly with other persons sufficed for the purposes of

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* The relevant terms of this section are printed at p. 819, letters F to I, post.

† The terms of this subsection are printed at p. 819, letter I, to p. 820, letter B, post.

s. 55, and, though in general voting power conferred by shares held by a trustee was to be disregarded (s. 55 (5)), it was not to be disregarded when the trust was created by the trustee as settlor (s. 58 (5)).

SEMBLE (per VISCOUNT SIMONDS, LORD COHEN and LORD KEITH OF AVONHOLM; LORD REID and LORD DENNING dissenting): s. 55 (3) of the Finance Act, 1940, is a provision which expands the meaning of the phrase to "have control" of a company in s. 55 (1), but s. 55 (3) is not itself a comprehensive definition of the phrase (see p. 820, letter E, p. 828, letter E, and p. 830, letter D, post; cf. p. 824, letter F, and p. 831, letter G, post).

Observations on the meaning of the words "deem" and "deemed" (see p. 820, letter F, p. 823, letters F to I, p. 828, letter E, and p. 831, letters H and I, post).

Decision of the COURT OF APPEAL ([1959] 3 All E.R. 140) affirmed.

[As to the valuation of shares by reference to the value of the assets, see 15 HALSBURY'S LAWS (3rd Edn.) 75, para. 154.

For the Finance Act, 1940, s. 55, see 9 HALSBURY'S STATUTES (2nd Edn.) 483.]

Cases referred to:

Berendsen (S.), Ltd. v. *Inland Revenue Comrs.*, [1957] 2 All E.R. 612; [1958] Ch. 1; [1957] 3 W.L.R. 164; 3rd Digest Supp.

Bibby (J.) & Sons, Ltd. v. *Inland Revenue Comrs.*, [1944] 1 All E.R. 548; 170 L.T. 370; *affd.* H.L., sub nom. *Inland Revenue Comrs.* v. *J. Bibby & Sons, Ltd.*, [1945] 1 All E.R. 667; 114 L.J.K.B. 353; 173 L.T. 17; 29 Tax Cas. 167; 2nd Digest Supp.

British American Tobacco Co., Ltd. v. *Inland Revenue Comrs.*, *Inland Revenue Comrs.* v. *F. A. Clark & Son, Ltd.*, [1941] 2 All E.R. 651; [1941] 2 K.B. 270; 111 L.J.K.B. 1; 165 L.T. 275; *British American Tobacco Co., Ltd.* v. *Inland Revenue Comrs.*, *affd.* H.L., [1943] 1 All E.R. 13; [1943] A.C. 335; 112 L.J.K.B. 81; 169 L.T. 98; 29 Tax Cas. 49; 2nd Digest Supp.

Inland Revenue Comrs. v. *Silverts, Ltd.*, [1951] 1 All E.R. 703; [1951] Ch. 521; 29 Tax Cas. 491; 2nd Digest Supp.

Noble (B. W.), Ltd. v. *Inland Revenue Comrs.*, (1926), 12 Tax Cas. 911.

Parsons, Re, Parsons v. *A.-G.*, [1942] 2 All E.R. 496; [1943] Ch. 12; 112 L.J.Ch. 65; 167 L.T. 384; 2nd Digest Supp.

Public Trustee v. *Inland Revenue Comrs.*, [1960] 1 All E.R. 1; [1960] 2 W.L.R. 203.

St. Aubyn v. *A.-G.*, [1951] 2 All E.R. 473; [1952] A.C. 15; 3rd Digest Supp.

Shields (John) & Co. (Perth), Ltd. v. *Inland Revenue Comrs.*, 1950 S.C. 441; 29 Tax Cas. 475; 2nd Digest Supp.

Appeal.

Appeal by Barclays Bank, Ltd. from an order of the Court of Appeal (LORD EVERSHED, M.R., ROMER and PEARCE, L.JJ.), dated July 21, 1959, and reported [1959] 3 All E.R. 140, reversing an order of DANCKWERTS, J., dated Dec. 17, 1958, and reported [1959] 1 All E.R. 65. By their originating summons dated Oct. 7, 1958, the appellants, the executors of the will of Tom Shipside, deceased, asked for the determination under s. 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, of the following question: whether, on the true construction of the Finance Act, 1894, and the amending Acts, and, in particular, the Finance Act, 1940, s. 55, the principal value of eleven hundred fully paid ordinary shares of £1 each in T. Shipside, Ltd. comprised in the estate of the deceased should be estimated for the purpose of payment of estate duty on his estate in respect of his death (a) in accordance with the provisions of the Finance Act, 1940, s. 55, or (b) in accordance with the provisions of the Finance Act, 1894, s. 7, or (c) in some other, and, if so, what way. DANCKWERTS, J., held that the valuation had to be made in accordance with the Finance Act, 1894, s. 7; on appeal by the Crown, the Court of Appeal held that the method of valuation prescribed by the Finance Act, 1940, s. 55, was applicable.

Viscount Bledisloe, Q.C., and *J. W. Mills* for the appellants.
R. O. Wilberforce, Q.C., and *E. Blanshard Stamp* for the Crown.

Their Lordships took time for consideration.

June 21. The following opinions were read.

VISCOUNT SIMONDS: My Lords, this appeal once more demands your Lordships' consideration of s. 55 and s. 58 of the Finance Act, 1940, and it is not surprising that it raises questions which to me at least appear to be of outstanding difficulty. At the date of his death on Dec. 15, 1955, Tom Shipside, whom I will call "the testator", was the registered holder of 1,100 fully paid ordinary shares of £1 each of T. Shipside, Ltd. Of these shares, he was the beneficial owner. At all times the issued ordinary share capital was 8,350 £1 shares. On Dec. 1, 1936, the testator settled 3,650 of these shares on trusts for the benefit of his wife and children, himself taking no beneficial interest. The original trustees were the testator and two other persons, but on the retirement of one of them the testator, in exercise of a power reserved to him by the settlement, appointed two more persons to be trustees. Thus, at his death, there were four trustees registered as the holders of the 3,650 shares and, as his name appeared first in the register, he was, under the articles of association of the company, entitled to vote in respect of them. He was, therefore, entitled to vote in respect altogether of shares amounting to more than half the issued share capital of the company. The question then arose whether the 1,100 shares which passed on his death should be valued for estate duty in accordance with s. 7 (5) of the Finance Act, 1894, i.e., by reference to their market value, or with s. 55 (2) of the Finance Act, 1940, i.e., by reference to the estimated value of the assets of the company. On a summons issued for the determination of this question, DANCKWERTS, J., decided in favour of the former method, the Court of Appeal of the latter. It is necessary, then, to set out and examine closely the relevant sections of the Act of 1940. They are as follows:

> " 55.—(1) Where for the purposes of estate duty there pass, on the death of a person dying after the commencement of this Act, shares in or debentures of a company to which this section applies, then if—(a) the deceased had the control of the company at any time during the five years ending with his death; . . . the principal value of the shares or debentures, in lieu of being estimated in accordance with the provisions of s. 7 (5) of the Finance Act, 1894, shall be estimated by reference to the net value of the assets of the company in accordance with the provisions of the next succeeding subsection."
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> [Subsection (2) of s. 55 contains provisions for ascertaining the value of the shares by reference to the net value of the assets.]
>
> " (3) For the purposes of this section a person shall be deemed to have had control of a company at any time if he then had—(a) the control of powers of voting on all questions, or on any particular question, affecting the company as a whole which if exercised would have yielded a majority of the votes capable of being exercised thereon; . . . or if he could have obtained such control . . . by an exercise at that time of a power exercisable by him or with his consent.
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> " (5) Control of a company which a person had in a fiduciary capacity shall be disregarded for the purposes of this section.
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> * * *
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> " 58.—(4) References in this Part of this Act to a disposition's being made by any person, to a power's being exercised or exercisable by any person, or to any other act's being done by any person, include references to its being made, or being exercised or exercisable, or being done, by him and

> another jointly or by another at his direction or by a company of which he had control within the meaning of s. 55 (3) of this Act, whether with or without the consent of any other person; references importing an omission on the part of any person in relation to any such matter as aforesaid shall be construed in like manner; and references in relation to any such matter as aforesaid to its being made, or being exercised or exercisable, or being done or omitted, with the consent of any person include references to its being made, or being exercised or exercisable, or being done or omitted, at his request or with or subject to his acquiescence.
>
> " (5) References in this Part of this Act to a person having any power or control or doing any act in a fiduciary capacity shall be construed as references to his having that power or control or doing that act in a fiduciary capacity imposed on him otherwise than by a disposition made by him and in such a capacity only."

The first question—much discussed, though the answer to it may not be decisive—is whether s. 55 (3) is an exhaustive definition of the words occurring in s. 55 (1), " control of the company ", or is an expansive provision, extending the scope of those words beyond their natural meaning. I respectfully suggest that this is a problem which ought not to be allowed to arise, for, profoundly difficult as the drafting of a Finance Act must be, it should be possible at least to indicate clearly into which category such a section as s. 55 (3) falls. That the problem does arise in the present case is apparent, for different views are taken on the question in the Court of Appeal. I do not think that much assistance is to be got from the solution which has been given to similar questions in other cases such as *Re Parsons, Parsons* v. *A.-G.* (1), *St. Aubyn* v. *A.-G.* (2) or *Public Trustee* v. *Inland Revenue Comrs.* (3). The answer must depend on the construction of the particular sections under review in the context of the whole Act in which they are found. In the present case, I agree with ROMER, L.J. (4), in thinking that the so-called " deeming " provision of sub-s. (3) is expansive of sub-s. (1) and that, if a case falls naturally within sub-s. (1), it is unnecessary to look beyond it. I bear in mind what LORD RADCLIFFE said in *St. Aubyn's* case (5) about the word " deem " but, nevertheless, regard its primary function as to bring in something which would otherwise be excluded. I agree, too, with the learned lord justice (4) in thinking that the words in sub-s. (3), " control of powers of voting on all questions ", are singularly inapt to describe the right of a registered shareholder to vote in respect of shares in his name. They are, on the other hand, apt enough if they are intended not to cover such a case but to supplement it. It is said that the reference to s. 55 (3) in s. 58 (4) points in the other direction, but it is, I think, possible that s. 58 (4) looks rather to the extended meaning of control given by s. 55 (3) than to its natural meaning given by s. 55 (1).

As I have said, I doubt whether the answer that is given to this primary question is conclusive of the problem raised in this appeal, but it leads me to examine it on the footing that I must ask whether the testator, being under the constitution of the company entitled to vote in respect of both the 1,100 and the 3,650 shares, " had the control of the company " within the natural meaning of those words. My Lords, in *B. W. Noble, Ltd.* v. *Inland Revenue Comrs.* (6), the words " controlling interest in the company " occurring in the Finance Act, 1920, were said by ROWLATT, J., to mean the interest of one

> " whose shareholding in the company is such that he is the shareholder who is more powerful than all the other shareholders put together in general meeting ";

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(1) [1942] 2 All E.R. 496; [1943] Ch. 12.
(2) [1951] 2 All E.R. 473; [1952] A.C. 15.
(3) [1960] 1 All E.R. 1.
(4) [1959] 3 All E.R. at p. 147.
(5) [1951] 2 All E.R. at p. 498; [1952] A.C. at p. 53.
(6) 12 Tax Cas. 911 at p. 926.

A in other words, one who can by his votes control the company in general meeting. His opinion was approved in a later case in this House; see *British American Tobacco Co., Ltd.* v. *Inland Revenue Comrs.* (7). I see no difference between the natural meaning of the two phrases " having a controlling interest in the company " and " having control of the company ", though it might be desirable, and in the case of the latter phrase was found to be so, to give an extended B meaning to the words. If so, I think that your Lordships should accept the guidance given by this House in *Inland Revenue Comrs.* v. *J. Bibby & Sons, Ltd.* (8). That case determined that control must be ascertained by reference to the company's constitution, and that it is irrelevant that a shareholder who has the apparent control may himself be amenable to some external control. I need not repeat what was said by the noble and learned Lords who took part in that C appeal. What they said applies with equal force to cases arising under s. 55 of the Finance Act, 1940. The Scottish case of *John Shields & Co. (Perth), Ltd.* v. *Inland Revenue Comrs.* (9) applied the same principle to somewhat different circumstances; so did *Inland Revenue Comrs.* v. *Silverts, Ltd.* (10). Nor need anything be said about *S. Berendsen, Ltd.* v. *Inland Revenue Comrs.* (11), which did no more than affirm the obvious distinction between the cases already cited D and that in which shares are registered in the name of a limited company.

I come to the conclusion without recourse to the expansive provision of sub-s. (3) that the testator had control of T. Shipside, Ltd. If I found it necessary to look at the later subsections, I could not come to a different conclusion. For, unless sub-s. (3) is to be interpreted as excluding from the category of persons having control a person who obviously has control by virtue of shares standing E in his own name, the same result must follow. It is not the necessary or natural consequence of an extended meaning being given to a phrase that it should lose its natural one. It is easy to see that the legislature might wish to block a means of escape from the new method of valuation imposed by the section while retaining in its fulness the natural meaning. I see nothing inconsistent in saying that anyone, who by reason of his apparent voting power has the majority of votes, F controls the company, but adding that he also shall be deemed to control the company who can by any means procure the exercise of a majority of voting power.

Mention should, perhaps, be made of s. 55 (5), which provides that control of a company which a person had in a fiduciary capacity is to be disregarded for the purpose of the section. This provision is, so far as the present case is con- G cerned, neutralised by s. 58 (5), which excludes its operation where the fiduciary capacity arises from a trust established by the person having control. But it would seem to have been unnecessary to make this provision, if it was not intended that, where s. 55 (3) was invoked, the Revenue authorities should not look behind the apparent to the real power.

I do not think it necessary to refer to the difficult sub-s. (4) of s. 58, for it H cannot, on any construction, assist the Crown.

In the view that I take, the appeal should be dismissed with costs.

LORD REID: My Lords, this case is concerned with the proper basis of valuation for estate duty of 1,100 shares in T. Shipside, Ltd. which belonged to the late Tom Shipside who died on Dec. 15, 1955. This company had been I formed in 1917 to take over a motor business carried on by the deceased. Eight thousand three hundred and fifty shares were issued, of which he originally held 4,750. In 1936 he made a settlement of 3,650 of these shares on members of his family retaining no beneficial interest for himself. But he was a trustee of this settlement, and there were also three other trustees at the relevant time.

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(7) [1943] 1 All E.R. 13; 29 Tax Cas. 49.

(8) [1945] 1 All E.R. 667; 29 Tax Cas. 167.

(9) 29 Tax Cas. 475.

(10) [1951 1 All E.R. 703; 29 Tax Cas. 491.

(11) [1957] 2 All E.R. 612; [1958] Ch. 1.

The question is whether Tom Shipside had control of the company before his death within the meaning of s. 55 of the Finance Act, 1940. If he had, his 1,100 shares must be valued by reference to the value of the assets of the company in manner provided by the Act of 1940. If he had not, they must be valued in the ordinary way under the Finance Act, 1894. The former method produces a larger valuation. I shall not set out more than a few of the provisions of the Act of 1940. I think that it is quite clear that the purpose of that Act is to prevent a person from diminishing the value of his property for estate duty by erecting a screen between himself and his assets in the form of a company of which he retains control but the constitution of which contains convenient restrictions so that, if there are say one thousand shares, each share valued in the ordinary way is worth less than 1/1000 part of the value of the net assets of the company. There are so many possible variants of such a scheme, that the provisions of the Act had to be elaborate, and it may be that the statutory provisions sometimes go beyond what is necessary to counteract schemes of this kind. But, if the meaning of any particular provisions is in doubt, I would incline to that meaning which can reasonably be related to the apparent purpose of the Act.

The deceased is said to have had control of the company because he was in a position to cast at a general meeting a majority of the votes, 4,750 out of a total of 8,350. He had unrestricted power to vote in respect of his own 1,100 shares and he had, in fact, the right to vote in respect of the 3,650 trust shares. The names of all four trustees appeared on the company's register, but his name came first, and a provision in the articles entitled him for that reason to vote if he chose to personally or by proxy. If he did not choose to vote, then the second named trustee would be entitled to vote. The deceased had not an unrestricted power to vote in respect of these 3,650 shares. It was his duty to obtain the concurrence of the other three trustees, and, if they objected to the way in which he proposed to vote, it is admitted that they could obtain from the court a direction as to how the votes should be cast and, if necessary, an injunction to prevent the deceased from voting as he proposed. But it is argued that that is all irrelevant, that, if he chose to break the law and suffer the consequences, the company must receive his vote, and that, for the purposes of this legislation, he was just as much in control of the company as if he had had unrestricted power to vote in respect of these shares. No one doubts that control means voting control—control of the majority of votes at a general meeting. If a person owns the majority of the shares and holds them in his own name there is no difficulty. But there are other possibilities. He may be in real control, although he does not hold the majority of shares in his own name, because he also has a legal right to direct another shareholder how he shall vote, and can in this way control a majority of the votes. On the other hand, he may be only in apparent control because, although in fact he is the person who casts the votes, as to some or all of these votes he may be bound to vote as directed by someone else, or he may be bound to obtain the consent of someone else. The question is whether, in the context which I shall now quote, control means real control, or apparent control, or whether, as the Crown contend, it means both, so that the Crown have an option; these provisions can be enforced against a person's estate if he had either real or apparent control. The appellants contend that control means real control and that the deceased did not have real control of the company because he was not entitled to cast the 3,650 votes without the consent of the other three trustees.

I must now turn to the relevant provisions of the Act of 1940. Section 55 (1) provides that shares in or debentures of a company shall be valued by reference to the net value of its assets if:

> " (a) the deceased had the control of the company at any time during the five years ending with his death ";

Section 55 (3) then provides:

> " For the purposes of this section a person shall be deemed to have had

> control of a company at any time if he then had—(a) the control of powers of voting on all questions, or on any particular question, affecting the company as a whole which if exercised would have yielded a majority of the votes capable of being exercised thereon; . . . or if he could have obtained such control . . . by an exercise at that time of a power exercisable by him or with his consent."

With these must be read s. 58 (4):

> " References in this Part of this Act to a disposition's being made by any person, to a power's being exercised or exercisable by any person, or to any other act's being done by any person, include references to its being made, or being exercised or exercisable, or being done, by him and another jointly or by another at his direction or by a company of which he had control within the meaning of s. 55 (3) of this Act, whether with or without the consent of any other person; references importing an omission on the part of any person in relation to any such matter as aforesaid shall be construed in like manner; and references in relation to any such matter as aforesaid to its being made, or being exercised or exercisable, or being done or omitted, with the consent of any person include references to its being made, or being exercised or exercisable, or being done or omitted, at his request or with or subject to his acquiescence."

I have quoted this subsection in full because it is said to be unusually obscure. I do not find any of these provisions particularly obscure if each is taken by itself. What is wrong is that they will not fit together.

The leading provision requires that the deceased shall have had " control " of the company. As the word " control " was the basis of a new scheme of taxation and was a novelty in estate duty legislation, I would have expected to find it defined in the Act, but, unless s. 55 (3) is intended to be a definition, it stands undefined. One difficulty about accepting this subsection as a definition is that it uses the word " deemed ", and that is not a word generally used to introduce a definition. But the draftsman clearly thought that it was a definition, because s. 58 (4) contains the words " a company of which he had control within the meaning of s. 55 (3) ", and I am not persuaded that I must reject this view by reason of the phraseology of the subsection. The word " deemed " has often given trouble, and I would adopt what LORD RADCLIFFE said about it in *St. Aubyn* v. *A.-G.* (12):

> " The word ' deemed ' is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible."

I think that the last sentence fits this case. Section 55 (3) contains three parts—(a), which could appropriately be called a definition, and (b) and the concluding part, which are extensions, and the composite character of the subsection may explain, if it does not excuse, the use of the word " deemed ".

When I look at sub-s. (3), I find that it specifies various ways in which a person can have real control or power to acquire it, but I find no sign of apparent control without real control being sufficient. The first words of sub-s. (3) (a) make it plain to my mind that the Crown can go behind the register of shareholders and prove that the deceased, though not actually the holder of certain shares, had control of their votes. I find it inconceivable that any draftsman would have used the elaborate phraseology of this paragraph if all that he meant to say was the right to cast a majority of votes; to speak of control of powers of voting which, if exercised, would have yielded a majority, seems to me clearly to include a case where the deceased controlled the voting power of another shareholder by having a right to direct him how he was to vote so that, if he exercised that control, he could command a majority. And s. 58 (4) confirms this because, inter alia, it makes an act done by another person at his direction equivalent to the deceased's own act. I would have been surprised if this legislation had not contained provisions of that kind; if it only dealt with apparent control—if it made the number of shares held by the deceased in his own name the criterion—the door would be wide open for evasion either by putting shares in the name of a nominee or by making some more elaborate arrangement by which the votes of another shareholder could, in fact, be controlled. And I would reach the same result—that control primarily means real control—if s. 55 (3) is not a definition. I say " primarily " because I have still to deal with the Crown's argument that control has a double meaning, and covers both real and apparent control.

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(12) [1951] 2 All E R. at p. 498; [1952] A.C. at p. 53.

But before I leave s. 55 (3) (a) there is another difficulty. Suppose the deceased held twenty per cent. of the shares in his own name and was able to control the votes of another shareholder who held thirty-five per cent. Obviously the two should be added together to show what is the fact—that the deceased controlled the company. If sub-s. (3) (a) is a definition, then the difficulty is not great. Control of powers of voting is more appropriate language where the control is of other people's powers. A person could be said to control his own power of voting if, in fact, he had an unrestricted right to cast his own votes as he chose, but I do not think that he could be said to control his own power of voting if, in fact, he had no right to vote without someone else's consent. The difficulty appears to me to be much greater if the subsection is not a definition but an extension of sub-s. (1). Then sub-s. (3) would only deal with control of other people's power of voting. The shareholder's right to cast his own votes would be dealt with under sub-s. (1). If the deceased held a majority of shares in his own name, he would, on this view, have control under sub-s. (1); if he controlled sufficient shares in the hands of others to form a majority, then he would have control under sub-s. (3). But if, as in the example I have given, his own shares had to be added to those which he controlled to give a majority, I cannot find anything in the section which directs them to be added together. That confirms me in my view that sub-s. (3) was intended to cover the whole matter, i.e., to be a definition, and that there cannot be a case to which sub-s. (1) applies but sub-s. (3) does not.

Up to this point, the argument for the appellants, in my view, succeeds; the deceased did not have real control of the majority of votes because he was not entitled to cast the trust votes without the consent of his co-trustees. But s. 58 (4) nullifies that reason in all cases to which it applies. Looking to its terms and context, I have no doubt that, if it had been properly drafted, it would have applied to this case. I can imagine no reason why there should be any distinction between this case and those to which it clearly does apply. But that is not enough in a taxing Act. A person cannot be taxed by implication; the words used must be sufficiently wide on a fair interpretation to cover his case. This subsection is so drafted that it can only be applied if you can find a reference to one of the three matters which it specifies. The reference must be, for example, to a power being exercised or exercisable by a person—not merely to a power. And wherever you find such a reference, you are directed to write in " or by him and another jointly or . . . whether with or without the consent of any other person ". If you cannot write that in, you cannot apply the subsection. There are many places in this Part of the Act where that can be done; there is one in the concluding part of s. 55 (3). But I cannot find any reference which, when expanded as s. 58 (4) directs, would affect this case; there is no reference of this kind in s. 55 (1) or s. 55 (3) (a). The latter subsection requires that the deceased should have " had control of powers of voting ", and these words would have to be expanded by adding " by himself or by him and another jointly or . . .". But, in my opinion, " control of powers of voting " is not a reference to " a power's being exercised or exercisable by any person " or " an act's being done by any person ". So I find myself compelled to hold that s. 58 (4) does not apply.

Some importance was attached in argument to two provisions which deal with trustees. Section 55 (5) provides:

> " Control of a company which a person had in a fiduciary capacity shall be disregarded for the purposes of this section."

But, as one might expect, s. 58 (5) provides that this is not to apply where the fiduciary capacity was imposed on a person by himself. So, in this case, s. 55 (5) does not apply. And I can draw no general conclusion from these provisions, because s. 55 (5) is another example of a provision which will not fit together with the rest. Let me suppose that a person owns twenty-five per cent. of the shares himself and has been made trustee by another for a further thirty per cent. Without s. 55 (5), he has control on any view. He alone decides how to cast fifty-five per cent. of the votes. And, if s. 55 (5) only means what it says, it does not help him; he does not have control in a fiduciary capacity, because in that capacity he only has thirty per cent. of the votes. But plainly he ought to be protected by this subsection. I would leave that muddle to be cleared up when that became necessary.

I turn now to the argument that, in any event, these provisions also apply where the deceased had only apparent control. I cannot find anything in these numerous and elaborate provisions which appears to be directed against the estate of a person who only had apparent control, and it does not seem necessary to apply them in that case to achieve the objects of the Act. Moreover, this case shows that the result of so applying them would be capricious. Once s. 58 (4) is out of the way, it is admitted that Mr. Shipside's estate would have escaped if the names of the trustees had been placed on the register in a different order, and the trust votes had always been cast by one of the trustees whose name preceded his on the register. The order in which the trustees cause their names to appear does not seem a very solid ground for imposing additional taxation on the estate of one of them. This argument is really based on the grounds of decision of this House in *Inland Revenue Comrs.* v. *J. Bibby & Sons, Ltd.* (13). That was a case of excess profits tax, and the question was whether the directors had a " controlling interest " in the company. The total holdings of the individual directors were less than fifty per cent., but three of the directors who were brothers were trustees of a family settlement and, adding the trust shares to the directors' individual holdings, produced a majority and so a controlling interest. So, individually and jointly, the directors did have real control of the company; the trustee directors did not require to get the consent of anyone else before the votes of the trust shares were cast. But that was not the reason given in the speeches in this House. In rejecting the argument for the unsuccessful party that controlling interest meant beneficial interest, their Lordships undoubtedly held that the register alone could be looked at, and the fact that a registered shareholder might be subject to outside control was irrelevant. But I do not see how that can be applied to this case unless, indeed, it were held that this rule is of such general application that, even under the Act of 1940, only the register can be looked at. Neither party has argued that, and there are numerous provisions in the Act of 1940 which, in my opinion, clearly entitle the Crown to go behind the register and prove that the deceased had control, although he was not the holder of a majority of the shares. If it were not so, there would be such an easy and obvious method of evasion that an amending Act would immediately be necessary. And if, under this Act, the Crown can go behind the register, what ground is there for applying the rule in *Bibby's* case (13) to prevent the shareholder from doing the same.

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(13) [1945] 1 All E.R. 667; 29 Tax Cas. 167.

Moreover, the rule in *Bibby's* case (14) is not absolute. An earlier decision of this House (*British American Tobacco Co., Ltd.* v. *Inland Revenue Comrs.* (15)) shows that it does not apply where a shareholder is another company; it is then permissible to go behind the register, and inquire who controls that company. And it is at least doubtful whether it applies where a registered shareholder is a bare trustee, for that matter was expressly reserved in this House. I must confess that I find this reservation difficult to understand. The question was one of construction—What is the meaning of "controlling interest"? Once it was held that it did not mean beneficial interest, I would have thought it must mean either the power to cast a majority of votes according to the register or the power to cast a majority taking into account votes of other shareholders which one or more directors have a right to require to be cast as they prescribe. To say that it means the latter where the other shareholder is a bare trustee but the former in all other cases seems to me perilously like legislating. There may be good reason for the distinction, but I am as yet unable to see how it can be reached by a process of construction, particularly as the dividing line between a bare trustee and a trustee not quite bare seems to be a narrow one.

In my opinion, we ought not to attempt to apply the rule in *Bibby's* case (14) to cases under the Act of 1940. We cannot be bound to do so. In however general terms a rule may be stated, we cannot be bound to apply it in a different field if it is inappropriate there, and I think that it is inappropriate here. We are only dealing here with the power of a single individual to control votes, and that does not seem to involve a particularly difficult inquiry. Moreover, we cannot, in my judgment, apply the rule to the Crown, the Act contradicts it in too many places; and, if we did, the door would be wide open for evasion. And if we cannot apply it to prevent the Crown from going behind the register, I see no reason to apply it to prevent the taxpayer from doing the same. I must admit that I feel no great urge to extend a rule which was not necessary for the decision of *Bibby's* case (14), which has given rise in later cases to much fine-spun argument and subtle distinction, and which would make tax evasion all too easy if it were not buttressed by an illogical exception.

LORD COHEN: My Lords, the Crown claims that for the purpose of estate duty the shares held by the late Tom Shipside in a company known as T. Shipside, Ltd. should be valued on an assets basis in accordance with s. 55 (1) of the Finance Act, 1940, as amended by a later Act, on the ground that, as they contend, the deceased had the control of the company at some time within the five years ending with his death. The issued capital of the company at all material times was 8,350 ordinary shares of £1 each, and each such £1 share carried one vote. The deceased owned beneficially only 1,100 shares but, as trustee with three co-trustees, he held 3,650 shares, so that, if these trustee shares ought to be aggregated with his personal holding for the purpose of determining whether he controlled the company within the meaning of s. 55, he held more than half the issued share capital. It remains to add that, under the articles of association,

> "In the case of joint holders the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders, and for this purpose seniority shall be determined by the order in which the names stand in the register of members."

DANCKWERTS, J., rejected the Crown's contention on the ground that, under s. 55, it is the duty of the court to investigate the true position of the deceased shareholder and that, if his power to control the majority of the voting power in the company in question was dependent on the exercise of votes held by him and others as trustees, he could not be said to control the company since he was bound to vote only on the unanimous decision of himself and his co-trustees. The decision of DANCKWERTS, J., was reversed by the Court of Appeal. Their Lordships differed somewhat in their construction of s. 55, but were agreed that the material factor determining the question of control was voting power as laid down in the articles of association of the company and that, as, under the articles, the deceased was entitled to cast a majority of the votes, he had the control of the company within the meaning of s. 55 (1).

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(14) [1945] 1 All E.R. 667; 29 Tax Cas. 167.
(15) [1943] 1 All E.R. 13; 29 Tax Cas. 49.

Our attention was not called to any authority as to the meaning of " control " in s. 55 (1), but we were invited to look at a number of authorities as to the meaning of the phrase " controlling interest " in certain Finance Acts dealing with the assessment of liability to profits tax and excess profits tax. None of these Acts contained any provision defining what was meant by the words " controlling interest ", but the courts laid down that (i) a person who has power by the exercise of voting rights in accordance with the constitution of a company to carry a resolution at a general meeting has a controlling interest within the meaning of that phrase in the Acts in question, and (ii) it is immaterial whether or not his exercise of that voting power can be controlled either by co-trustees or through appropriate proceedings by order of the court.

The decision of this House in *Inland Revenue Comrs.* v. *J. Bibby & Sons, Ltd.* (16) clearly establishes the first of these propositions. In that case, the directors in their own right held less than a majority of the voting powers, but three of them as trustees held enough shares to make up the balance and it was held that their votes in respect of the joint holding should be aggregated with the individual holdings of the directors in determining whether the directors had a controlling interest. As LORD RUSSELL OF KILLOWEN said (17): " The words ' controlling interest ' mean ' controlling voting power ': that is the interest in view, not beneficial interest ". But, as the trustees were all directors, the House did not have to consider what the position would be if only one of the trustees had been a director of the company. This kind of question arose in the Court of Session in *John Shields & Co.* (*Perth*), *Ltd.* v. *Inland Revenue Comrs.* (18). In that case, more than half the share capital of a company was held by the trustees of the will of a former governing director of the company. The voting rights in respect of these shares resided under the company's articles of association in the trustee first named on the company's register except on the occurrence of an event which at the material time had not happened. The trustee whose name appeared first on the register was never a director of the company, and it was held that, in these circumstances, the directors did not have a controlling interest in the company, notwithstanding that one of the other trustees was a governing director of the company and might have secured for himself the majority of the voting powers. This decision is, of course, not binding on your Lordships, but I respectfully agree with it and, in my opinion, the second of the propositions I have stated is a reasonable deduction from it.

Some reliance was placed by the appellants on the decision in your Lordships' House in *British American Tobacco Co., Ltd.* v. *Inland Revenue Comrs.* (19). In that case, it was held that, in determining whether company A held a controlling interest in company C, it was permissible to take into account indirect control through company B. In my opinion, this decision does not conflict with the decision in *Bibby's* case (16). In *Inland Revenue Comrs.* v. *Silverts, Ltd.* (20), the present Master of the Rolls (LORD EVERSHED) considered at length the relationship between the decisions in *Bibby's* case (16) and the *British American Tobacco* case (19) and I agree with him that there is no conflict between the two. He summed up his conclusion on the point (21) in these words:

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(16) [1945] 1 All E.R. 667; 29 Tax Cas. 167.

(17) [1945] 1 All E.R. at p. 670; 29 Tax Cas. at p. 180.

(18) 29 Tax Cas. 475.

(19) [1943] 1 All E.R. 13; 29 Tax Cas. 49.

(20) [1951] 1 All E.R. 703 at p. 709; 29 Tax Cas. 491 at p. 508.

(21) [1951] 1 All E.R. at p. 709; 29 Tax Cas. at p. 508.

> " In our opinion, this result involves no conflict with the *British American Tobacco* case (22). Although (as already stated) the formula ' controlling interest ' ought to be treated as being used in the same sense in the Acts of 1937 and 1939, namely, in the ordinary sense of the English language, yet (as observed by ROMER, J.) the questions posed in the *British American Tobacco* case (22) and in the *Bibby* case (23) were different. In neither case was the question the general one: ' Who controls the company? ' In the *British American Tobacco* case (22) the question was whether (in the ordinary and proper sense of the words) company A held a controlling interest in company C, though the control was exercised, not directly but indirectly through the agency of company B. If the question were raised under some other taxing provision: ' Has company B a controlling interest in company C? ' an affirmative answer to that question might be given consistently with the affirmative answer to the first question in the *British American Tobacco* case (22). So, in the *Bibby* case (23) and in the present case, the question: ' Have the directors a controlling interest in the company? ' falls to be answered, aye or no, without regard to the possible question (if asked) whether some other person or body has (indirectly) a controlling interest in the same company."

If, therefore, s. 55 (1) had spoken of the deceased's having a controlling interest in a company and had stopped there, the decisions that I have cited would be conclusive in the Crown's favour. The appellants, however, say that the wording used in s. 55 (1) is " control of " and not " controlling interest in ". If that were all, I should be content to say that it seems to me to be a distinction without a difference, but the section goes on, in sub-s. (3), to specify in what circumstances for the purposes of the section a person is to be *deemed* to have had control of a company. It is said that sub-s. (3) is a definition section, and that the deceased did not fall within any branch of that definition. The use of the word " deemed " seems to me inappropriate to a definition section, and I should be inclined to agree with ROMER, L.J. (24), that it is supplementary to or expansive of sub-s. (1), and not merely expository thereof. If that be the correct view, I should, for the reasons I have already given, be of opinion that the present case falls within sub-s. (1). But, even if I am wrong and sub-s. (3) is to be treated as an exhaustive definition, I should still be of opinion that this appeal fails for the reasons given by the Master of the Rolls. He sums them up in four paragraphs (25), and I would respectfully adopt what he there says.

Counsel for the appellants relied on sub-s. (5) of s. 55 as showing that the court had to look behind the register to decide whether control was held in a fiduciary capacity; but, in my opinion, that subsection does not assist him, since it is quite consistent with the view that the register is the determining factor in deciding whether a deceased has control.

The Crown relied in the alternative on s. 58 (4). Like the Master of the Rolls, I find that subsection difficult to construe and am glad to have reached my conclusion independently of it.

One matter has given me some anxiety, and that is the effect of your Lordships' decision in this case on a case where a majority holding in a company is registered in the name of B. who is a bare trustee for a deceased A. LORD GREENE, M.R., was of opinion in *Bibby's* case (26) that the controlling interest in such a case would be held to be in A. With that view I sympathise, but their Lordships preferred, in *Bibby's* case (23), to reserve that case for decision when the point should arise. It is probably best to take the same course now.

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(22) [1943] 1 All E.R. 13; 29 Tax Cas. 49.

(23) [1945] 1 All E.R. 667; 29 Tax Cas. 167.

(24) [1959] 3 All E.R. at p. 147.

(25) [1959] 3 All E.R. at pp. 145, 146.

(26) [1944] 1 All E.R. 548 at p. 550; 29 Tax Cas. 167 at p. 173.

A Finally, let me cite the observation made in *Bibby's* case (27) by my noble and learned friend on the Woolsack:

> "Those who by their votes can control the company do not the less control it because they may themselves be amenable to some external control."

Despite the change in language in s. 55, these words seem to me applicable to the B present case, and, for the reasons which I have given, I would dismiss the appeal.

LORD KEITH OF AVONHOLM: My Lords, it is common ground that the company in which the deceased held shares at his death was a company to which s. 55 of the Finance Act, 1940, applied, and the sole question is whether the deceased had control of the company within the meaning of that section at any C time during the five years ending with his death.

Control might arise in various ways under the section, but the only control which the Crown claims that the deceased had is voting control in the affairs of the company. The shares which the deceased held beneficially were insufficient to give him voting control but, if it is permissible to consider the voting power which he had as the senior, by virtue of order of registration in the register of D members, of four joint holders of shares under a settlement made by the deceased and to add this voting power to that which he had in respect of the shares held beneficially, then he had clear voting control. If the judgment of this House in *Inland Revenue Comrs.* v. *J. Bibby & Sons, Ltd.* (28) applies, there is only one answer. He had full voting control. But that decision was given with reference to a different statute, the Finance (No. 2) Act, 1939, concerned with excess profits E tax, and the matter under consideration was "controlling interest" of directors in their company. There was no elaboration of the words "controlling interest" as there is of "control of a company" in the Act of 1940, and the words had to be construed standing as they were by themselves, except for the general context provided by the subject-matter of the statute.

In the present case, DANCKWERTS, J., whose judgment has been reversed by F the Court of Appeal, found himself able to distinguish the case of *Bibby & Sons* (28) on the ground that, in the statute then under consideration, there were no provisions which required investigation, as here, beyond and outside the mere position of the shareholder on the company's register. In the present case, he found in s. 55 (5) and s. 58 (5) provisions which called for investigation of the real situation outside the statutory machinery for administration of company control. G So examining the matter, he found the control to reside in the four trustees who held the shares under the settlement and not in the senior of these four persons as entered in the company's register. I find, however, in these provisions indications more adverse to the appellants than favourable to them. If, under the settlement, the shares settled had been an absolute majority of the shares of the company it seems clear, in my opinion, that the voting power thus exercisable H should be treated as showing control by the settlor if he had that control by virtue of being, or becoming, sole trustee, or being entered in the register of the company as the senior of the shareholders in whose names the trust shares were registered. In such a case, there seems no room for the consideration that appealed to DANCKWERTS, J., that the control exercisable by the settlor is not his free and unfettered power to vote, but a power exercisable only on the unanimous decision I of the four registered shareholders. Section 58 (5) would be meaningless on that view. In effect, it says that fiduciary shares shall not be disregarded for the purposes of the statute where they give control of the company and were created by the person having that control.

Control from outside is thus not, in my opinion, an answer to the Crown, where the settlor has controlling voting power in respect of fiduciary shares. Nor is there anything in the statute that suggests that outside control is to be regarded where the holding of fiduciary shares is less than sufficient to give, of itself, voting control in the company. It is, I think, a possible construction of s. 58 (5) that control of a company which a person had in a fiduciary capacity does not mean absolute control in a fiduciary capacity, but control which a person can exercise by the use of fiduciary shares, so that, when added to the shares held by him beneficially, they give him voting control. But, apart from this construction, I think that, once appeal to outside control is rejected, there is no answer to the contention that this case is governed by the judgment in *Bibby & Sons*' case (29). It would be a most anomalous position if fiduciary shares were to be taken into account where they were a majority of the shares issued by the company and were to be rejected when they were a minority.

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(27) [1945] 1 All E.R. at p. 673; 29 Tax Cas. at p. 184.
(28) [1945] 1 All E.R. 667; 29 Tax Cas. 167.

If the Act of 1940 had been passed after the judgments in this House in *British American Tobacco Co., Ltd.* v. *Inland Revenue Comrs.* (30) and *Inland Revenue Comrs.* v. *J. Bibby & Sons* (29), it may be that the Act would have taken a different form. It seems, however, to have anticipated some of the problems that were discussed in these and kindred cases, and to have met them by the terms of s. 55 (3). It is, however, only by a forced construction that sub-s. (3) could, in my opinion, be taken to apply to the exercise of voting power in respect of shares held either in a beneficial, or in a fiduciary capacity. I incline, therefore, to the view that sub-s. (3) is not a definition of the meaning of " control of a company " under sub-s. (1), but an extension of the meaning under that section. On either view, however, the appellants, in my opinion, must fail. If it is a definition section, it must cover direct voting power in respect of shares held beneficially, if only on the principle that the greater must include the less. And if it includes such voting power, it must equally, on the ratio of *Bibby & Sons* (29), include voting power exercised through the holding of fiduciary shares.

Reference was made to s. 58 (4) of the statute. This is a somewhat obscure provision which I am inclined to read as meaning broadly that anything done relevant to the statute is to be treated as done by a person, whether done by him alone or jointly with another, or by another at his direction, or by a company of which he has control within the meaning of s. 55 (3). In the matter of control of a company under s. 55, it excludes a defence that control by an individual must be exercisable by him directly and personally. I find it unnecessary, however, to examine this provision more closely for it has no relevance, in my opinion, to the facts of the case.

I would dismiss the appeal.

LORD DENNING: My Lords, Tom Shipside died on Dec. 15, 1955. The question is whether, during the last five years before his death, he " had the control of " a company called T. Shipside, Ltd.; for the amount of estate duty depends on it. T. Shipside, Ltd. had issued in all 8,350 shares. Up till 1936, Tom Shipside held 4,750 of these shares. That is fifty-seven per cent. So he undoubtedly at that time had control of the company. But in 1936 he settled 3,650 of the shares on his wife and children; and it is said that, by this settlement, he deprived himself of the control of the company. He may have deprived himself of control *in law*—that we have to consider—but it is open to question whether he deprived himself of control *in fact*; for he named, as trustees of the settlement, himself Tom Shipside, his wife Mary Shipside, and his solicitor Mr. Eccleston. Some years later, in 1948, his solicitor retired from the trust; and he and his wife appointed two new trustees, namely, his son Thomas William Shipside and a trusted adviser Mr. Hopkins. These family arrangements may have been significant in law, but the Master of the Rolls (LORD EVERSHED) doubted their significance in fact. He said (31):

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(29) [1945] 1 All E.R. 667; 29 Tax Cas. 167.

(30) [1943] 1 All E.R. 13; 29 Tax Cas. 49.

(31) [1959] 3 All E.R. at p. 146.

> "It appears to me at least highly likely that the conduct and management of the company's affairs remained (and may even have been intended to remain) after the settlement exactly the same as it had been before."

The contention of the appellants, the executor of Tom Shipside's estate, was simply this: Whereas Tom Shipside had control of the company before 1936, he ceased to have control after 1936 because he was then only one out of three or four trustees. It is nothing to the point, so it is said, that he, his wife and son were counted among these trustees. He could not vote on any question without the concurrence of his co-trustees; and if he was minded to vote contrary to their wishes, they could get an injunction to stop him. To this the Crown made answer that, when the 3,650 shares were registered in the books of the company, in the names of the trustees of the settlement, Tom Shipside was the first name recorded in the register; and the company, under its articles, was bound to accept his vote to the exclusion of the votes of the other trustees. The company could not be expected to inquire whether he had obtained the concurrence of his co-trustees or whether any injunction had been granted against him. It had to accept his vote, when tendered for the joint holding of 3,650 shares, just as it had to accept his vote for his sole holding of 1,100 shares. So he had control, say the Crown, by reason of being first-named on the register. If he had put the name of his wife or son first on the register (as he might easily have done), it would have made all the difference. He would not then have had the control of the company.

My Lords, I find these arguments on either side equally unattractive. I feel like exclaiming "A plague on both your houses!" (32). The argument of the executor means that a man who holds a majority of shares can always rid himself of the control of a company by making his wife, or some other member of his family, a joint holder with himself of the shares. The argument of the Crown means that a man who is a joint holder of shares with his wife has control if he puts his own name first on the register, but not if he puts his wife's name first. I do not think that Parliament intended to enact anything so haphazard or so open to abuse. It must have intended to deal with joint holdings of shares; and the only place where it has done so is s. 58 (4) of the Finance Act, 1940. It seems to me that a reasonable interpretation of that subsection will cure all the difficulties presented by the rival contentions. This point—the "new point" raised by the Crown for the first time in the Court of Appeal—is, to my mind, the answer to the difficulties. But I cannot explain it without first making a survey of s. 55.

Section 55 is dealing with the position of a person who has died—"person" in the singular, not in the plural—and it is, to my mind, both intelligible and comprehensive when it is applied to a man's own holdings of shares without regard at this stage to his joint holdings. It contains a definition, or what I regard as a definition, of the circumstances in which a person will be held to have had control of a company. The definition is given in s. 55 (3). The word "deemed" there simply means "held". The subsection is to be read as if it said: "For the purposes of this section a person shall be *held* to have had control of a company at any time if . . ." You must remember that the draftsman here is seeking to explain, not the meaning of a single word, but the meaning of the entire phrase: "a person" who "had the control of a company at any time". A very natural way of explaining such a phrase is to use words to convey what it is to be *understood* to mean; or *considered* to mean; or, if you like, what it is to be *deemed* to mean: for the purposes of the section. If you should try to explain the phrase yourself, you will, I suggest, soon find yourself slipping into the words of the draftsman here or something very like them. "Deemed" is not used in the technical sense which a lawyer uses when he "deems" black to be white. It is used in the sense which an ordinary man uses when he "deems" a spade to be a spade. The SHORTER OXFORD DICTIONARY says that the ordinary current sense of "deem" is "to form the opinion, be of opinion; to conclude, consider, hold." Furthermore, the draftsman has himself shown that he intended it to be a definition. In s. 58 (4), he speaks of "a company of which he had control within the meaning of s. 55 (3)". Clearly the draftsman there regards s. 55 (3) as giving a *meaning* to the phrase "a person who had control of a company". Surely when one gives a meaning to a phrase, one defines it.

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(32) As said by Mercutio in Romeo and Juliet, Act 3, Scene 1.

I do not see that any difficulties arise from regarding s. 55 (3) as a definition. Quite the reverse. The words used are apt to cover all the many cases of a single holder which Parliament must have intended to cover. A man has control of a company not only when he has the majority voting power by means of shares in his own name; but also when he has it by means of shares in the name of a nominee; and also when he has it by means of some shares in his own name and others in the name of a nominee. Naturally enough, too, the legislature had to deal with the case where a man holds shares in a fiduciary capacity as being a sole trustee for others. Such shares, which he holds as trustee, may be so numerous as by themselves to give him control; or, although not numerous, they may, when added to others which he holds beneficially, be sufficient to tip the scale and give him control. Section 55 (5), as I read it, provides that such control, gained by reason of a trustee holding, is not to count for the purposes of this section. He has, then, control only in a fiduciary capacity; and such control is to be disregarded. But stay a moment. Suppose that he himself, although a trustee of the shares, was really the founder of the trust—put up the money for it, so to speak—so that he is sole trustee of his own funds, settled maybe on his wife and family. Where that happens, he is, often as not, wearing a cloak marked "Trustee" as a cover for his own dispositions. Parliament has, in s. 58 (5), thought of this also. It says shares so marked by him as "Trustee" are to count as if they were his own. If he gains control by means of trustee shares created by himself—by his own disposition—he has control of the company. So Parliament seems to have thought of most, if not all, contingencies affecting a single holder. But suppose a man is not sole owner of shares, but is only joint owner; or is not sole trustee, but is jointly trustee with others. A good instance is where a man founds a trust and puts the shares, not into his own name alone as trustee, but into his own name jointly, let us say, with the name of his wife and others whom he knows will carry out his wishes. All of them are trustees, but no one can doubt that the founder has, in practice, control of the company just as much as if he was sole trustee. Has not Parliament dealt with joint holdings?

I am clearly of opinion that Parliament has considered joint holdings and provided for them. It has done so in s. 58 (4). It says that, whenever the Act refers to a "disposition", "power", or "any other act" being made, exercised or done *by any person*, it includes cases when it is made, exercised or done *by him and another jointly*. The subsection does not, in terms, say that, when the Act refers to "control being had" by any person, it includes control which is had by him and another jointly, but it is, to my mind, sufficiently comprehended. The phrase "control being had" is ejusdem generis with the phrase "power being exercised", and it is, I think, included in the generic words "any other act being done". "Control" is for many purposes used as synonymous with "power", and Parliament must have intended to put them both on the same footing. A good illustration is s. 55 (5), which says that "control" which a person had in a fiduciary capacity shall be disregarded. That must have been intended to cover, not only the case when the majority voting power is in the hands of a sole trustee, but also the far more common case when settled shares are held by two or more trustees jointly. And it can only cover that case if "control" is comprehended within s. 58 (4) as well as "power". Take also the concluding words of s. 55 (3). It includes the words "power exercisable" by a person. It shows that *potential* control by one person *jointly* with another is to be regarded as giving him control of the company for the purposes of the section. If *joint potential* control is enough, should not *joint actual* control suffice ? These considerations lead me to the conclusion that, as a consequence of s. 58 (4), a man who has control of a company *jointly* with others has control of the company for the purposes of s. 55, and his assets must be valued accordingly. If he holds the joint holding in a fiduciary capacity only, it does not count. But if he holds it beneficially, or is himself the founder of the joint holding, having created it by his own disposition, then it counts as giving him control just as if he were a single owner. This seems to be a sensible and just conclusion, and to be in conformity with the intention of Parliament. It means that Tom Shipside in this case had control of the company—not by virtue of the mere chance that his name came first on the register—but by virtue of the fact that he was the founder of the settlement and one of the joint holders of it.

My Lords, I am almost shy of attaching so much weight to s. 58 (4); for I am well aware that the Master of the Rolls found it inelegant and obscure. Its language was, he said, almost offending. And even Romer, L.J., found it bewildering. So be it. If it is to be approached literally, I would find the same. But where I differ is that I think we should not place so much emphasis on the literal wording of it. We should seek rather to find the object which Parliament had in mind when it enacted it. And this I have no doubt about. The object was to make sure that, whenever the Act referred to a single person doing something or other, it covered him also when he was one of several doing it jointly. Seeing that is its object, I would do my best to effectuate it, even in a taxing statute; especially when the contrary view leads to such untoward results.

If I were wrong in my interpretation of s. 58 (4), then I would have been in favour of allowing the appeal; for I agree with my noble and learned friend, Lord Reid, in thinking that " control " in this Act means real control and not apparent control. I am not prepared to subscribe to the view that a man who is a nominee or bare trustee has control of a company. It seems to me, as it did to Lord Greene, M.R., and his brethren in the Court of Appeal in *J. Bibby & Sons, Ltd.* v. *Inland Revenue Comrs.* (33), that, in such a case, the control would naturally be said to be in the beneficial owner and not in the nominee or bare trustee. Nor am I prepared to subscribe to the view that, on a joint holding, the control is in the person whose name comes first on the register. I would be in favour of looking beyond the first name on the register so as to see where the real control rests: and I would be prepared to find it in all the joint holders concurrently, as Danckwerts, J., did in this very case. I would not, therefore, have found that the deceased Tom Shipside had control of the company but for the provisions of s. 58 (4) of the Act; and it is only by virtue of this that I would dismiss this appeal.

Appeal dismissed.

Solicitors: *Gibson & Weldon* (for the appellants); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

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(33) [1944] 1 All E.R. at p. 552; 29 Tax Cas. at p. 176.

TUKER AND ANOTHER *v.* MINISTRY OF AGRICULTURE, FISHERIES AND FOOD.

[COURT OF APPEAL (Sellers, Ormerod and Upjohn, L.JJ.), April 8, 11, June 2, 1960.]

Agriculture—Marketing scheme—Validity—Apple and Pear Publicity Scheme—Proposed board—Discretionary functions—No power of buying or selling or regulation—Agricultural Marketing Act, 1931 (21 *&* 22 *Geo.* 5 *c.* 42), *s.* 1 (1), *s.* 5, *s.* 6—*Agricultural Marketing Act,* 1958 (6 *&* 7 *Eliz.* 2 *c.* 47), *s.* 1 (1), *s.* 6, *s.* 7, *s.* 8, *s.* 9.

A scheme regulating the marketing of an agricultural product within the Agricultural Marketing Act, 1958, is one which introduces some orderly system of marketing that product, and, while it may properly confer on a board thereby constituted discretionary powers and duties so as to give proper flexibility to the working of the scheme, yet a scheme which is from start to finish purely discretionary does not satisfy the Act (see p. 838, letters E and F, post).

The National Farmers' Union of England and Wales submitted to the Ministry of Agriculture, Fisheries and Food a draft scheme described as the Apple and Pear Publicity Scheme, purporting to be a scheme for regulating the marketing of apples and pears within the Agricultural Marketing Acts, 1931 to 1949. The draft scheme provided for the organisation of a board and committee, and for the keeping of a register of all producers other than small producers and those selling only for manufacture, and it prohibited sales by other producers subject to a right in the board to grant exemptions. It authorised the board to advertise apples and pears and to promote their consumption and use, to encourage better grading, packing, storage and presentation of them and to promote research and education in the needs, demands and practices of buyers and consumers. No system of regulating sales was imposed by any provision of the draft scheme. On the question whether the draft scheme was one that was within the purview of the Agricultural Marketing Acts, 1931 to 1949 (or of the Agricultural Marketing Act, 1958), having regard particularly to the terms of s. 1 (1), s. 5 and s. 6 of the Act of 1931 (or of the replacing provisions of the Act of 1958),

Held: the draft scheme did not satisfy the Agricultural Marketing Acts, 1931 to 1949 (or the Agricultural Marketing Act, 1958) since the restrictions were not sufficient to give it the character of a scheme regulating the marketing of pears and apples, and its regulation of marketing, if any, was by a discretionary power which might or might not be exercised and of which the terms were undefined (see p. 839, letter H, post).

Appeal dismissed.

[**Editorial Note.** The Agricultural Marketing Act, 1958, which came into operation on Aug. 23, 1958, was an Act which effected a consolidation with corrections and improvements. It is stated at p. 835, letter I, post, that the Act of 1958 did not alter the law in any respect material to the present decision.

As to the powers which an agricultural marketing scheme may contain, see 1 HALSBURY'S LAWS (3rd Edn.) 416, para. 819; and for a case on the subject, see 2 DIGEST (Repl.) 156, *1143*.

For the Agricultural Marketing Act, 1931, s. 5, see 1 HALSBURY'S STATUTES (2nd Edn.) 241; and for the Agricultural Marketing Act, 1958, s. 6 and s. 7, see 38 ibid., 12 and 14.]

Appeal.

The appellants appealed against an order of DIPLOCK, J., made on Dec. 16, 1958, and determining, on an originating summons taken out by the appellants, representing the National Farmers' Union of England and Wales, that a scheme described as the Apple and Pear Publicity Scheme submitted by the union to the Ministry of Agriculture, Fisheries and Food, on June 6, 1958, and rejected by the Minister, was not a scheme within the provisions of the Agricultural Marketing Acts, 1931 to 1949, or the Agricultural Marketing Act, 1958.

B. J. M. MacKenna, Q.C., and *D. A. Grant* for the appellants.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*), and *J. C. B. W. Leonard* for the respondents.

Cur. adv. vult.

June 2. **SELLERS, L.J.**, read the following judgment of the court: On June 6, 1958, the National Farmers' Union of England and Wales submitted to the Ministry of Agriculture, Fisheries and Food a draft of a document described as an Apple and Pear Publicity Scheme, purporting to be a scheme under the Agricultural Marketing Acts, 1931 to 1949, regulating the marketing of apples and pears. By a letter of June 23, 1958, the Ministry replied to this effect:

> "I am to say that, while the Minister is satisfied that the National Farmers' Union of England and Wales is substantially representative as aforesaid and that apples and pears are agricultural products within the meaning of the Agricultural Marketing Act, 1931, he is advised that the scheme submitted is not a scheme that regulates the marketing of those products and that consequently it is not within the scope of s. 1 of that Act. In the light of that advice the Minister regrets that, in relation to this scheme, he is unable to take any of the steps laid down in that section. I am to add, in view of the terms of the last paragraph of your letter, that the Minister's decision relates only to the scheme submitted to him. He will consider any other scheme that is submitted to him when he receives it."

No other scheme was submitted, and the union resorted to the courts.

On June 27, 1958, by an originating summons, the court was asked to determine the question:

> "whether on a true construction of the Agricultural Marketing Acts, 1931 to 1949, a document entitled the Apple and Pear Publicity Scheme submitted to the said Ministry on June 6, 1958, in accordance with the provisions of the said Acts is a scheme within the provisions of the said Acts."

DIPLOCK, J., held that the scheme failed to comply with the requirements of the Agricultural Marketing Act, 1958, or its predecessors. He held that it was not a scheme regulating the marketing of an agricultural product by the producers thereof within the meaning of the relevant legislation. The litigation has been conducted by two representatives suing on behalf of the National Farmers' Union of England and Wales, and a notice of appeal dated Feb. 9, 1959, alleged six grounds of either misdirection or wrong decision on the part of the learned judge.

The statutes on the one hand and the scheme purporting to fulfil the statutory requirements on the other have received from the learned judge and from the argument of learned counsel before this court a most careful and thorough analysis. After the summons was issued and before the case was heard, the statutes referred to had been repealed and replaced by a consolidating Act, the Agricultural Marketing Act, 1958. But the case was argued in the court below and very largely before us by reference to the statutes operating when the scheme was prepared and submitted, and not to the new consolidating Act only. As the law was not altered in 1958 in any respect material here, it seems desirable, to save confusion, to retain the learned judge's references. The essence of the issue between the parties is whether the scheme submitted, and adhered to as originally submitted nearly two years ago, is a scheme regulating the marketing of apples and pears, or whether it is, as its title suggests, a publicity or advertising scheme and in substance no more than that.

The Agricultural Marketing Act, 1931, was passed to enable schemes to be made for regulating the marketing of agricultural products and for other stated objects. The long title of the Act is:

> " An Act to enable schemes to be made for regulating the marketing of agricultural products; to confer powers upon boards and other bodies to be constituted in connexion with, or acting for purposes connected with, such schemes; to establish agricultural marketing funds for the purpose of making loans thereout to the boards aforesaid; to encourage agricultural co-operation, research and education; and to provide for purposes connected with the matters aforesaid."

By s. 1:

> " A scheme regulating the marketing of an agricultural product by the producers thereof may be submitted to the Minister in accordance with Part 1 of Sch. 1 to this Act, and the Minister may, subject to the provisions of this section, approve the scheme " (1).

By Sch. 1 a scheme regulating the marketing of an agricultural product may be submitted by any persons who satisfy the Minister that they are substantially representative of the persons who produce that product in the area to which the scheme is applicable. Subsections (3) to (5) deal with procedure which was not invoked here, because the Minister did not regard the scheme as one which could in any circumstances be approved. If the procedure had been followed, then s. 1 (8) provides:

> " If the Minister . . . is satisfied that the scheme will conduce to the more efficient production and marketing of the regulated product, he may . . . lay before each House of Parliament a draft of the scheme . . ." (2).

There then follow provisions whereby the scheme may be approved and be brought into force. When approved by Parliament, the Minister by order approves the scheme and its validity cannot be attacked in any court.

The provisions of the Acts are detailed and cannot perhaps be easily or helpfully summarised. There are provisions which are essential in every scheme and those were referred to as mandatory provisions. The mandatory provisions under s. 2, s. 3, s. 4 and s. 7 are of a procedural and administrative nature; for example, every scheme shall (a) provide for the registration of any producer who makes application for that purpose (s. 2 (1)); (b) constitute a board to administer the scheme (s. 2 (1)); (c) provide for the establishing of a fund—to be administered and controlled by the board (s. 7 (1)).

For present purposes, the more important provisions are the mandatory provisions of s. 6 and the optional provisions of s. 5. The optional provisions of s. 5 indicate what may be provided in a scheme for the regulation of marketing and the encouragement of co-operation, education and research. They include provisions: (a) for empowering the board to buy the regulated product, and to sell, pack, store, adapt for sale, insure, advertise and transport the regulated product (3); (b) for requiring registered producers to sell the regulated product only to or through the agency of the board (4); (c) for empowering the board to buy, and to sell or let for hire to registered producers, anything required for the production, adaptation for sale, or sale of the regulated product (5); (e) for empowering the board to regulate sales of the regulated product by any registered producer by determining for such period as may be fixed by the board on the occasion of each determination—(i) the kind, variety or grade of the product which may be sold; (ii) the price at, below or above which, the terms on which, and the persons to or through the agency of whom the product of any kind, variety, grade or quantity thereof may be sold (6); (f) for regulating the manner in which the regulated product or any kind, variety or quantity thereof is to be graded by or on behalf of registered producers, or the manner in which the regulated product or any kind, variety, grade or quantity thereof is to be marked, packed, stored, adapted for sale, insured, advertised or transported by or on behalf of registered producers (7).

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(1) Agricultural Marketing Act, 1958, s. 1 (1) replaces this and the words from Sch. 1 to the Act of 1931, referred to above.

(2) This is now provided by s. 2 (7) of the Act of 1958.

(3) Cf. Agricultural Marketing Act, 1958, s. 7 (1) (a). There is some divergence between the provisions of the Act of 1931 summarised in the text and the replacing provisions of the Act of 1958.

(4) Cf. Agricultural Marketing Act, 1958, s. 6 (2) (a).

(5) This provision (s. 5 (c) of the Act of 1931) was repealed by Agricultural Marketing Act, 1949, s. 20 (2), Sch., and is not reproduced in the Act of 1958 in similar terms, but see s. 7 (1) (d) thereof.

As the learned judge observed, the provisions of s. 5 are permissive and fall into two classes, those empowering the board to do various things and those restricting the rights of producers to do various things. Section 5 was extended by s. 10 of the Agricultural Marketing Act, 1933, and further extensions of permissive powers were given by s. 9 (1) of the Agricultural Marketing Act, 1949. In the Act of 1958, the relevant sections embracing all these provisions as to regulation of marketing and other matters which must or may be included in schemes are s. 6, s. 7 and s. 8.

There can, we think, be no doubt that any scheme submitted must regulate marketing to comply with the essential requirement of the statutes. It would not be sufficient, in our view, merely to provide that a board had power to make a scheme to regulate marketing—i.e., to delegate a power, without defining and imposing the scheme though no doubt within a scheme, once propounded, there might well be flexibility, powers of adjustment and discretion.

The essence of the appellants' argument was, first, that a scheme would of necessity satisfy the provisions of the Act, and be a marketing scheme within it, if it contained no power other than the mandatory provisions concerning the sale of the product. Secondly, it was said, if it was essential to a valid scheme that it should contain one or more optional provisions, then this scheme in fact satisfied that condition even if the terms of the scheme did not oblige the board to exercise those powers. Regulating the marketing of a product, it was urged, meant no more than imposing some restrictions on the freedom to market and if the scheme restricts the freedom it is sufficient to satisfy the Act. To sum up the appellants' argument, it was contended that s. 1 (1) of the Act of 1931 was descriptive only of a scheme containing all the mandatory provisions and such of the option provisions as the promoters desired.

Before DIPLOCK, J., it had been submitted by counsel for the appellants, as it was submitted here, that a scheme may be a valid scheme although it contains no restrictive provisions authorised by s. 5. After examining the permissive or optional powers in detail, the learned judge observed that they are either provisions which in terms regulate in one way or another the sale of the production by registered producers or give to the board powers in relation to, and only in relation to, a production the marketing of which is regulated by the scheme and in relation to, and only in relation to, registered producers. The section amply confirms that the statutes are dealing with schemes regulating the marketing of agricultural products by producers thereof. After examining s. 6 of the Act of 1931, (8), in a manner which we entirely accept and need not repeat, the learned judge holds:

> " I do not think it possible to read para. (a) [of s. 6 (1)] otherwise than as referring to a scheme which contains provisions regulating the marketing of

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(6) This provision was repealed by Agricultural Marketing Act, 1933; see now s. 6 (2) (c) of the Act of 1958.

(7) See now Agricultural Marketing Act, 1958, s. 7 (1) (h).

(8) Section 6 (1) (a) of the Act of 1931 is replaced by s. 6 (1) of the Act of 1958, which also is mandatory; s. 6 (1) (c) of the Act of 1931 is replaced by s. 9 (2) (3) of the Act of 1958 in somewhat altered, though still mandatory, form.

> the product additional to the mere prohibition of sales by unregistered producers imposed by para. (a) itself. In my opinion, on the true construction of the Act, it requires that a scheme, to be a valid scheme under the Act, must be one which contains provisions, additional to the mere prohibition of sales by non-registered producers, regulating the marketing by registered producers of an agricultural product; viz., provisions which must be complied with—that is, not contravened; see para. (c) of s. 6 (1)—by registered producers touching or concerning the sale by them of the product. I am further of opinion that it is not sufficient that a scheme should merely empower the board to do certain things without also imposing, or at least requiring the board to impose, obligations or restrictions on the activities of registered producers. It does not seem to me that in the natural meaning of the words a scheme regulating the marketing of an agricultural product can have a lesser content than that which I have indicated."

We agree with the conclusions of the learned judge. A scheme to satisfy the Acts must be a scheme regulating the marketing of an agricultural product; this clearly appears from the long title and s. 1 (1). We reject the view that a scheme of necessity satisfies the Act if it contains all the mandatory provisions together with, it may be, one or more of the optional provisions. It is a question to be considered, on a consideration of the scheme as a whole, whether it can properly be so described and no special rules can be laid down. Each draft scheme must depend on its own scope and ambit.

We, however, accept as fundamental to the operation of the Act the submission of the Attorney-General that a scheme regulating the marketing of an agricultural product is one which introduces some orderly system of marketing that product. Furthermore, we accept his argument that, while such a scheme may properly confer on a board thereby constituted many discretionary powers and duties so as to give proper flexibility to the working of the scheme, yet a scheme which is from start to finish purely discretionary cannot properly be described as a scheme regulating the marketing of an agricultural product. It is possible that some schemes containing nothing more than the mandatory provisions might satisfy the requirements of the Act. Others, however seemingly complex and detailed, might not do so.

It is therefore necessary to look at the scheme in broad perspective to see whether it can be properly so described. The title given to the scheme by the promoters is the Apple and Pear Publicity Scheme. It fittingly describes the scheme which clearly provides for the raising of funds for advertising and publicity. The effect of so doing may well promote sales, but it does not serve to regulate the marketing of the products advertised.

Within the first fifty-three clauses there is elaborate provision for an organisation of a board and committee, their election and their procedure. It is proposed that a register of producers shall be kept and every producer shall, on application to the board, be entitled to have his name and address registered therein. By cl. 37:

> "A producer shall be exempt from registration if:—(a) he has not more than two hundred apple and pear trees on land in his possession in England and Wales; or (b) he does not sell apples or pears, otherwise than to makers of apple juice, cider or perry for manufacture into those products; or (c) his apple and pear acreage does not exceed two acres."

The principal powers of the board are contained in Part 6. In this Part, cl. 55 is as follows:

> "Subject to the provisions of the Act of 1931 with respect to the effect of schemes or contracts no person shall sell apples or pears unless he is registered or is exempt from registration."

The effect of cl. 37 would place the restriction only on those producers with more than two hundred apple and pear trees or whose acreage containing such trees exceeds two acres. Clause 56 is required by the Act of 1958, s. 8 (1) (a):

> "The board may from time to time determine that registered producers and sales of apples and pears of such classes or descriptions as may be specified in the determination shall be exempt from such of the provisions of this Part of this scheme as may be specified."

The most important clause disclosing the purpose and object of the proposed scheme is cl. 57, which is as follows:

> "The board may: (a) Advertise apples and pears and promote, improve and increase the consumption and use of apples and pears for all purposes both at home and abroad. (b) Encourage the better grading packing storage and presentation of apples and pears. (c) Co-operate with any other person in doing the things aforesaid and do anything calculated to procure, promote or facilitate the doing of any such things by any other person. (d) Encourage, promote or conduct research and education in connexion with the needs demands and practices of buyers and consumers of apples and pears and report the results of such research to producers."

Under s. 7 (1) (a) of the Act of 1958, a scheme may empower the board to buy the regulated product and to sell, grade and, amongst other things, "advertise" the regulated product. There is therefore express power to advertise in association with the other authorised activities to which advertising would clearly be incidental. It is the failure of the scheme to utilise the other powers available under the statutes, the buying and the selling of the regulated product and the absence of regulation, which in our view justified the rejection of the scheme by the Minister and the decision to that effect by the learned judge.

We agree with Diplock, J., that there is nothing in cl. 57 which regulates the marketing of apples and pears by registered producers or producers at all. Neither does cl. 58, cl. 59 or cl. 60 achieve that object. No system or order or regulation of sales is imposed by any of the clauses. A scheme to make a scheme, which this draft might be said to be, is not in our opinion the sort of scheme that the legislation in question had in mind. As drafted, it may from the point of view of those interested have a real purpose and many virtues and, on the face of it, the difficulty of overcoming the Minister's objections does not appear great and the reasons for the refusal so to do are not in our view obvious.

Section 6 (1) (c) of the Agricultural Marketing Act, 1931, a mandatory provision for requiring the board to impose and recover from any registered producer who contravenes any provision of the scheme made in pursuance of the last foregoing section (i.e., s. 5 permissive or optional provisions) "such monetary penalties . . .", indicates a scheme embracing more than s. 6 in the regulation of the marketing of products and the control of producers. Likewise, s. 6 (1) (a) requires that no sale of the product the marketing of which is regulated by the scheme shall be made by any producer who is not either a registered producer or a person exempted from registration by or under the provisions of the scheme.

We would not regard the restrictions as they stand in the draft scheme as sufficient and adequate to give the draft the character of a scheme regulating the marketing of apples and pears. Furthermore, the regulating of marketing, if any, is by a discretionary power which may or may not be exercised and the terms of which, as well as the obligations with regard thereto, are undefined. In our judgment, the draft scheme does not comply with the requirements of the statutes, and the appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Ellis & Fairbairn* (for the appellants); *Solicitor, Ministry of Agriculture, Fisheries & Food* (for the respondents).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

MAYER *v.* HARTE AND OTHERS.

[COURT OF APPEAL (Sellers, Willmer and Harman, L.JJ.), May 19, 20, 23, June 1, 1960.]

Costs—" Bullock " order—Forms of order—Discretion of judge—Circumstances to be taken into account—Bankruptcy of unsuccessful defendant—Whether any principle of law that where unsuccessful defendant bankrupt costs of successful defendants should be given directly against him.

A plaintiff brought an action for damages ultimately quantified at £20 10s. against two defendants of whom the second defendant, a builder, paid £15* into court with a denial of liability. More than a year after disclosure, by further and better particulars of the second defendant's defence, of the name and address of a sub-contractor by whom the work giving rise to the damage complained of had been carried out, the plaintiff joined the sub-contractor as third defendant. During the fifteen months which elapsed between the delivery of the particulars and the trial the plaintiff made no inquiries as to the financial standing of the third defendant, who was in fact an undischarged bankrupt. At the trial she obtained judgment for the £20 10s. against the third defendant, and the first and second defendants succeeded in their defences. In the course of the argument on costs the county court judge said that he could not take the bankruptcy of the third defendant into account in making an order, but he apparently did not wholly disregard it. He made an order for the costs of the first and second defendants to be paid by the plaintiff and for such costs to be added to the plaintiff's costs recoverable from the third defendant (a *Bullock* order) and refused to make an order for the first and second defendants' costs to be paid instead by the third defendant direct (a *Sanderson* order, sometimes also termed a *Bullock* order). On appeal,

Held (HARMAN, L.J., dissenting): the order of the county court judge should stand because—

(i) costs were in the discretion of the court, subject only to the requirement that the discretion must be judicially exercised, and there was no principle of law that required the county court judge to make an order for the first and second defendants to recover their costs direct from the third defendant merely because the third defendant was insolvent, nor was it shown that the county court judge failed to take into consideration the third defendant's insolvency when deciding what order to make as to costs; therefore the county court judge had not failed to exercise discretion judicially and the Court of Appeal would not interfere.

Rudow v. *Great Britain Mutual Life Assurance Society* ((1881), 17 Ch.D. 600); and *Sanderson* v. *Blyth Theatre Co.* ([1903] 2 K.B. 533) considered.

(ii) if, however, the court were to consider the position de novo, the costs of the first two defendants should, in the first instance, fall on the plaintiff in the circumstances of the present case since, though the sum paid into court had been only less by £5 10s. than the effective claim, the plaintiff had continued the action for fifteen months after being informed of the third defendant's name and address, without making any inquiry as to the financial standing of the third defendant.

Appeal dismissed.

[**Editorial Note.** Since the Supreme Court of Judicature Act, 1873, it has been possible in the High Court to order the costs of a successful defendant to be

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* Under C.C.R., Ord. 11, r. 10, an order of the court would be needed before the money could be paid out, and C.C.R., Ord. 11 did not expressly provide, in such circumstances as those of the present case, for the costs of the first defendant, who would have succeeded, in effect, in his defence if the £15 had been paid out to the plaintiff (compare *Parkes* v. *Knowles*, [1957] 3 All E.R. at p. 602, letter H, and R.S.C., Ord. 22, r. 4 (3); and see p. 842, letter C, post).

A paid by an unsuccessful defendant, as distinct from ordering the costs of the successful defendant to be paid by the plaintiff and to be recovered by him from the unsuccessful defendant. Both the direct and the indirect forms of order have come to be referred to as " Bullock " orders. In order to distinguish between the two types of order, it may be convenient to refer to the former—the direct—order as a "*Sanderson*" order and to the latter—the indirect—order as a
B "*Bullock*" order (compare the former practice stated at p. 850, letter A, post). See, generally, as to costs in actions against two or more defendants, 30 HALSBURY'S LAWS (3rd Edn.) 318, para. 579.

As to the discretion as to costs of a county court judge, see 9 HALSBURY'S LAWS (3rd Edn.) 302, para. 731.]

C Cases referred to:

Besterman v. *British Motor Cab Co.*, [1914] 3 K.B. 181; 83 L.J.K.B. 1014; 110 L.T. 754; Digest (Practice) 879, *4189*.

Bullock v. *London General Omnibus Co.*, [1907] 1 K.B. 264; 76 L.J.K.B. 127; 95 L.T. 905; Digest (Practice) 878, *4185*.

Campbell (Donald) & Co. v. *Pollak*, [1927] All E.R. Rep. 1; [1927] A.C. 732; 96 L.J.K.B. 1132; 137 L.T. 656; Digest (Practice) 861, *4061*.

D *Esron, The & The Wills No. 66*, [1914] W.N. 81; Digest (Practice) 877, *4179*.

Hanak v. *Green*, [1958] 2 All E.R. 141; [1958] 2 Q.B. 9; [1958] 2 W.L.R. 755; 3rd Digest Supp.

Hong v. *A. & R. Brown, Ltd.*, [1948] 1 All E.R. 185; [1948] 1 K.B. 515; [1948] L.J.R. 1816; 2nd Digest Supp.

E *Rudow* v. *Great Britain Mutual Life Assurance Society*, (1881), 17 Ch.D. 600; 50 L.J.Ch. 504; 44 L.T. 638; Digest (Practice) 877, *4176*.

Sanderson v. *Blyth Theatre Co.*, [1903] 2 K.B. 533; 72 L.J.K.B. 761; 89 L.T. 159; Digest (Practice) 878, *4184*.

Appeal.

The plaintiff appealed against an order of His Honour JUDGE POTTER made on
F Nov. 25, 1959, in Bloomsbury County Court, ordering the plaintiff to pay the costs of the first and second defendants in an action for damages for trespass and to add those costs to the costs of the plaintiff which the judge had ordered to be paid by the third defendant (a " Bullock " order). The grounds of appeal were that, in making the order, the judge had failed to give effect to the facts that the third defendant was an undischarged bankrupt or that the second defendant
G knew that fact before the hearing but failed to disclose it to the plaintiff.

J. G. Wilmers and *A. T. Hoolahan* for the plaintiff.

Leonard Halpern for the first defendant.

J. A. Nevin for the second defendant.

The third defendant did not appear and was not represented.

Cur. adv. vult.

H June 1. The following judgments were read.

HARMAN, L.J. (reading the first judgment at the request of SELLERS, L.J.) said: The plaintiff and the first defendant were next-door neighbours occupying houses having adjoining roofs with dormer windows in them. These were covered with asphalt. The plaintiff's had been recently renewed, but the first defendant's
I was old and he determined to have it repaired, and for this purpose he employed the second defendant, a builder, but instructed him to re-cover his part of the roof and dormer with zinc instead of asphalt. For this job the second defendant employed the third defendant, who was a plumber, and he, apparently after some demur, was instructed by the second defendant to join up the zinc on the first defendant's side with the asphalt on the plaintiff's side by turning back the asphalt and tucking the zinc underneath. This the third defendant did, and in the course of it trespassed on the plaintiff's roof and pulled the asphalt covering back six inches or so in order to tuck the zinc underneath. This was not a

satisfactory job and a leak soon started at the join, but on the plaintiff's side where her asphalt had been cracked, with the result that water came into her room below. The plaintiff, discovering this in July, 1957, called in her builder, who reported that the roof repairs alone would cost £17 10s. In September, 1957, she wrote to the first defendant complaining of the damage, to which the first defendant replied that he had got in touch with his builder, i.e., the second defendant; for himself he disclaimed all responsibility. Solicitors' letters followed, and a demand was made against the second defendant for £17 10s. and in addition £15 for consequential damage to the room below, and the plaint was issued on Nov. 1, 1957, joining both the first and second defendants. The particulars claimed £17 10s. for the roof and £3 consequential damage. The first defendant delivered his defence on Nov. 15, 1957, and shortly afterwards on Dec. 9 the second defendant paid £15 into court with a denial of liability. The plaintiff was ill-advised enough to decline this offer, the reason being that it would have involved paying the first defendant's costs.

For some reason which I have been unable to understand, the second defendant did not deliver his defence until May 2, 1958. He then for the first time disclosed the fact that he had employed the third defendant to do the work in question and pleaded that he was an independent contractor. At this point the action went to sleep for about a year, but on July 10, 1959, the plaintiff added the third defendant and re-delivered her particulars of claim. The third defendant, who appeared in person, put in a defence blaming the second defendant and wrote a letter to the registrar explaining the circumstances as he saw them. There followed cross-notices of contribution between the defendants, and in the end the pleadings are far more elaborate than is usual in a High Court action involving half a million pounds.

The case came on for hearing on Oct. 19, 1959, before His Honour JUDGE POTTER. Each of the first and second defendants was represented by counsel, as was the plaintiff, but the third defendant—who was known, at any rate to the second defendant, though not to the plaintiff, to be a man of straw—appeared in person. Judgment was given on Nov. 25, 1959, in favour of the first and second defendants on the ground that each of them had employed an independent contractor, and against the third defendant for the sum claimed, viz., £20 10s., on the ground of trespass.

The note of the judgment on the question of costs, with which alone we are concerned, is in these terms:

> " His Honour JUDGE POTTER gave judgment for the plaintiff against the third defendant for £20 10s. and judgment for the first and second defendants against the plaintiff. On the judgment against the third defendant the learned judge awarded costs in favour of the plaintiff on scale 2; and on the judgment in favour of the first and second defendants he awarded costs in favour of the first and second defendants on scale 3. Counsel for the plaintiff submitted that it would not be proper for the plaintiff to bear the first and second defendants' costs. The learned judge said that he would make a 'Bullock order'. The third defendant disclosed that he was an undischarged bankrupt. Counsel for the second defendant stated that he had known before trial that the third defendant was an undischarged bankrupt."

I may say that that admission is disputed.

> " Counsel for the plaintiff read to the learned judge the passage in the County Court Practice under the heading 'Costs' in the note to County Court Rules Ord. 5, r. 2 (1959 Edn.) at p. 269. The learned judge said that he had forgotten the 'other type of Bullock order'. Counsel for the first defendant objected that an order for costs had now been made and that the plaintiff could appeal. The learned judge said that he had in mind the type of order (i.e., that the plaintiff should add to the costs recoverable from the third defendant the costs which she would have to pay to the first and

A second defendants) and that he would allow further discussion as to the form of his order. After hearing counsel for the first and second defendants, however, the learned judge struck out the Bullock order. Counsel for the plaintiff then submitted that this was a proper case for the 'other type' of Bullock order (i.e., that the unsuccessful third defendant should pay costs direct to the successful first and second defendants) considering that the B third defendant was an undischarged bankrupt and that this fact was known to the second defendant; that in the circumstances the second defendant should not have an order for costs against the plaintiff; and that in any event the plaintiff was entitled to a Bullock order of the type originally intended by the learned judge. He further submitted that in the present circumstances the latter type of Bullock order would be unjust to the plaintiff C who had succeeded in establishing her claim but who would by this type of order bear the whole brunt of the costs. The learned judge said that he could not take into account the third defendant's bankruptcy when making his order for costs and that the plaintiff could have searched before joining the third defendant. The learned judge then said that since when first making the Bullock order he had the type of order in mind (i.e., that the D plaintiff should add to the costs recoverable from the third defendant the costs which she would have to pay to the first and second defendants) that was the order which he would make."

It will be seen that after some changes of mind the learned judge made what is commonly known as a Bullock order (i.e., the order made in *Bullock* v. *London General Omnibus Co.* (1)). That case was an action tried with a jury, being a claim E in tort against two defendants, one of whom was held liable and the other not, and the learned judge ordered that the plaintiff should pay the costs of the successful defendant, but allowed the plaintiff to add these costs to the sum recoverable from the unsuccessful defendant.

When the learned county court judge first said he would make such an order this was the only form of order in such cases that he had in mind. He was, F however, reminded by counsel for the plaintiff that there was another form of order more properly called the *Sanderson* v. *Blyth Theatre Co.* (2) order. No authorities were cited to the county court judge, but a passage was read to him from the COUNTY COURT PRACTICE (1959 Edn. at p. 270) where the position is stated in these words:

> G "Where defendants are joined or sued alternatively there is power in a proper case to order an unsuccessful defendant to pay the costs of a successful one, or to order the plaintiff to pay the costs of a successful defendant and to add them to his costs against the unsuccessful defendant."

The learned judge as so instructed saw the matter as one on which he could exercise his unfettered discretion either one way or the other and he chose to exercise H it in the *Bullock* (1) form and not the *Sanderson* (2) form. It is said, and with much force, that this was an exercise of the discretion as to costs always vested in the judge and one with which this court cannot interfere.

When the matter is more carefully examined, however, it appears that the first pronouncement on this subject is that of SIR GEORGE JESSEL, M.R., in *Rudow* v. *Great Britain Mutual Life Assurance Society* (3). A passage in the I headnote reads:

> "In cases where under the old practice in Chancery the court would have ordered the plaintiff to pay the costs of one defendant and have them over against another defendant, an order will now be made at once for the one defendant to pay them to the other."

SIR GEORGE JESSEL, M.R., in the course of the argument, said this (4):

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(1) [1907] 1 K.B. 264. (2) [1903] 2 K.B. 533. (3) (1881), 17 Ch.D. 600.
(4) (1881), 17 Ch.D. at p. 607.

> "I think it right to state, for I have the concurrence of the lords justices, that under the Judicature Acts it is no longer necessary or proper to order a plaintiff to pay the costs of a defendant and have them over against another defendant, so that if the second defendant is insolvent the plaintiff loses them. The proper form of order now is to order the defendant who is liable to them as between himself and his co-defendant to pay them to the co-defendant."

In the course of his judgment he said this, after speaking of the order which had been made (5):

> "The result, therefore, was, that by virtue of that order the plaintiff became liable to pay Wurth's costs in full and was to have them over against the company. The order employed the machinery which was adopted by the old Court of Chancery and which is no longer either necessary or useful, but is mischievous, and, as this court has already laid down today, is no longer to be used."

In that case the company in question was a company in liquidation and therefore would not be able to pay costs in any event.

These are strong words. Before the Supreme Court of Judicature Act, 1873, it was not permissible to order a party to pay costs to another party on the same side of the record and the Court of Chancery therefore devised the expedient of ordering the plaintiff to pay one defendant's costs but to add them to his costs recoverable against another defendant. SIR GEORGE JESSEL, M.R., was pointing out that this expedient was no longer necessary since the Judicature Act and should no longer be adopted. It was still maintained in actions tried with a jury, however, having regard to the language of R.S.C., Ord. 65, r. 1. This, indeed, is why in *Bullock's* case (6) there was no discussion as to the exact form of the order, it being a jury case. The Master of the Rolls points out that the old form of order might be mischievous in a case where a defendant from whom costs were recoverable by a plaintiff was insolvent, as was the respondent company in *Rudow's* case (7).

The Master of the Rolls' decision was affirmed by the Court of Appeal in *Sanderson* v. *Blyth Theatre Co.* (8) where the headnote reads as follows :

> "In an action in the King's Bench Division, claiming relief against the defendants in the alternative, the court has jurisdiction in a proper case to order the unsuccessful defendant to pay the costs of the successful defendant, or to order the plaintiff to pay the costs of the successful defendant and then to add those costs to the costs which the unsuccessful defendant is ordered to pay to the plaintiff."

The leading judgment was delivered by ROMER, L.J., and he points out that it is of course a matter in which the judge has a discretion. He says this in one passage (9):

> "The modern practice, in order to avoid circuity, has been in such cases, where there has been no jury, to order the unsuccessful defendant to pay directly to the successful defendant his costs: see *Rudow* v. *Great Britain Mutual Life Assurance Society* (7). But of course a judge has jurisdiction to follow the old practice if he thinks fit to do so, and ought to do so when necessary, as, for example, when, having regard to Ord. 65, r. 1, difficulties would otherwise arise by reason of the trial being with a jury."

STIRLING, L.J., carries the matter somewhat further. He says this (10):

> "Now in suits where persons were made defendants for the purpose of complying with the rule just stated, the Court of Chancery had full jurisdiction, when disposing of a suit on its merits, to deal with the costs of such parties and to decide by whom they should be borne. If the court was of

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(5) (1881), 17 Ch.D. at p. 610. (6) [1907] 1 K.B. 264. (7) (1881), 17 Ch.D. 600.
(8) [1903] 2 K.B. 533. (9) [1903] 2 K.B. at p. 539. (10) [1903] 2 K.B. at p. 542.

> opinion that their costs ought to be borne by a co-defendant, the ordinary practice was to direct the plaintiff to pay them in the first instance, and then to add them to his own, and to have them over against the defendant who was to bear them . . . Where, however, a suit was instituted by the Attorney-General ex officio, the practice was different, for, as the Attorney-General could not be ordered to pay costs, costs were ordered to be paid directly by one defendant to another . . . After the Judicature Acts came into operation this practice was altered by the Court of Appeal in *Rudow* v. *Great Britain Mutual Life Assurance Society* (11) and it was laid down that the proper form of order was to order the defendant liable to costs as between himself and his co-defendant to pay them to the co-defendant. JESSEL, M.R., said that the machinery which had been adopted by the Court of Chancery was no longer either necessary or useful, but was mischievous. I understand this to mean that it was no longer necessary, because under the Judicature Acts and rules the court had full power to order one defendant to pay costs to another, and that it was mischievous because the plaintiff who was ordered to pay costs in the first instance, and then to have them over against the defendant, ran the risk of losing them if the defendant proved to be insolvent. The change of practice appears to me, if I may be allowed to say so, to be perfectly proper, and I think that the new practice ought to be adhered to wherever it is practicable to do so."

No doubt these last pronouncements were obiter dicta because, the case being a jury case, the judgment of GRANTHAM, J., in the *Bullock* (12) form was approved. Nevertheless the two cases in the Court of Appeal seem to me to lay it down that in a case not tried with a jury prima facie the *Sanderson* (13) form of order should be followed and that this is particularly so where the insolvency of the defendant on whom the costs will fall makes the injustice to the plaintiff a glaring one. It is unfortunate that in the note to the ANNUAL PRACTICE, Ord. 65, r. 1, under the heading of " Co-defendants ", where this matter is discussed, it is stated that it is the plaintiff's insolvency that matters, and *Rudow's* case (11) is cited for that proposition. This appears merely to be the usual mistake of writing " plaintiff " for " defendant ". The practice also appears to be followed in the Admiralty Court—as witness the judgment of BARGRAVE DEANE, J., in *The Esron & The Wills No. 66* (14). *Besterman* v. *British Motor Cab Co.* (15) shows that it is not necessary to justify such an order that one defendant should blame another. The headnote says :

> " . . . it is a question in all cases whether it was a reasonable and proper course for the plaintiff to join both the defendants in the action."

This case was cited in *Hong* v. *A. & R. Brown, Ltd.* (16), which shows that the practice was still followed at that date. The headnote in that case reads in these terms (17):

> " Where a plaintiff reasonably brings proceedings against two separate defendants and fails against the one but succeeds against the other, there is no rule of law compelling the judge to make a Bullock order under which the unsuccessful defendant is ordered to pay the successful defendant's costs. That is a matter within the judge's discretion and having regard to the Judicature Act . . . no appeal will lie . . . unless it can be established that the judge has failed to exercise any real discretion, because either he failed to act judicially or had purported to exercise his discretion without the proper materials on which to exercise it."

Both ROMER, L.J.'s judgment in *Sanderson* v. *Blyth Theatre Co.* (13), which I have cited, and the headnote to *Hong* v. *A. & R. Brown, Ltd.* (18) show that the judge has a discretion in the matter, as indeed is always the case in questions of costs, but this discretion, like all others, must be exercised in a judicial manner and all proper circumstances must be taken into account.

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(11) (1881), 17 Ch.D. 600. (12) [1907] 1 K.B. 264. (13) [1903] 2 K.B. 533.
(14) [1914] W.N. 81. (15) [1914] 3 K.B. 181.
(16) [1948] 1 All E.R. 185; [1948] 1 K.B. 515. (17) [1948] 1 K.B. 515.

Turning back to the present case, the learned judge could only decide to make a *Bullock* (19) order, whether in one form or the other, on the footing that the plaintiff was justified in bringing both the first and second defendants before the court even though she had not succeeded against them. It must also mean that he had decided that it was just that the third defendant ought to bear, whether directly or indirectly, the costs of his co-defendants. There is no appeal on either of these two points. If all the parties were solvent, it would not much matter in which form the order was couched; the eventual result would be the same and in such a case the advantage of making the *Sanderson* (20) form of order is confined to avoiding circuity, as ROMER, L.J., says; but directly it turns out that the third defendant is an insolvent person the *Bullock* (19) form of order will work a great injustice to the plaintiff, who not only recovers nothing from the third defendant but has to pay the costs of the first and second defendants and is thus very far out of pocket though she had a good cause of action. This, it seems to me, is why both the Master of the Rolls and STIRLING, L.J., pointed out that the insolvency of the defendant to be made liable is the strongest reason for making the order in the *Sanderson* (20) form. No doubt this will in itself produce some injustice to the first and second defendants, who are successful litigants and will have to bear their own costs, but they were each of them at least indirectly responsible for the wrong done to the plaintiff and should therefore suffer rather than she.

The learned county court judge did not have the cases cited to him, and he was evidently unaware that the Court of Appeal had twice indicated the proper practice. Moreover, he expressly refused to take into account the third defendant's bankruptcy, which is the very circumstance to which he was by the authorities directed to have regard, and this seems to me altogether to vitiate the exercise of his discretion. I cannot but think that, if the cases had been put before him, he must have arrived at the conclusion that this is eminently a case for a *Sanderson* (20) order and that this was the order which he would have made. I, therefore, would allow the appeal.

WILLMER, L.J.: I confess that I have found this case one of no little difficulty, and I have not found it easy to make up my mind which way our decision should go. The plaintiff and the first and second defendants are " innocent " parties, in the sense that they have all vindicated their respective rights. The question to be determined is which of these innocent parties is the one who ought to suffer from the unfortunate fact of the third defendant's insolvency.

By her notice of appeal the plaintiff put forward the contention that the learned judge had erred on a question of legal principle. The principle alleged to have been violated is that said to have been laid down by SIR GEORGE JESSEL, M.R., with the concurrence of the other members of the Court of Appeal, in *Rudow* v. *Great Britain Mutual Life Assurance Society* (21): see his statement in the course of the argument (22) repeated in substance in his judgment (23). My Lord has already read the passages referred to, and I do not, therefore, pause to read them again. The circumstances that have arisen in the present case, it is contended, are precisely those envisaged by the Master of the Rolls. It is accordingly argued that his direction how the costs ought to be borne in such a case (viz., that the successful defendants should recover their costs direct from the unsuccessful defendant) is one which ought to be followed, especially as no case

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(18) [1948] 1 K.B. 515.
(19) [1907] 1 K.B. 264.
(20) [1903] 2 K.B. 533.
(21) (1881), 17 Ch.D. 600.
(22) (1881), 17 Ch.D. at pp. 607, 608.
(23) (1881), 17 Ch.D. at p. 610.

A can be found in which any adverse comment has since been made on what was said by the Master of the Rolls in *Rudow's* case (24). Reliance was also placed on *Sanderson* v. *Blyth Theatre Co.* (25) and more particularly on the judgment of STIRLING, L.J. (26), where he said that the practice laid down by the Master of the Rolls in *Rudow's* case (24) was one that " ought to be adhered to wherever it is practicable to do so ".

B I find it impossible to extract from these cases any inflexible principle which requires that, in a case such as the present, the judge must necessarily direct that the successful defendants shall recover their costs direct from the unsuccessful defendant. Any such principle would be contrary to the decision of the House of Lords in *Donald Campbell & Co.* v. *Pollak* (27), whereby it was laid down once and for all that costs are in the absolute and unfettered discretion of the court, C subject only to the requirement that the discretion must be judicially exercised. It is to be remarked, moreover, that the actual decision in *Sanderson's* case (25), as appears from the headnote, was to the effect that the court has jurisdiction either to order the unsuccessful defendant to pay the successful defendant's costs direct, or to order the plaintiff to pay the successful defendant's costs and add them to the costs which the unsuccessful defendant is ordered to pay to the D plaintiff. ROMER, L.J., who gave the leading judgment, made it clear (28) (in the passage which my Lord has already read) that the matter is one for the discretion of the court. For myself I should be content to adopt the statement contained in the note in the ANNUAL PRACTICE (1959 Edn., at p. 1842) which is in the following terms:

> E " . . . the court has a discretion to order the unsuccessful defendant to pay the successful defendant's costs. This it may do either by ordering payment of these costs direct by the unsuccessful to the successful defendant, or by ordering the plaintiff to pay the latter's costs, and allowing him to include these costs in the costs payable to him by the unsuccessful defendant. Each of these two forms of order is commonly known as a Bullock order (from *Bullock* v. *London General Omnibus Co.* (29)). Where the plaintiff may be F insolvent, the first-mentioned order is generally the more appropriate."

As authority for that proposition the statement of SIR GEORGE JESSEL, M.R., in *Rudow's* case (30) is, perhaps rather inappropriately, cited. But I do not think that the proposition is any the less correct for that.

In these circumstances I cannot regard this case as raising any question of G principle, and this much was eventually conceded, or virtually conceded, by counsel in the course of his argument for the plaintiff. The real question is whether it can be shown that the learned judge failed to exercise judicially the discretion which was undoubtedly his. If he did so fail, the further question would arise what order should now be made by this court. In exercising his discretion as to costs, it was without doubt the duty of the judge to take into consideration all H the circumstances of the litigation. One of those circumstances was the fact of the insolvency of the third defendant—a fact which was known to the second defendant before trial, but of which the plaintiff was unaware. If it can be shown that the learned judge completely ignored this fact, and wholly omitted to take it into consideration, there would, I think, be good ground for conceding that he did not exercise his discretion judicially. The position is somewhat I unsatisfactory, because the record of what took place at the trial—for which we are indebted to the note made by counsel for the plaintiff—is necessarily scanty, and the learned judge appears to have given no reasons for the decision at which he ultimately arrived. The record shows, however, that during the course of the argument the learned judge did say that he could not take into account the third defendant's bankruptcy when making his order for costs. This observation has not unnaturally been seized on by the plaintiff as showing that the learned judge failed to exercise his discretion judicially. It was, however, merely an observation made during the argument, and it is an observation that is not altogether free from ambiguity. The learned judge may have meant no more than that he could not regard the third defendant's bankruptcy as such an overriding consideration as would force him to make the order for which the plaintiff asked. Counsel for the first defendant has told us that, according to his recollection, the learned judge did in fact weigh up the risks of loss in relation to the recovery of costs due to the third defendant's insolvency, and decided that those risks ought more fairly to fall on the plaintiff than on the successful defendants. Counsel says that he did not understand the learned judge to be ruling out of consideration altogether the fact of the third defendant's insolvency.

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(24) (1881), 17 Ch.D. 600. (25) [1903] 2 K.B. 533. (26) [1903] 2 K.B. at p. 543.
(27) [1927] All E.R. Rep. 1; [1927] A.C. 732. (28) [1903] 2 K.B. at p. 539.
(29) [1907] 1 K.B. 264. (30) (1881), 17 Ch.D. at pp. 607 and 610.

In this rather unsatisfactory state of affairs I cannot say I am satisfied that the learned judge failed to give any consideration whatsoever to the fact of the third defendant's insolvency. If he did take it into consideration, the weight that he attached to it would be a matter entirely for his discretion. Even if we, or any of us, sitting in this court were disposed to attach a greater degree of weight to this particular circumstance, that would not be a sufficient ground for interfering with an order made in the exercise of the learned judge's discretion.

That is sufficient to dispose of this appeal. But in case I am wrong, and if it be the fact that the learned judge did refuse to take into account at all the third defendant's insolvency, then the position, as I see it, would be that it would be for this court to consider the whole of the circumstances de novo, and arrive at its own conclusion as to how the discretion as to costs ought to be exercised. I have thought it right, therefore, to consider the matter from this point of view, and I have for myself come to the conclusion that in the particular circumstances of this case the right order to make would in any event be that which the learned judge did make. In coming to this conclusion I have not, I hope, underrated the strength of the argument that can be, and has been, put forward on behalf of the plaintiff. It is, no doubt, a circumstance of great significance that the learned judge did see fit to make some form of Bullock order. It is a necessary inference from this circumstance that the learned judge was satisfied that the plaintiff was justified in continuing the action against all three defendants. Why, then, should she be in effect deprived of the fruits of her victory by the misfortune of the third defendant's insolvency, which was no concern of hers? So far as the plaintiff was concerned, it was the first and second defendants between them who selected the third defendant to do the work on the roof which caused the damage. Having thus, as it were, brought him on the scene, why should not they bear the risk of loss consequent on his insolvency?

These are no doubt powerful considerations, but they do not by any means include all the circumstances that should be considered. When regard is had to the history of this unfortunate litigation, and to the amount at stake, there are in my judgment even more powerful reasons for concluding that the risk of loss consequent on the third defendant's insolvency should be borne by the plaintiff rather than by either of the successful defendants. It will be material to set out a few salient facts and dates. The plaint was issued on Nov. 1, 1957, against the first and second defendants in the first instance, claiming the sum of £32. On Dec. 9, 1957, a sum of £15 was paid into court by the second defendant. On Jan. 29, 1958, the particulars of claim were amended, reducing the damages claimed to £20 10s. The plaintiff could, of course, have applied for an order for payment of the £15 out of court, but she preferred to go on with an action against two defendants for the sake of £5 10s. The defence of the second defendant was delivered on May 2, 1958, and from this the plaintiff learned that the third defendant was employed as a sub-contractor to perform the actual work on the roof. On July 16, 1958, in response to a request, further and better particulars of the second defendant's defence were delivered, giving information as to the address of the third defendant and as to the nature of the business which

A he carried on. The plaintiff, therefore, had every opportunity of ascertaining
what sort of man the third defendant was. If she caused any inquiries to be
made we have not been told about them. She waited, however, for a year,
and then, on July 10, 1959, added the third defendant, and delivered re-amended
particulars of claim claiming her damages against all three defendants.
The action came on for trial on Oct. 19, 1959. The trial was not
B completed on that day; the matter was adjourned, and was finally disposed
of on Nov. 25, 1959.

The position, therefore, was that at any time after July 16, 1958 (i.e., during
a period of fifteen months before trial) the plaintiff could have found out for
herself that the third defendant was not a man of substance. At any time after
Dec. 9, 1957, she could have had £15 without incurring any further risk as to
C costs. Yet for the sake of £5 10s. she elected to go on with what was bound to be
an expensive piece of litigation (31), against three defendants, one of whom (as she
could have ascertained) was not a man of substance. That she was legally entitled
to pursue her remedy and exact her full pound of flesh cannot be doubted. It
cannot be said that her action was an abuse of the process of the court, for it was
proved in the event that she was entitled to her £20 10s. But equally the first and
D second defendants were entitled to defend themselves against a claim which the
event proved to be unjustified as against them. Prima facie, having successfully
resisted the plaintiff's unjustified claim, they could expect to be able to look to the
plaintiff for the payment of their costs. The plaintiff, as dominus litis, called the
tune, and the innocent defendants could but dance to it.

In my judgment the plaintiff, having for the sake of £5 10s. elected to invoke
E the costly machinery of a four-party contested action, without apparently making
any inquiry as to the financial standing of the defendant against whom she
succeeded, took the risk both of incurring herself, and of exposing other innocent
parties to, costs which were only too likely to be irrecoverable, and which would
in any case exceed by many times the amount at stake in the action. In these
circumstances, if the matter were one for my discretion, I should be disposed to
F make the same order with regard to the costs as was made by the learned judge.
On this ground also, therefore, in my judgment this appeal should be dismissed.

SELLERS, L.J.: My Lords have stated the facts and the issues fully and
clearly; and as I find my brethren at variance as to the result of this appeal it
remains for me briefly to add my own conclusion on the matters involved. Since
G I have sat in this court I have observed that no issue seems to excite quite such
vigour and duration of argument as an issue of costs on appeal. Unfortunately
in this case, as in *Hanak* v. *Green* (32), the costs of so elaborate a discussion
outweigh too far the amount in issue in the action.

In such circumstances as have arisen here, if no question of the insolvency of
any party (including the plaintiff) arises, it has long been the practice for a judge
H in his discretion to make one of the two orders set out in the headnote to *Sanderson*
v. *Blyth Theatre Co.* (33), which HARMAN, L.J., has already read. The main
dispute on appeal in that case was whether there was jurisdiction in the court to
order the payment at all by the unsuccessful defendant of the costs of the successful
defendant. ROMER, L.J., made an interlocutory remark to the effect that
" Such an order is constantly made in the Chancery Division ". Both the orders
I approved in the *Sanderson* case (33) are nowadays frequently referred to, it
appears, as Bullock orders, from the case of *Bullock* v. *London General Omnibus
Co.* (34). That was an action in tort tried by a jury, and judgment was entered
for the plaintiff against the first defendant and judgment for the successful
defendant against the plaintiff, with costs in each case; and the judgment

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(31) The reason for the plaintiff's refusal to accept the £15 is stated at p. 842, letter C, ante, to have been that she would have to have paid the first defendant's costs.

(32) [1958] 2 All E.R. 141; [1958] 2 Q.B. 9.

(33) [1903] 2 K.B. 533.

(34) [1907] 1 K.B. 264.

further ordered that the costs so payable by the plaintiff to the successful defendant should be included in the costs recoverable from the first defendant. Unless my recollection is very faulty, that order to recover over was always referred to—and it seems accurately—as a *Bullock* (35) order. It was the same kind of order as was in fact made by GRANTHAM, J., in *Sanderson's* case (36)—a case with a jury—but as *Sanderson's* case (36), while upholding the order made, stated that a direct order could now be made, the direct order used to be referred to as the *Sanderson* (36) order in contradistinction to the *Bullock* (35) order.

Either of these orders was in the entire discretion of the learned judge, who most frequently was guided by counsel as to which the parties preferred or which was most convenient. If there were a likelihood of an appeal between a plaintiff and an unsuccessful defendant without either party contemplating or wishing to appeal in respect of a successful defendant, the true *Bullock* (35) order was the more desirable, as there would then be no need for the unsuccessful defendant to bring a co-defendant before the appellate court to rid himself of a direct liability for the costs of that defendant.

As these two forms of order have stood for over fifty years and have been regularly applied as alternatives in a judge's discretion, I cannot think that they can be disturbed now, whichever order the judge thinks fit to make. It may well be, as learned counsel stated, that under modern conditions with defendants so often covered by insurance the direct order has become the more common. But, as I have said, it is undesirable in some circumstances where an appeal is contemplated.

It is said now that the direct order must be made as a matter of legal principle if it is found that an unsuccessful defendant is insolvent or an undischarged bankrupt. Reliance has been placed on the judgment of SIR GEORGE JESSEL, M.R., in *Rudow* v. *Great Britain Mutual Life Assurance Society* (37). This case had been relied on in *Sanderson's* case (36) as justifying a direct order between defendants " in order to avoid circuity ", as appears in the extract from the judgment of ROMER, L.J., already cited in the judgment of HARMAN, L.J. The main contest in *Rudow's* case (37) was whether only the old order could be made —that is, an order that the plaintiff should pay a successful defendant's costs and that the plaintiff should recover those costs against the unsuccessful defendant— or whether a direct order could be made. The court decided that an order could be made at the trial for one defendant to pay costs to the other direct. In the course of the argument SIR GEORGE JESSEL, M.R., made the observation to which my Lord has referred in his judgment as a strong pronouncement (38). But it is significant, in my view, that the matter of insolvency of one of the parties affecting the other is referred to as a consequence of the order, and so indeed it can be, if that order can be made, a matter to be taken into consideration. A passage from the judgment of STIRLING, L.J., in the *Sanderson* case (39) has also been read and I do not repeat it. In my view the judgment as a whole does not treat this as a principle of law or an obligation which it is imperative for the judge to invoke. I would regard what was said by SIR GEORGE JESSEL as a guide, not a rule—certainly, if there were any doubt, after the decision and pronouncement of the House of Lords in *Donald Campbell & Co.* v. *Pollak* (40).

No cases were cited to us (I invited learned counsel to cite if possible) and I know of none where the observations of SIR GEORGE JESSEL as far back as 1881 (41) have been applied, either as a matter of obligation or of discretion. The observation in the White Book may be, as my Lords think, a slip, and indeed it is not strictly accurate but it seems to me to be a more appropriate application of the direct order than in the case of an insolvent unsuccessful

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(35) [1907] 1 K.B. 264. (36) [1903] 2 K.B. 533. (37) (1881), 17 Ch.D. 600.

(38) See p. 844, letter B, ante. (39) [1903] 2 K.B. at p. 542.

(40) [1927] All E.R. Rep. 1; [1927] A.C. 732.

(41) *Rudow* v. *Great Britain Mutual Life Assurance Society*, (1881), 17 Ch.D. 600 at pp. 607 and 610.

A defendant. The passage in the ANNUAL PRACTICE is (1960 Edn. at p. 1842) "Where the plaintiff may be insolvent, the first-mentioned order is generally the more appropriate"—and the reasons are obvious when the order for costs has to go through an insolvent plaintiff.

The first and second defendants in this case were sued and successfully resisted the claim. The plaintiff can apparently pay their costs. She seeks to avoid B that and asks for an order which probably would mean that the costs would not be paid. Why the successful defendants should be the losers and not the unsuccessful plaintiff I cannot see, and I would agree, if discretion lies in this court, with the views of WILLMER, L.J., as I do with his views generally in his judgment, but like him I think the matter was entirely for the learned judge and that the learned judge has not erred in law. The appeal therefore will be C dismissed.

Appeal dismissed.

Solicitors: *R. Edler & Co.* (for the plaintiff); *Philip Mills & Co.* (for the first defendant); *Walford & Co.* (for the second defendant).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

D

BENJAMIN AND ANOTHER v. MINISTER OF PENSIONS AND NATIONAL INSURANCE.

E

[QUEEN'S BENCH DIVISION (Salmon, J.), June 1, 1960.]

National Insurance—"Employed person"—Solicitor's articled clerk—Articles in usual form, not providing for any remuneration—£100 *given to clerk, in one year, in four equal payments—Clerk told to spend the money on holidays* F *—Whether "gainfully occupied in employment . . . under a contract of service"—National Insurance Act,* 1946 (9 *&* 10 *Geo.* 6 *c.* 67), *s.* 1 (2) (*a*).

In order to determine whether a person is within the class of employed persons in s. 1 (2) (a) of the National Insurance Act, 1946, viz., "persons gainfully occupied in . . . employment under a contract of service", two questions must be decided, namely, (a) whether the person is employed G under a contract of service and then (b) whether he is gainfully occupied, but it is not necessary that the gain should be derived from the contract of service (see p. 854, letter I, to p. 855, letter A, post).

On Aug. 31, 1954, K. entered a solicitor's employment as an articled clerk. The articles of clerkship were in the usual form and contained no provision for any remuneration to the clerk. Before the articles were drawn H up, the solicitor explained to K. that he would receive no remuneration. At Christmas, 1954, the solicitor gave £10 to K., because he liked K. and because it was Christmas. At Christmas, 1955, he gave £25 to K., for the same reasons. In January, 1956, the solicitor told K. that he was pleased with him and that, in recognition of his work, he would give him £100 in 1956 which he was to spend on holidays and not to use for his general living I expenses. It was arranged that K. should receive the money in four equal payments when he wanted them, and K. received cheques for £25 in March, July, September and December, 1956. From Nov. 17, 1956, to July 8, 1957, K. was absent from the office, with the solicitor's permission, attending a firm of law tutors. On July 8, 1957, after successfully completing his examinations, he returned to the solicitor's office and continued to work there until the term of the articles expired on Aug. 30, 1957, being paid £5 a week during this period. On the question whether K. was included in the class of employed persons or in the class of non-employed persons, for the purposes of the National Insurance Act, 1946, during the period from Jan. 1, 1956, to Dec. 31, 1956, it was not disputed that during that period K. was employed under a contract of service.

Held: K. was included in the class of employed persons, for the purposes of the Act of 1946, from Jan. 1, 1956, to Dec. 31, 1956, because—

(i) in the circumstances, the £100 given to K. during 1956 was intended to be in payment for services, and was not given to him as a personal present. Principle of *Blakiston* v. *Cooper* ([1909] A.C. 104) applied.

(ii) he was thus a person " gainfully occupied in employment . . . under a contract of service ", within s. 1 (2) (a)* of the Act of 1946, although the contract of service made no provision for payments to him (see p. 855, letter F, post).

(iii) the fact that a person, when he entered into his employment, had no hope, intention or desire of obtaining gain was irrelevant, if he was subsequently paid for his services during the course of his employment, to the question whether he was " gainfully occupied " for the purposes of the Act (see p. 856, letter A, post).

Appeal dismissed.

[**Editorial Note.** The payments at Christmas, 1954, and Christmas, 1955, were held by the Minister not to bring the articled clerk within the class of employed persons for the purposes of national insurance (see p. 853, letter I, and p. 858, letter D, post).

As to classification of insured persons, see 27 HALSBURY'S LAWS (3rd Edn.) 710-714, paras. 1294-1297.

For the National Insurance Act, 1946, s. 1 (2), see 16 HALSBURY'S STATUTES (2nd Edn.) 673.

For the National Insurance (Determination of Claims and Questions) Regulations, 1948, reg. 3, reg. 4, see 15 HALSBURY'S STATUTORY INSTRUMENTS (First Re-issue) 214, 215.

For R.S.C., Ord. 55B, see the ANNUAL PRACTICE, 1960, p. 1591.]

Cases referred to:

Blakiston v. *Cooper*, [1909] A.C. 104; 78 L.J.K.B. 135; 100 L.T. 51; sub nom. *Cooper* v. *Blakiston*, 5 Tax Cas. 347; 28 Digest (Repl.) 226, *976*.

Seymour v. *Reed*, [1927] All E.R. Rep. 294; [1927] A.C. 554; 96 L.J.K.B. 839; 137 L.T. 312; 11 Tax Cas. 625; 28 Digest 232, *1009*.

Vandyk v. *Minister of Pensions & National Insurance*, [1954] 2 All E.R. 723; [1955] 1 Q.B. 29; [1954] 3 W.L.R. 342; 3rd Digest Supp.

Case Stated.

This was an originating motion of appeal under R.S.C., Ord. 55B, on a Case Stated by the Minister of Pensions and National Insurance under reg. 4 of the National Insurance (Determination of Claims and Questions) Regulations, 1948 (S.I. 1948 No. 1144).

On Aug. 1, 1957, in accordance with reg. 3 (1) of the regulations, the appellants, Messrs. Benjamin & Collins, made an application for the determination by the Minister of the question (among other questions) whether John Maxwell Kennedy was included in the class of employed persons or in the class of non-employed persons for the purposes of the National Insurance Act, 1946, while serving as an articled clerk since Aug. 31, 1954. On Aug. 2, 1957, Mr. Kennedy furnished written particulars in accordance with reg. 3 (2) of the regulations. The Minister, in accordance with reg. 3 (3), appointed Mr. A. J. A. Compton to hold an inquiry into the question and to report to him thereon. An inquiry was held on Nov. 8, 1957, when evidence was given by Mr. Harold Benjamin and Mr. Kennedy.

After considering Mr. Compton's report, the Minister found the following facts to be admitted or proved. At all material times Mr. Benjamin carried on business as a solicitor in partnership with Mr. Leonard Collins under the name of Harold Benjamin & Collins at an address in London. On Aug. 31, 1954, articles of clerkship were executed between Mr. Kennedy, of the first part, a Mr. G. Kennedy, as guarantor, of the second part, and Mr. Benjamin, of the third part. The articles were in the usual form: Mr. Kennedy paid no premium to Mr. Benjamin and Mr. Benjamin paid no remuneration to Mr. Kennedy. Mr. Kennedy undertook to serve Mr. Benjamin faithfully and diligently during the term of the articles, and Mr. Benjamin covenanted, among other matters, to teach Mr. Kennedy. Before the execution of the articles Mr. Benjamin told Mr. Kennedy that there was no question of his receiving any remuneration. At Christmas, 1954, one of the appellants' staff gave Mr. Kennedy an envelope containing a cheque for £10 drawn in his favour by the appellants, and at Christmas, 1955, Mr. Kennedy was given, in the same way, a cheque for £25. On each occasion Mr. Benjamin had given instructions for this to be done because Mr. Kennedy was his articled clerk, because he liked Mr. Kennedy, and because it was Christmas. It was the custom of the appellants to give Christmas boxes to all the staff.

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* The terms of s. 1 (2) are printed at p. 854, letter C, post.

At about the beginning of January, 1956, Mr. Benjamin told Mr. Kennedy that he was pleased with him and that, in recognition of his work, the appellants would give him £100 in 1956, which he was to spend on holidays and not to use for his general living expenses. Mr. Benjamin said that it would be simpler and better if Mr. Kennedy received the sum in four equal payments and that Mr. Kennedy should tell him when he wanted some of the money. In March, 1956, and again in July, 1956, before Mr. Kennedy went on a holiday, he was given a cheque for £25. In September, 1956, he was given another cheque for £25. He did not have a holiday in September, but at that time he was going out of London at week-ends and consequently spending more on his living expenses than he would otherwise have done. From Nov. 17, 1956, until July 8, 1957, Mr. Kennedy was absent from the office, with Mr. Benjamin's permission, attending a firm of law tutors; but on Dec. 7, 1956, he called on Mr. Benjamin for another purpose and was given a cheque for £25 by him. On July 8, 1957, Mr. Kennedy, after successfully completing his examinations, returned to the office and continued to work there until Aug. 30, 1957, when the term of the articles expired. During that period he was paid £5 a week.

It was contended on behalf of the appellants and Mr. Kennedy (who were represented at the inquiry by counsel representing the appellants in the High Court): (i) that Mr. Kennedy was employed under a contract of service, but that, as the contract did not provide for payment, he was not gainfully occupied in employment although he received some payments of money, since the gain was not a contractual gain; (ii) that Mr. Kennedy did not enter into or carry on the occupation with the hope or intention of obtaining gain in return for his services; and (iii) that the payments were only occasional gifts, and were not sufficient in the way of regularity or frequency to cause the occupation to be described as gainful, until Mr. Kennedy began to receive £5 a week as a regular payment.

On Aug. 28, 1958, the Minister decided that Mr. Kennedy (a) was included in the class of employed persons for the purposes of the National Insurance Act, 1946, during the periods from Jan. 1, 1956, to Dec. 31, 1956, and from July 8, 1957, to Aug. 30, 1957, and (b) was included in the class of non-employed persons for the purposes of the Act during the periods from Aug. 31, 1954, to Dec. 31, 1955, and from Jan. 1, 1957, to July 7, 1957. The Minister thus found that the payments at Christmas in 1954 and 1955 did not bring Mr. Kennedy within the class of employed persons. Pursuant to a request in writing dated Dec. 15, 1958, the Minister stated a Case, setting forth the facts on which his decision was based and his decision thereon, dated Dec. 23, 1959. The appeal by notice of originating motion, under R.S.C., Ord. 55B, was stated to be against the Minister's decision that Mr. Kennedy was included in the class of employed persons during the periods from Jan. 1, 1956, to Dec. 31, 1956, and from July 8, 1957, to Aug. 30, 1957;

but, as Mr. Kennedy was clearly an employed person for the period from July 8, 1957, to Aug. 30, 1957, the appeal was not pressed in regard to that period, and the question before the court was whether he was an employed person within the meaning of the Act for the period from Jan. 1, 1956, until Dec. 31, 1956.

J. F. Coplestone-Boughey for the appellants.
R. A. Barr for the Minister.

SALMON, J., stated the facts and continued: The case turns on the true construction of s. 1 (2) of the National Insurance Act, 1946. The subsection reads:

> " For the purposes of this Act, insured persons shall be divided into the following three classes:—(a) employed persons, that is to say persons gainfully occupied in employment in Great Britain, being employment under a contract of service; (b) self-employed persons, that is to say persons gainfully occupied in employment in Great Britain who are not employed persons; (c) non-employed persons, that is to say persons who are not employed or self-employed persons."

The contest really is whether Mr. Kennedy during 1956 was an employed person within the meaning of the words in s. 1 (2) (a) of the Act, or a non-employed person within the meaning of the words in s. 1 (2) (c). No one suggests that he was a self-employed person within the meaning of the words in s. 1 (2) (b).

The practical effect of the decision is this: if the Minister is right, then Mr. Kennedy and the appellants are liable to pay the appropriate national insurance contributions for the whole of 1956; if the Minister is wrong, then neither Mr. Kennedy nor the appellants will be obliged to pay any contribution to national insurance during that period.

The first point taken by counsel for the appellants is that the money, the £100 which Mr. Kennedy received during 1956 was not paid to him under a contract of service. Learned counsel says, and says truly, that there is not a word about payment to the clerk in any part of the articles of clerkship; the articles merely impose an obligation on the clerk to serve his master and the master to teach his clerk during the whole of that period. Counsel relies, too, on the finding that Mr. Benjamin informed Mr. Kennedy before the signing of the articles that there would be no question of Mr. Kennedy receiving any remuneration. He says that, if the £100 was paid for services, which he strongly disputes, nevertheless it was not paid under the contract of service.

Counsel for the Minister contends that what one has to consider in construing the section is whether the person is gainfully occupied, and then whether he is employed under a contract of service. Counsel submits that it is not at all necessary that the gain should be derived from the contract of service. He supports that argument by referring to the other paragraph of s. 1 (2). He says that, if one looks at para. (b), it is obvious that the legislature contemplated that persons could be gainfully occupied but not under any contract of service. He cites, for example, members of the Bar who are gainfully occupied but in respect of whom there is no contract of service. He refers, too, to cases of waiters who are sometimes paid no remuneration under their contract of service but rely merely on tips, and to the well known case of head porters who sometimes under their contract of service pay for the privilege of being head porters, so that they may receive tips. It seems to me that this is a valid argument. I cannot believe that the waiter who is employed under a contract of service without any remuneration from his employers, but who receives large sums weekly by way of tips, is not gainfully occupied in employment within the meaning of the Act.

First, I think, one has to see whether the person is in employment under a contract of service, and then, if he is in employment under a contract of service, whether he is gainfully occupied. In my judgment, it matters not at all that the

A contract of service itself does not provide for any payment to the servant. In this case there is no dispute that Mr. Kennedy was employed under a contract of service, and for the purposes of this point it is assumed that the money which was received was received for services. It is true that the money was not paid under the articles of clerkship, but, in my judgment, that does not make any difference to the liability to pay contributions to the national insurance fund.

B Counsel for the appellants relied on the judgment of SLADE, J., in *Vandyk* v. *Minister of Pensions & National Insurance* (1). It is true that in that case there are certain passages in the judgment of SLADE, J., which, taken out of their context, seem to lend some support to the argument that the gain must be provided for under the contract of service. It is to be observed, however, that SLADE, J., was not addressing his mind to the point which arises in the present C case. In the case decided by SLADE, J., the sole question was whether or not gainful employment meant that a profit must accrue to the employed person before he came within the provisions of the Act. In that case a disabled man was receiving a salary of £300 a year under a contract of service, plus some travelling expenses to get to and from his work, and the only question in that case was: Did the fact that he was getting remuneration and expenses under the D contract of service establish that he was gainfully occupied, notwithstanding that it cost him more to get to and from his work than the total sum which he received under the contract? SLADE, J., was not considering a case such as the present case where a man was serving under a contract of service which made no provision for payment of salary, and I think that he was merely addressing his mind to the problem before him and certainly did not intend to deal with a case E of this kind. The passages to which counsel for the appellants referred can support him only if they are read out of their context. Accordingly, I do not think that I can usefully obtain any assistance from *Vandyk* v. *Minister of Pensions & National Insurance* (1).

I, therefore, decide against the appellants on the first point without any hesitation. I have come to the clear conclusion that the gain need not be F provided for in the contract, and it matters not at all that during the course of the service the master has paid the man various sums of money for the services which he has rendered under the contract without any contractual obligation. I think that, if the money is paid to the servant for the services which he has rendered under the contract of service, then he is a person gainfully occupied in employment under a contract of service notwithstanding that the contract makes G no provision for those payments.

The second point taken by counsel for the appellants is that the employed person must have entered the employment with the hope, intention or desire of being gainfully employed. There is no question but that, when Mr. Kennedy entered into his articles of clerkship, he had no hope, or no reason to hope, that H payment was intended, because the articles made no provision for payment. Moreover, he was told that he was not going to get anything by way of remuneration. The point now put forward on behalf of the appellants is based on a decision given by the National Insurance Commissioner, or observations made by him, in an entirely different context (2). It may well be that there are cases when it is important to consider what was the hope, intention or desire of the person alleged to have been employed or self-employed, during the relevant period. I For example, a man may be painting a series of pictures, or writing a book, which he hopes to sell later. It may be that for a year or more he will be engaged in producing the book or picture, but he cannot enjoy the fruits of his labour, or the pecuniary fruits of his labour, until later; nevertheless, during the time that he is bringing his work to fruition, he is hoping, intending and desiring to obtain gain from it. I think that during that period he is gainfully occupied. When, however, the person in question is receiving money during the course of his employment, it is not, I think, very important to consider what his hopes, intentions or desires were at the time when he entered on his employment or during its course. I do not consider that, if a man is in fact paid money for services during the course of his employment, the fact that when he entered into his employment he had no hope, intention or desire of obtaining gain is of the slightest relevance. In any event, after Mr. Benjamin had said to Mr. Kennedy at the beginning of 1956 that he was going to give him £100 during 1956, and that it would be better to pay him in four equal instalments and that Mr. Kennedy should tell him when he wanted the money, I have no doubt at all that Mr. Kennedy was then hoping, intending, and certainly desiring to get the £100 during 1956. In my judgment, there is nothing of substance in the second ground on which it is suggested that this appeal should be allowed.

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(1) [1954] 2 All E.R. 723; [1955] 1 Q.B. 29.

(2) For a reference to the decision, see [1954] 2 All E.R. at p. 728; [1955] 1 Q.B. at p. 39.

The third ground is quite different. Counsel for the appellants says, and I agree with him, that the gain must arise from the employment and not from the personality of the employed person. The crucial test is: In this case was Mr. Kennedy being paid for his services, or was he gaining something merely because of his personality and its impact on Mr. Benjamin? If Mr. Benjamin liked Mr. Kennedy, as I am sure he did, and thought that he was a promising and charming young articled clerk, and one day said to him " You are looking very ill, I think you have been overworked, you had better go away on holiday and I will pay for it ", that, I think, would have been a purely personal gift and would in no sense have been payment for services. But if Mr. Benjamin at the beginning of 1956 said to himself: " This young man has now been with me for some sixteen months and he is beginning to be very useful as a clerk; I think I should like to pay him some money for what he is doing for me: that would only be fair ", and decided to give him £2 a week for the work which he was doing in 1956, then it seems to me that that is quite different. I think that in those circumstances Mr. Kennedy was a person gainfully occupied in employment, and that £2 a week, or that £100 during 1956, could properly be regarded as payment for services. It is obvious that in cases of this kind there is bound to be a certain amount of overlapping. What is, in substance, a personal payment to the clerk, because the solicitor likes him and wants to send him away on holiday, cannot entirely be dissociated from the services which the clerk is rendering to the solicitors; and similarly, when Mr. Benjamin decided to pay Mr. Kennedy for his services during 1956, that cannot be entirely dissociated from the fact that he liked Mr. Kennedy.

Broadly, it comes in the end to a question of fact. On which side of the line does it fall? Is it a personal gift, or is it remuneration? The broad proposition of law put forward by counsel for the appellants is not very seriously challenged by counsel for the Minister. The proposition rests on the analogy which counsel for the appellants draws from the well-known line of tax cases starting with *Blakiston* v. *Cooper* (3), where the House of Lords were considering whether voluntary Easter offerings of money given as a free-will gift to a clergyman for his personal use were being given for the purpose of increasing his stipend, and were assessable to income tax as profits accruing to him by reason of his office under Sch. E to the Income Tax Act then in force (the Act of 1842).

Counsel for the appellants says, and, I think, says rightly, that, in considering whether a person is gainfully occupied in employment, it is useful to look at the cases in which the courts have decided whether or not, for the purpose of the Income Tax Acts, a man is assessable to income tax on profits accruing to him by reason of his office. He concedes that between those words and the words of s. 1 (2) of the National Insurance Act, 1946, there is a crucial difference, as was pointed out in *Vandyk* v. *Minister of Pensions & National Insurance* (4). It is

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(3) [1909] A.C. 104.

(4) [1954] 2 All E.R. 723; [1955] 1 Q.B. 29.

A not necessary under the National Insurance Act, 1946, for there to be any profit, but, if the words were " money accruing to him by reason of his office ", the analogy would be much more exact.

For the purposes of this case it does not seem to matter whether the occupation results in a profit, which was the short point in *Vandyk* v. *Minister of Pensions & National Insurance* (5), before SLADE, J. In *Blakiston* v. *Cooper* (6), LORD B LOREBURN, L.C., said:

> " In my opinion, where a sum of money is given to an incumbent substantially in respect of his services as incumbent, it accrues to him by reason of his office. Here the sum of money was given in respect of those services. Had it been a gift of an exceptional kind, such as a testimonial, C or a contribution for a specific purpose, as to provide for a holiday, or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present."

I appreciate that, when Mr. Benjamin told Mr. Kennedy he was going to have £100 during 1956, he told him that he was to spend the money on holidays, D but it was to be given to him in four equal instalments. I am certainly not at all persuaded that it was intended purely as a present. Indeed, I do not think that it was intended as a present at all.

The next case in which the problem that arose in *Blakiston* v. *Cooper* (7) was considered, and to which I have been referred, is *Seymour* v. *Reed* (8), which raised the fascinating problem whether Seymour, who was a well-known Kent County E professional cricketer, should be taxed in respect of the money which he received for his benefit. I use the word " benefit " in the sense in which it is used in the cricket world. After referring to the words of Sch. E to the Income Tax Act, 1918, which were slightly different from those in Sch. E to the Act which was in force in 1909, VISCOUNT CAVE, L.C., said (9):

> " These words and the corresponding expressions contained in the earlier F statutes (which were not materially different) have been the subject of judicial interpretation in cases which have been cited to your Lordships; and it must now, I think, be taken as settled that they include all payments made to the holder of an office or employment as such, that is to say, by way of remuneration for his services, even though such payments may be voluntary, but that they do not include a mere gift or present (such as a testi-G monial) which is made to him on personal grounds and not by way of payment for his services. The question to be answered is, as ROWLATT, J., put it, ' Is it in the end a personal gift or is it remuneration? ' If the latter, it is subject to the tax; if the former, it is not."

There has been a large number of cases in which this topic has been considered H and I do not think that there has ever been any difference of judicial opinion about the principle to be applied. Assuming, as I do, that that principle ought to be applied in the present case, one is brought back to the question: Was that £100 to be received by Mr. Kennedy in payment for his services, or was it intended as a personal present?

In the Case which the Minister has stated, he has merely stated his conclusions, I but has not given any grounds on which he reached them. If I may say so, when a Case is stated for the purpose of coming before a court of appeal, it is very useful for the appellate tribunal to know the grounds on which the decision appealed against is based. I can imagine that there might be cases where the fact that one did not know the grounds would make it impossible for one to decide the appeal. In the present case, however, I am entitled to draw inferences of fact (10); I think that I am entitled to look at the whole of the Case to deduce what the grounds are on which the Minister must have based his decision, but it would be much more convenient if, instead of my having to deduce the grounds, the grounds were very shortly stated.

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(5) [1954] 2 All E.R. 723; [1955] 1 Q.B. 29.
(6) [1909] A.C. at p. 107.
(7) [1909] A.C. 104.
(8) [1927] All E.R. Rep. 294; [1927] A.C. 554.
(9) [1927] All E.R. Rep. at p. 297; [1927] A.C. at p. 559.

I think that the Minister has come to the decision that the £100 was given to Mr. Kennedy for the work that he was to do during 1956 and not as a personal present. I am led to that conclusion by the finding of the Minister that at about the beginning of January, 1956, Mr. Benjamin told Mr. Kennedy that he was pleased with him and that in recognition of his work the appellants would give him £100 in 1956, and that Mr. Benjamin said that it would be simpler and better if Mr. Kennedy received the sum in four equal payments, but that Mr. Kennedy should tell him when he wanted some of the money. I do not think that this means that Mr. Kennedy was being paid £100 in 1956 for what he had done in 1955, but that Mr. Benjamin realised that, having regard to Mr. Kennedy's standard of work in 1955, his work in 1956 would be worthy of reward.

The argument that has been put before me today was fully before the Minister, and this point that the character of the payments had to be looked at in the light of the authorities to which I have referred was very fully argued, and the Minister was referred to the cases. Having heard that argument, the Minister came to the conclusion that the £10 given at Christmas, 1954, and the £25 at Christmas, 1955, did not make Mr. Kennedy gainfully occupied during 1954 and 1955. I think that he must have come to that conclusion because he thought that Mr. Benjamin had made these payments at Christmas to Mr. Kennedy, just as a Christmas gift, a pure gift. When, however, he came to 1956, the Minister must have felt that the character of the payment of £100 was entirely different from the character of the earlier payments, because, whereas the earlier payments had been pure gifts, as the Minister in effect found, the £100 was, and was intended to be, in payment for services.

I appreciate that Mr. Kennedy was told at the time that he was to spend the money on holidays and not to use it for his general living expenses, but I think that Mr. Benjamin (I am not saying a word against him), being no doubt fairly familiar with the law stated in the earlier cases and what was said about holidays by other judges in later cases, felt that, if possible, he would like Mr. Kennedy to have the money free of tax and free of obligation to pay national insurance contributions. That is perfectly proper on the part of Mr. Benjamin. He felt that if he gave it in this form, it might well be that it would escape liability for tax and it would not attract liability to pay national insurance contributions.

I cannot say, on the facts as found, that the Minister has come to a wrong conclusion when he has, as I think, concluded that Mr. Kennedy was gainfully occupied during 1956 because the four payments of £25 each made by the appellants during that period were made in payment for his services. I think that that is the ground on which the Minister came to the conclusion that Mr. Kennedy was gainfully occupied, the ground being that the money was paid to him by way of payment for his services as a clerk. That really disposes of all the grounds raised by counsel for the appellants in his interesting argument. For the reasons which I have stated, none of them commends itself to me and the appeal, accordingly, is dismissed.

Appeal dismissed.

Solicitors: *Harold Benjamin & Collins* (for the appellants); *Solicitor, Ministry of Pensions & National Insurance* (for the Minister).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

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(10) See R.S.C., Ord. 55B. r. 8; the ANNUAL PRACTICE, 1960, p. 1592.

SMITH AND ANOTHER *v.* HUGHES AND OTHERS.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Hilbery and Donovan, JJ.), June 16, 1960.]

Criminal Law—Soliciting for the purposes of prostitution—Whether soliciting from window or balcony is soliciting "in a street"—Street Offences Act, 1959 (7 *&* 8 *Eliz.* 2 *c.* 57), *s.* 1 (1).

A common prostitute who solicits men in a street from the balcony of a house or from behind closed or open ground floor or first floor windows of a house adjoining the street commits the offence of soliciting "in a street or public place" contrary to s. 1 (1) of the Street Offences Act, 1959.

[For the Street Offences Act, 1959, s. 1, see 39 HALSBURY'S STATUTES (2nd Edn.) 262.]

Cases Stated.

These were appeals by Cases Stated from the adjudications of one of the magistrates of the police courts of the metropolis sitting at Bow Street Magistrates' Court as a magistrates' court, before whom informations were preferred on Nov. 27, 1959, Dec. 8, 1959, Jan. 5, 1960 and on a day unknown in 1960 by the respondents, police officers, that the appellants, Marie Theresa Smith and Christine Tolan being common prostitutes, did solicit in a street for the purpose of prostitution, contrary to s. 1 (1) of the Street Offences Act, 1959.

There were two informations against Marie Theresa Smith, which were heard on Feb. 4, 1960, when the following facts were found. The appellant was a common prostitute, living at 39, Curzon Street, W.1, and using the premises for the purposes of prostitution. That on Nov. 4, 1959, between 8.50 p.m. and 9.5 p.m. the appellant solicited men passing in the street for the purposes of prostitution from a first floor balcony of 39, Curzon Street, the balcony being some eight to ten feet above street level. The appellant's method of soliciting the men was (i) to attract their attention to her by tapping on the balcony railing with some metal object and by hissing to them as they passed in the street beneath her, and (ii) having so attracted their attention, to talk with them and invite them to come inside the said premises by such words as "Would you like to come up here a little while?" at the same time as she indicated the correct door of the premises. That on Jan. 9, 1960, between 12.40 a.m. and 1 a.m. the appellant solicited men passing in the street for the purposes of prostitution from a closed ground floor window of 39, Curzon Street, the window being some three feet from railings, four feet high, which bounded the pavement on the side of the premises. That the appellant's method of soliciting the men was (i) to attract their attention to her by tapping on the window pane with some metal object as they passed by in the street in front of her and (ii) having so attracted their attention, to invite them in for a price which she indicated by extending three fingers of her hand and indicating the correct door of the premises. That on one occasion the price so indicated by the appellant was agreed and the man entered the premises, leaving some fifteen minutes later. On another occasion the price so indicated by the appellant was not agreed by the man concerned, who made a counter-proposal as to price by extending two fingers of his hand. This counter-proposal was not accepted by the appellant and the man walked away.

There were four informations against Christine Tolan which were heard on Feb. 4, 1960, two being heard also on Feb. 8, 1960, when the following facts were found. That the appellant was a common prostitute living at 39, Curzon Street, London, W.1, and using the premises for the purposes of prostitution. That on Nov. 4, 1959, between 9.25 p.m. and 9.35 p.m. the appellant solicited men passing in the street for the purposes of prostitution from a half-open ground floor window of 39, Curzon Street, the window being some three feet from four feet high railings which bounded the pavement on the side of the premises. That the appellant's method of soliciting the men was (i) to attract their attention to her by half leaning out of the window towards the men as they passed by in the street in front of her and (ii), having so attracted their attention, to talk with them and invite them inside the premises by such words as " A short time for £3 " at the same time as she indicated the correct door of the said premises. That on Dec. 4, 1959, at about 10.50 p.m. the appellant solicited men passing in the street for the purposes of prostitution from a ground floor window of 39, Curzon Street. That the appellant's method of soliciting the men was (i) to attract their attention to her by tapping on the window pane with some metal object as they passed by in the street in front of her and (ii), having so attracted their attention, to invite them inside the premises by smiling and indicating the correct door of the premises. That on one occasion a man accepted the appellant's suggestion and went towards the door of 39, Curzon Street, which the appellant was holding open ready for him to enter. However, when a police officer came up, the appellant hastily slammed the door and the man left (not having entered the premises). About five minutes later a second man left the premises. That on Dec. 5, 1959, at about 10.40 p.m. the appellant solicited men passing in the street for the purposes of prostitution from a closed ground floor window of 39, Curzon Street. That the appellant's method of soliciting the men was to attract their attention to her by tapping on the window pane with some metal object as they passed by in the street in front of her and (ii) having so attracted their attention to talk to them and invite them inside the said premises at the same time as she indicated the correct door of the said premises. That on Dec. 15, 1959, between 10.30 p.m. and 10.50 p.m. the appellant solicited men passing in the street for the purposes of prostitution from a partly open first floor window of 39, Curzon Street, the window being about ten feet above street level. That the appellant's method of soliciting the men was (i) to attract their attention to her by tapping on the window pane with some metal object as they passed by in the street beneath her and (ii) having so attracted their attention, to invite them in by gestures and for a price she indicated by extending three fingers of her hand and indicating the correct door of the premises.

It was contended for the appellants that the balcony; the interior of the premises behind a closed or half closed window on the ground floor; and the interior of a building behind a slightly open window on the first floor were not " in a street " within the meaning of s. 1 (1) of the Street Offences Act, 1959, and accordingly no offence had been committed. It was contended for the respondents that the soliciting had taken place " in a street " within the meaning of that Act. The magistrate was of opinion that the said soliciting had taken place " in a street " within the meaning of s. 1 (1) of the Street Offences Act, 1959, and accordingly convicted the appellants.

M. Beckman for the appellants.
Paul Wrightson for the respondents.

LORD PARKER, C.J.: These are six appeals by way of Cases Stated by one of the stipendiary magistrates sitting at Bow Street, before whom informations were preferred by the respondent in each case against the appellant for that she " being a common prostitute, did solicit in a street for the purpose of prostitution, contrary to s. 1 (1) of the Street Offences Act, 1959." The magistrate in each case found that the appellant was a common prostitute, that she had solicited and that the solicitation was in a street, and in each case fined the appellant.

The facts, to all intents and purposes, raise the same point in each case; there are minute differences. The appellants in each case were not themselves physically in the street but were in a house adjoining the street. In one case the appellant was on a balcony and she attracted the attention of men in the street by tapping and calling down to them. In other cases the appellants

A were in ground-floor windows, either closed or half open, and in another case in a first-floor window.

The sole question here is whether in those circumstances each appellant was soliciting in a street or public place. The words of s. 1 (1) of the Act are in this form:

> B "It shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution."

Observe that it does not say there specifically that the person who is doing the soliciting must be in the street. Equally it does not say that it is enough if the person who receives the solicitation or to whom it is addressed is in the street. For my part, I approach the matter by considering what is the mischief aimed C at by this Act. Everybody knows that this was an Act intended to clean up the streets, to enable people to walk along the streets without being molested or solicited by common prostitutes. Viewed in that way, it can matter little whether the prostitute is soliciting while in the street or is standing in a doorway or on a balcony, or at a window, or whether the window is shut or open or half open; in each case her solicitation is projected to and addressed to somebody D walking in the street. For my part, I am content to base my decision on that ground and that ground alone. I think that the magistrate came to a correct conclusion in each case, and that these appeals should be dismissed.

HILBERY, J.: I agree. 39, Curzon Street, from the papers in front of us, appears to be let to two prostitutes who practise their profession from that address, and the way of practising it is shown by the Cases Stated, as my Lord E has said; in one case by tapping on the window pane with some metal object as men passed by in the street in front of her, and then openly inviting them into her room. In the other cases it was done by tapping on the windows of various rooms occupied by these prostitutes and then, if the window was open, giving invitations by way of solicitation or signals representing solicitation. In each case signals were intended to solicit men passing by in the street. They did F effect solicitation of the men when they reached those men. At that moment the person in the street to whom the signal was addressed was solicited and, being solicited in the street, I agree with the conclusion of my Lord and for these reasons I have intimated that these appeals must be dismissed.

DONOVAN, J.: I agree with both the judgments which have been delivered.

G *Appeals dismissed.*

Solicitors: *S. Cook & Green* (for the appellants); *Solicitor, Metropolitan Police* (for the respondents).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

PRACTICE DIRECTION.

CHANCERY DIVISION.

Infant—Guardianship of Infants Acts—Appeals from courts of summary jurisdiction—Title of proceedings—Application for leave to adduce further evidence Date of hearing of appeal –Guardianship of Infants Acts, 1886 *and* 1925—*R.S.C., Ord.* 55A, *Ord.* 59, *r.* 34 (2), (3), (4).

PENNYCUICK, J., has given the following direction, which supersedes the Practice Direction* given on Mar. 16, 1949, by ROMER, J.:—

Notices of appeal under the Guardianship of Infants Acts, 1886 and 1925, from a decision of a court of summary jurisdiction are to be intituled, as nearly as may be appropriate, in the form following:—

In the High Court of Justice
Chancery Division
Group A
In the matter of A.B. an Infant
and
In the matter of an Appeal from an Order dated 19 of
the Justices of the Petty Sessional Division of in
the county of .
and
In the matter of the Guardianship of Infants Acts, 1886 and 1925.

The notice of appeal must comply with sub-r. (2) of r. 34† of Ord. 59 of the Rules of the Supreme Court and must be served and the appeal must be entered as provided by sub-r. (3) and sub-r. (4) of that rule.

Within ten days of the service of the notice of appeal the solicitors on each side shall notify the cause clerk whether or not they desire to adduce further evidence on the hearing of the appeal. If either party does so desire, an appointment will be given for the solicitors (with or without counsel) to attend the judge to obtain his directions on the matter. On this appointment the applicant must be prepared to indicate in outline what further evidence it is desired to adduce, whether it is to be oral or by affidavit, and why it was not given before the justices.

The date for the hearing of the appeal will normally be fixed when the solicitors (with or without counsel) are so before the judge.

It is the duty of the appellant's solicitor to notify the respondent's solicitors (or respondent if in person) of this direction on service of the notice of appeal.

If neither party desires to adduce further evidence, the date fixed for the hearing of the appeal will be notified to the solicitors for the parties on application to the judge's clerk.

J. B. H. WYMAN,
Chief Registrar.

June 30, 1960.

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* See the ANNUAL PRACTICE, 1960, p. 1582.

† See the ANNUAL PRACTICE, 1960, p. 1751.

R. *v.* JAMES.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Hilbery and Diplock, JJ.), May 30, June 20, 1960.]

Criminal Law—Sentence—Borstal training—Vagrancy—Breach of probation—Committal of offender to quarter sessions with view to borstal training—Maximum sentence for offence three months—Whether sentence of borstal training could be imposed—Vagrancy Act, 1824 (5 *Geo.* 4 *c.* 83), *s.* 4—*Magistrates' Courts Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 55), *s.* 28.

In April, 1959, the appellant, then just under seventeen years old, was convicted by a juvenile court of being a rogue and a vagabond under s. 4 of the Vagrancy Act, 1824*, and was placed on probation for two years. In February, 1960, she failed to notify a change of address as required by the order and was brought before a magistrates' court for breach of probation. The court committed her to quarter sessions under s. 28 of the Magistrates' Courts Act, 1952, for sentence, for the original offence, with a view to borstal training. Quarter sessions sentenced her to borstal training. On appeal against sentence,

Held: as the maximum sentence under s. 4 of the Vagrancy Act, 1824, was three months' imprisonment and a sentence for borstal training would be very much longer†, the sentence for borstal training would be set aside and a sentence of three months' imprisonment would be substituted.

R. v. *Longstreeth*‡ (unreported) followed.

Appeal allowed.

[As to committal of an offender to quarter sessions with a view to sentence for borstal training, see 25 HALSBURY'S LAWS (3rd Edn.) 227, para. 422.

For the Vagrancy Act, 1824, s. 4, see 18 HALSBURY'S STATUTES (2nd Edn.) 203.

For the Magistrates' Courts Act, 1952, s. 28, see 32 HALSBURY'S STATUTES (2nd Edn.) 447.]

Case referred to:

R. v. *Longstreeth*, (June 23, 1952), unreported; see p. 863, footnote (2), post.

Appeal.

This was an appeal by Leila Deirdre James against a sentence of borstal training imposed on her by the Appeal Committee of the County of Lancaster Quarter Sessions on Mar. 15, 1960, under s. 28 of the Magistrates' Courts Act, 1952, to which she was committed for sentence with a view to borstal training, under s. 20 (5) (a) of the Criminal Justice Act, 1948. The case first came before the court (LORD PARKER, C.J., HILBERY and HAVERS, JJ.) on May 30, 1960, when it was adjourned for a fresh probation report, the court desiring the probation officer to attend the adjourned hearing. The facts are stated in the judgment of the court.

The appellant appeared but was not represented.

LORD PARKER, C.J., delivered the following judgment of the court: This appellant was found guilty at Liverpool Juvenile Court on Apr. 9, 1959, as a rogue and vagabond under s. 4 of the Vagrancy Act, 1824. She was then just under seventeen years of age. For that she was put on probation for two years. On Jan. 29, 1960, however, she was fined for being drunk and disorderly, but no proceedings were taken in respect of that breach of probation. Next month, however, on Feb. 4, 1960, she was brought before a magistrates' court on a summons alleging that she was in breach of the probation order by failing to notify a change of address. She was thereupon committed to sessions with

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* Section 4 of the Vagrancy Act, 1824, so far as material, reads as follows: ". . . every person wandering abroad . . . and not giving a good account of himself or herself . . . shall be deemed a rogue and vagabond . . . [and may be committed to prison] for any time not exceeding three calendar months."

† See footnote (3), p. 863, post.

‡ See footnote (2), p. 863, post.

a view to borstal training. On Mar. 15, 1960, she appeared at Liverpool before A
the Appeal Committee for the County of Lancaster where she was sentenced to
borstal training. She now appeals against that sentence by leave of the court.
The matter that influenced the court was that under s. 4 of the Vagrancy
Act, 1824, the maximum sentence is of three months. That, of course, was
long before borstal training was introduced as a sentence (1) but in a case which
came before this court on June 23, 1952, *R.* v. *Longstreeth* (2), LORD GODDARD, B
C.J., pointed out that three months was the maximum sentence, whereas a
sentence of borstal training would be very much longer (3). He said:

> "I dare say it would be very much better that they [that is prisoners of
> that sort] should go somewhere to be trained but on the whole I do not
> think it is a satisfactory sentence because it does deprive him of his liberty.
> If he is sentenced to imprisonment he cannot be deprived of his liberty for C
> more than three months, and, if he behaves himself, that is two months.
> That is the position, and the court thinks that on the whole they ought to
> set aside the sentence of borstal [training]."

In the present case it is quite clear that the appellant does need training. She
has shown herself to be an unruly sort of person. It is said that she went to D
undesirable cafés and is self-willed, and the governor of the prison where she is
says in a report that she has improved—that borstal training is doing her good.
He goes on to say:

> "This girl has benefited from the short period of training she has received
> in a stable environment, and it would appear that she requires supervision
> over a sustained period." E

In the probation officer's report for which this court called, it is clear that the
probation officer does not think that she has reached that stage of stability
where she can be relied on not to go to coloured cafés. Accordingly it is just the
sort of case where the appellant would benefit from borstal training. Nevertheless
this court has, as I have indicated, said that in these circumstances borstal
training is the wrong sentence. This court feels that it ought to follow that F
decision, and accordingly in the circumstances of this case the sentence of borstal
training will be set aside and a sentence of three months' imprisonment will be
substituted. That means that the appellant has now served her sentence and
the probation officer will take her back to her home in Liverpool.

I would only add that the court confirms that the substituted sentence of
three months' imprisonment has the effect of ending the original probation G
order.

Appeal allowed. Sentence varied.

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(1) Viz., by s. 1 of the Prevention of Crime Act, 1908 (repealed).

(2) *R.* v. *Longstreeth* was heard before the Court of Criminal Appeal (LORD GODDARD, C.J., CROOM-JOHNSON and PARKER, JJ.) on June 23, 1952. The appellant had been charged as being a "suspected person" under the Vagrancy Act, 1824, s. 4, under which the maximum sentence on first conviction was three months' imprisonment. The accused had been committed for sentence, and a probation order had been made in the autumn of 1950 with a condition that the appellant reported to the probation officer. The appellant failed to report in accordance with the order. He was brought before the justices and sentenced by the chairman to borstal training. LORD GODDARD, C.J., said: "That means that if he goes to borstal he will probably be detained fifteen months, and that is what causes the court to wonder whether borstal training ought to be imposed on these youths when the maximum sentence which they can receive is one of three months . . ." HIS LORDSHIP then continued as set out at letter C, above. These two passages together contain the whole substance of the judgment.

(3) The length of a borstal sentence is limited by the Prison Act, 1952, s. 45 (2). Sentence cannot exceed three years, and as regards the probable length of detention see the observation of LORD GODDARD, C.J., quoted in footnote (2) above.

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GHANA COMMERCIAL BANK *v.* CHANDIRAM AND ANOTHER.

[Privy Council (Lord Tucker, Lord Jenkins and Lord Morris of Borth-y-Gest), May 10, 11, 12, June 20, 1960.]

Mortgage—Equitable mortgage—Equitable mortgagee paid off by subsequent B *lender—Presumption of intention to keep equitable mortgage alive—Whether presumption negatived by taking of an invalid legal mortgage.*

Privy Council—Ghana—Execution—Writ of fieri facias—Property subject to equitable mortgage—Attachment and sale of property—Estate taken by purchaser.

In July, 1954, H., who was the owner of certain property in Accra, C created an equitable mortgage on it in favour of his bankers, the B. bank, by deposit of title deeds. On Sept. 4, 1954, the title deeds to the property were, with the permission of the B. bank, sent to the G. bank, which bank undertook to hold them on behalf of the B. bank. On Sept. 24, 1954, a writ of fi. fa. for the attachment of the property was issued under the Ghana Supreme Court (Civil Procedure) Rules, 1954, Ord. 43*, at the D instance of one M.D.B., who had, in July, 1954, obtained a judgment against H. The order prohibited H. from alienating the property by sale, gift or in any other way, and all persons were thereby prohibited from receiving the property by purchase, gift or otherwise. On Oct. 27, 1954, H. executed a legal mortgage on the property in favour of the G. bank, by which, inter alia, he conveyed the property to the G. bank, its successors and assigns for E ever, subject to a proviso for redemption, and the mortgage provided that it was not to prejudice or affect the security created by any deposit which might already have been made with the G. bank of the deeds relating to the property. On the same day, the G. bank paid to the B. bank the sum owing to the B. bank on the security of the equitable mortgage of July, 1954, retaining in their custody the deeds which they held on behalf of the B. bank. F In November, 1954, H. let the property to M. (hereinafter called " the tenant ") on a monthly tenancy. On Apr. 16, 1955, the property was sold, as a consequence of the attachment of Sept. 24, 1954, to a purchaser, C. At that date the tenant was still in occupation of the property. On July 25, 1955, the G. bank's solicitor wrote to the tenant, stating that the legal estate in the property was vested in the G. bank under and by virtue of the G legal mortgage of Oct. 27, 1954, and requiring the tenant to pay all rent which was then or should thereafter become payable in respect of the property to the G. bank. On July 28, 1955, the purchaser's attorney wrote to the tenant informing him of the sale of the property to the purchaser on Apr. 16, 1955, and requiring him as from that date to pay the monthly rent in respect of the property to the attorney. On Aug. 13, 1955, the H tenant wrote to the purchaser's attorney to the effect that he was paying to the G. bank in accordance with their instructions all rents accruing in respect of the property. By the Ghana Supreme Court (Civil Procedure) Rules, 1954, Ord. 43, r. 11, after any attachment had been made, any alienation without the leave of the court of the property attached was null and void. In an action by the purchaser against the G. bank and the tenant I for, inter alia, a declaration of his title of ownership to the premises,

Held: the purchaser was absolutely entitled to the premises, subject to the equitable mortgage of July, 1954, since

(i) a purchaser of property under the execution of a writ of fi. fa. stepped into the shoes of the judgment debtor by purchasing no more than the " estate " of the judgment debtor therein and, therefore, the attachment of Sept. 25, 1954, took effect subject to the interest of the B. bank as equitable mortgagees;

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* The relevant rules of Ord. 43 are set out at p. 868, letters A to E, post.

(ii) the presumed intention of the G. bank on paying to the B. bank on Oct. 27, 1954, the amount secured by the equitable mortgage of July, 1954, was to keep that mortgage alive for the benefit of the G. bank until replaced by an effective legal mortgage, and, as the legal mortgage of Oct. 27, 1954, was null and void by virtue of the Ghana Supreme Court (Civil Procedure) Rules, 1954, Ord. 43, r. 11, the prior equitable mortgage of July, 1954, continued on foot for the benefit of the G. bank conferring the same priority for the amount thereby secured as had theretofore been enjoyed by the B. bank.

Dicta of WARRINGTON, J., in *Butler* v. *Rice* ([1910] 2 Ch. at pp. 282, 283) approved.

Appeal allowed.

[As to the effect of a legal mortgage on an equitable charge, see 27 HALSBURY'S LAWS (3rd Edn.) 420, para. 821; and for cases on the subject, see 35 DIGEST 620-621, *3564-3572*.

As to the title to property acquired by a purchaser under a writ of fi. fa., see 16 HALSBURY'S LAWS (3rd Edn.) 58, 59, para. 90; and for cases on the subject, see 21 DIGEST 515-518, *913-939*.]

Cases referred to:

Butler v. *Rice*, [1910] 2 Ch. 277; 79 L.J.Ch. 652; 103 L.T. 94; 35 Digest 620, *3567*.

Chetwynd v. *Allen*, [1899] 1 Ch. 353; 68 L.J.Ch. 160; 80 L.T. 110; 35 Digest 630, *3639*.

Dadzie v. *Kojo*, (1940), 6 W.A.C.A. 139.

Wickham v. *New Brunswick & Canada Ry. Co.*, (1865), L.R. 1 P.C. 64; 34 L.J.P.C. 6; 14 L.T. 311; 16 E.R. 158; 21 Digest 515, *915*.

Appeal.

Appeal by special leave by Ghana Commercial Bank from a judgment and decree of the Court of Appeal of Ghana (KORSAH, C.J., VAN LARE and GRANVILLE SHARP, JJ.A.), dated Dec. 2, 1958, affirming a judgment and decree of the Land Court of the High Court of Justice of Ghana (OLLENNU, J.), dated Sept. 3, 1957, whereby the first respondent, D. T. Chandiram, was awarded against the appellants and the second respondent, J. Mensah, a declaration of title of ownership to certain premises in Accra, damages for trespass, mesne profits and an order for recovery of possession of the premises. The facts are set out in the judgment of the Board.

Phineas Quass, Q.C., and *J. G. Le Quesne* for the appellants.

S. P. Khambatta, Q.C., and *Joseph Dean* for the first respondent.

The second respondent did not appear and was not represented.

LORD JENKINS: This case concerns competing interests in certain real property at Accra, the rival claimants being Ghana Commercial Bank, formerly the Bank of the Gold Coast—defendants in the action and now appellants (hereinafter called " the Ghana Bank "), who claim to be mortgagees of the property; and D. T. Chandiram, plaintiff in the action and now respondent (hereinafter called " the purchaser "), who claims to have bought the property at an execution sale free from the alleged mortgage. Also concerned in the litigation is one J. Mensah (hereinafter called " the tenant ") who, in his capacity as manager of St. John's Grammar School at Accra, was in possession of the property as tenant at the date of the execution sale, but who thenceforth, according to the purchaser, became a trespasser, by refusing to attorn tenant to the purchaser and insisting on paying his rent (£75 per month) to the Ghana Bank, who demanded such payment on the strength of the alleged mortgage. The purchaser accordingly joined the tenant as a defendant along with the Ghana Bank, and he has been made a respondent in the present appeal but was not represented at the hearing before their Lordships.

A The action was brought by the purchaser as plaintiff in the Land Court at Accra claiming against both defendants jointly and severally:—

"(a) A declaration of his title of ownership to the said premises
"(b) £500 general damages for trespass
"(c) £2,025 as mesne profits at the rate of £75 a month as from Apr. 16, 1955 [the date of the execution sale], to Sept. 15, 1956 [the end of the last B whole month prior to the issue of the writ on Sept. 26, 1956], and any further sums of money by way of mesne profits that will have accrued up to the date of judgment.
"(d) Recovery of possession."

The case was tried in the Land Court before OLLENNU, J., who, by a judgment C and decree dated Sept. 3, 1957, granted the purchaser the relief claimed (save that he reduced the claim for damages for trespass to £100) with costs. He assessed the mesne profits at £75 per month from Apr. 16, 1956, to Sept. 15, 1957, and found them to amount to £2,925; and he directed that the recovery of possession should take effect from Sept. 15, 1957. From that judgment and decree, both defendants appealed to the Court of Appeal of Ghana (KORSAH, D C.J., VAN LARE and GRANVILLE SHARP, JJ.A.), who, by a judgment and decree dated Dec. 2, 1958, dismissed the appeal, save that the learned judge's calculation of the mesne profits was corrected from £2,925 to £2,175. From the last-mentioned judgment and decree, the Ghana Bank now appeals to this Board.

The facts can be shortly stated. On July 16, 1954, one Ebenezer Ofue Holomah (hereinafter called "the debtor"), who was then the owner of the property E in dispute, created an equitable mortgage on it in favour of his bankers, Barclays (D.C. & O.) (hereinafter called "Barclays"), by the usual method of depositing with Barclays the title deeds to the property, together with a memorandum of deposit signed by him and stating (to put it shortly) that the deeds had been so deposited with the intent to create an equitable mortgage on all the hereditaments and property comprised therein for assuring the payment and discharge F on demand of all moneys and liabilities then or thereafter due from or incurred by the debtor to Barclays. The memorandum contained a usual form of undertaking on the part of the debtor to execute on demand a legal mortgage of the property to Barclays in such form and with such provisions and powers of sale, leasing and appointing a receiver as Barclays might require. The deeds were not, in fact, retained in the physical possession of Barclays, but were held on their G behalf by their solicitor, Mr. H. V. A. Franklin. It is not suggested that this circumstance has any material bearing on the case. On Sept. 4, 1954, Mr. Franklin sent the deeds to the Ghana Bank with a letter in which he stated that the debtor had requested him to hand them to the Ghana Bank, and that he had obtained Barclays' permission to do so against the Ghana Bank's undertaking to hold them on their behalf. According to the evidence of Kwasi Amoako Atta, H the Credit Manager of the Ghana Bank, the deeds were received by him on Sept. 9. There was no evidence as to the reason for this change in the custody of the deeds, but it did not materially alter Barclays' position. It was simply a substitution of the Ghana Bank for Mr. Franklin as the agents by whom the deeds were to be held on Barclays' behalf. On Sept. 24, 1954, a writ of fi. fa. for the attachment of the property was issued under the hand of the Chief Justice I (SIR MARK WILSON) at the instance of one M. D. Bassil, who had obtained a judgment dated July 27, 1954, against the debtor in the Divisional Court, Sekondi. The attachment was made by an attachment notice issued by the deputy sheriff and dated Sept. 25, 1954. No question is raised as to its validity. It prohibited the debtor from "alienating the property . . . by sale, gift, or in any other way, and" all persons were thereby prohibited "from receiving the said property by purchase, gift or otherwise". On the same date, auction notices were issued by the deputy sheriff advertising the property for sale on Oct. 18, 1954.

The attachment was effected under Ord. 43 of the Supreme Court (Civil Procedure) Rules, 1954. Order 43 includes the following provisions:

> " 4. If the judgment be for money, and the amount thereof is to be levied from the property of the person against whom the same have been pronounced, the court shall cause the property to be attached in the manner following.
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> * * *
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> " 7. Where the property shall consist of lands, houses, or other immovable property, or any interest therein, either at law or in equity, the attachment shall be made by a written order of the sheriff prohibiting the judgment debtor from alienating the property by sale, gift, or in any other way, and all persons from receiving the same by purchase, gift or otherwise, and the sheriff may also, by direction of the court, take and retain actual possession thereof.
>
> * * *
>
> " 11. After any attachment shall have been made by actual seizure, or by written order as aforesaid, and in case of an attachment by written order, after it shall have been duly intimated and made known in manner aforesaid, any alienation without leave of the court of the property attached, whether by sale, gift, or otherwise, and any payment of the debt or debts, or dividends, or shares to the judgment debtor during the continuance of the attachment, shall be null and void, and the person making such alienation or payment shall be deemed to have committed a contempt of court."

The debtor applied for and obtained a stay of execution pending an appeal, which was unsuccessful. Ultimately, fresh notices of attachment and auction were issued on Jan. 13, 1955, and the property was ultimately sold to the purchaser on Apr. 16, 1955. It was held in both courts below that, notwithstanding the stay of execution, the attachment effected on Sept. 25, 1954, remained in full force, and the contrary was not argued before their Lordships. On Oct. 27, 1954, the debtor executed a legal mortgage of the property in favour of the Ghana Bank. By this document (to put it shortly), the debtor covenanted with the Ghana Bank to pay on demand all such sums as then were or should from time to time become owing by him to the Ghana Bank (inter alia) on balance of current account and/or loan account and/or any other account sanctioned by the Ghana Bank, with interest at the rate of seven per cent. on the balance from time to time owing and conveyed the property to the Ghana Bank, its successors and assigns for ever, subject to the proviso for redemption therein contained. Their Lordships do not find it necessary to refer further to the terms of this legal mortgage, except to mention that it ended with a provision to the effect that the legal mortgage was not to prejudice or affect the security created by any deposit which might already have been made with the Ghana Bank of the deeds relating to the property or any other securities the Ghana Bank might then or at any time thereafter hold for the moneys thereby secured or any part thereof. On the same day (Oct. 27, 1954), the Ghana Bank paid to Barclays the sum owing to Barclays on the security of the equitable mortgage of July 16, 1954, retaining in their custody the deeds which had been passed to them by Mr. Franklin to hold on Barclays' behalf. There is no evidence as to the amount owing to Barclays on Oct. 27, 1954, but counsel for the purchaser in his opening speech appears to have put the amount in respect of which the legal mortgage was given by the debtor at £4,000. On Nov. 4, 1954, the debtor let the property to the tenant on a monthly tenancy at a rent of £75 per month, and the tenant was in occupation of it at the date of the sale to the purchaser.

As already mentioned that sale took place on Apr. 16, 1955. Prior to the sale, the Ghana Bank had requested the deputy sheriff to institute interpleader proceedings, but, for whatever reason, nothing came of this. In view of an argument addressed to their Lordships by counsel for the Ghana Bank as to the scope

A and effect of the attachment, it is right to notice that the judge's certificate of purchase dated June 29, 1955, described the subject-matter of the sale as consisting of "the right, title and interest" of the debtor in the property. On July 25, 1955, the Ghana Bank's solicitor wrote to the tenant a letter stating that the legal estate in the property was vested in the Ghana Bank under and by virtue of the legal mortgage of Oct. 27, 1954, and requiring the tenant to pay all rent B which was then or should thereafter become payable in respect of the property to the Ghana Bank or its duly authorised agent. On July 28, 1955, the purchaser's attorney wrote to the tenant informing him of the sale of the property to the purchaser on Apr. 16, 1955, and requiring the tenant as from that date to pay the rent of £75 per month in respect of the property to the writer as such attorney. On Aug. 13, 1955, the tenant wrote to the purchaser's attorney to the effect that C the tenant was paying to the Ghana Bank according to their instructions all rents accruing in respect of the property, which course was thereafter persisted in by the tenant in accordance with the Ghana Bank's demand.

In these circumstances, the present proceedings were, on Sept. 26, 1956, brought by the purchaser against the tenant and the Ghana Bank claiming (so far with success) the relief previously described. The learned trial judge at an D early stage in his judgment said:

> "It is agreed by counsel for the parties that the main question to be determined in the suit is 'In whom was the legal estate in the property vested on the date of attachment?'",

and this statement is fully justified by reference to the notes of counsels' arguments E in the record. Then, after a full statement of the facts, the learned judge went on to hold that the attachment of the property made on Sept. 25, 1954, was never lifted (this being a reference to the stay of execution on which some reliance had apparently been placed on the part of the Ghana Bank); that Barclays never at any time transferred their equitable mortgage on the property to the Ghana Bank, but merely created them their agents for the custody of the title F deeds; that, consequently, the Ghana Bank never acquired any proprietary interest which was subsisting or could subsist on Sept. 25, 1954, but were on that date holding the title deeds merely as agents or bailees of Barclays. So far the learned judge was clearly right, if his intention was merely to describe the position as matters stood on Sept. 25, 1954, but his statements to the effect that Barclays "never at any time" transferred their equitable mortgage to the Ghana Bank, G and that the Ghana Bank "never acquired any proprietary interest, legal or equitable, in the property," require further examination if and so far as they are intended to apply to the period between the date of the attachment and the date of the execution sale. The learned judge went on to say that "The legal estate and beneficial interest was on Sept. 25, 1954, vested in [the debtor] and in no other person". In saying this, the learned judge appears to have overlooked H the important circumstance that, on Sept. 25, 1954, the debtor's interest in the property was subject to Barclays' equitable mortgage. As to the legal mortgage given by the debtor to the Ghana Bank on Oct. 27, 1954, the learned judge held that the execution of this mortgage by the debtor while the attachment was subsisting without the leave of the court, and the acceptance of it by the Ghana Bank, were in contravention of the provisions of Ord. 43, r. 7, and that, accord- I ingly, by virtue of the provisions of Ord. 43, r. 11, this mortgage was null and void. It will be observed that the learned judge said nothing as to the effect on Barclays' equitable mortgage of the payment by the Ghana Bank to Barclays on Oct. 27, 1954, of the balance then owing from the debtor to Barclays on that security. It is clear from the learned judge's note of the argument addressed to him by the Ghana Bank's counsel that the point was taken that, even if the legal mortgage was null and void, the Ghana Bank still had the benefit of Barclays' equitable mortgage, having "stepped into the shoes" of Barclays on paying them the amount due under it. In fairness to the learned judge, it is right to say that, before him, the defence based on the continuance of the equitable mortgage for the benefit of the Ghana Bank (as distinct from the argument based on the contention that the Ghana Bank had acquired the legal estate by virtue of the legal mortgage of Oct. 27, 1954) seems not to have been accorded the major importance attached to it, at the hearing of the present appeal. Moreover, before the learned judge, the claim to the benefit of the equitable mortgage seems to have been based primarily on the erroneous ground that there had been a transfer of the equitable mortgage on Sept. 9, 1954, when the Ghana Bank received the title deeds from Mr. Franklin; and this may have led the learned judge to overlook the alternative claim to the effect that the Ghana Bank acquired the benefit of the equitable mortgage by paying off Barclays on Oct. 27, 1954. Be that as it may, the learned judge concluded that the purchaser acquired the whole of the right, title and interest which the debtor had in the property on Sept. 25, 1954, comprising the legal estate and beneficial interest, and the consequential right to immediate possession.

He went on to hold that the tenant became a trespasser the moment he refused to acknowledge the title of the purchaser; and that the Ghana Bank were also trespassers in that they claimed to be entitled to possession and had authorised the tenant to continue to occupy the premises on payment of the monthly rent to the Ghana Bank. On this basis, he made the order detailed above against the tenant and the Ghana Bank jointly and severally for damages, mesne profits and recovery of possession of the premises by the purchaser.

In the Ghana Court of Appeal, VAN LARE, J.A., delivered a judgment with which the other two members of the court agreed. That judgment contains the following statement of the law relating to the position of a purchaser under the execution of a fi. fa., which appears to their Lordships to be wholly correct:

> " The law is clear that a purchaser of a property under the execution of a fi. fa. steps into the shoes of the judgment debtor by purchasing no more than the ' estate ' of the judgment debtor therein. In other words what is sold and what is bought at a sale in execution is the right, title and interest of the judgment-debtor—*Dadzie* v. *Kojo* (1). It follows therefore that if a certain property which is attached under execution by way of fi. fa. turns out to be in any way encumbered the purchaser buys subject to that charge or encumbrance."

VAN LARE, J.A., went on to say that the case would have taken a different turn had Barclays still remained at the date of sale the party interested in the encumbrance, thereby, as it seems to their Lordships, indicating the view that, in accordance with his statement of the law as quoted above, Barclays, had they retained the equitable mortgage, could have enforced it against the property in the hands of the purchaser. Nevertheless, VAN LARE, J.A., went on to conclude that the appeal should be dismissed, it would seem on the grounds that Barclays ceased to have any interest in the property on being paid off by the Ghana Bank on Oct. 27, 1954; that there was no formal assignment of Barclays' interest to the Ghana Bank; that the legal mortgage given by the debtor to the Ghana Bank on Oct. 27, 1954, was null and void by virtue of the provisions of Ord. 43 above referred to; and, accordingly, that the Ghana Bank had no interest, legal or equitable, in the property at the date of the execution sale.

Their Lordships agree that the legal mortgage of Oct. 27, 1954, must be taken to have been null and void, and are unable to accept the submission made by counsel for the Ghana Bank to the effect that the legal mortgage should be related back to the date of the equitable mortgage, on the ground that it was merely an implementation of the debtor's undertaking contained in the latter document to execute a legal mortgage when required to do so by Barclays. It appears to their Lordships that the legal mortgage was, on the face of it, intended to constitute a new and distinct security. But this by no means compels the conclusion that the Ghana Bank did not become entitled to the benefit of Barclays' equitable mortgage on paying to Barclays on Oct. 27, 1954, the balance owing on that security. In their Lordships' opinion, it follows from their acceptance of VAN LARE, J.A.'s statement of the law as quoted above (to which may be added a reference to the observations of LORD CHELMSFORD in *Wickham* v. *New Brunswick & Canada Ry. Co.* (2)) that the attachment of Sept. 25, 1954, took effect subject to Barclays' interest as equitable mortgagees. It furthermore appears to their Lordships that, being outside the ambit of the attachment, the benefit of Barclays' equitable mortgage continued after Sept. 25, 1954, to be capable of assignment or devolution, whether by express disposition or by operation of law or by the application of equitable principles, just as it would have been if the attachment had never taken place.

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(1) (1940), 6 W.A.C.A. 139.

The case thus turns on the question whether the payment by the Ghana Bank to Barclays on Oct. 27, 1954, of the amount then owing on the security of Barclays' equitable mortgage had the effect of entitling the Ghana Bank to the benefit of the equitable mortgage with the like priority over the purchaser's interest as it had possessed in the hands of Barclays at the date of such payment off. It is not open to doubt that, where a third party pays off a mortgage, he is presumed, unless the contrary appears, to intend that the mortgage shall be kept alive for his own benefit: see *Butler* v. *Rice* (3).

In the present case, it has been contended that the execution of the abortive legal mortgage sufficed to negative any such intention. Their Lordships cannot agree. While not disputing that the Ghana Bank's intention was to substitute the legal mortgage for the equitable charge, they find it impossible to accept the view that the Ghana Bank intended the equitable charge to be extinguished in the event of the legal mortgage proving for any reason to be invalid or ineffective. In other words, their Lordships take the intention of the Ghana Bank to have been to replace the equitable charge by a valid and effective legal mortgage, but to keep it alive for their own benefit save in so far as it was so replaced. See *Butler* v. *Rice* (4) and *Chetwynd* v. *Allen* (5). Their Lordships would add that, if it is legitimate to look at the abortive legal mortgage for this purpose, the view they have formed as to the Ghana Bank's intention finds some support from the terms of the ultimate paragraph of that document, to which reference has already been made (6). Their Lordships accordingly hold that, by paying the amount due to Barclays, the Ghana Bank became entitled to the benefit of the equitable charge with the same priority for the amount thereby secured as had theretofore been enjoyed by Barclays.

But this conclusion gives rise to consequential questions which were not fully argued before their Lordships, and cannot be adequately dealt with in the present appeal, in view of the form of the proceedings and the absence of evidence as to the amount which can properly be claimed to be due to the Ghana Bank on the security of the equitable charge in priority to the purchaser's interest. For example, it seems to their Lordships open to question whether the equitable charge could rank as security in the hands of the Ghana Bank for any greater sum than the amount owing on it to Barclays at the date of the attachment or at the date of the payment off of Barclays by the Ghana Bank, whichever was the less. It also seems to their Lordships that the possible bearing on the question of priority of any payments made into or out of the debtor's account between acquisition of the benefit of the equitable charge by the Ghana Bank on Oct. 27, 1954, and the execution sale on Apr. 16, 1955, would require consideration. The award of damages for trespass over and above the claim for mesne profits appears to their Lordships to be ill founded, and counsel for the purchaser said that, in any event, he would not seek to maintain it. As to the claim for mesne profits against the Ghana Bank in respect of the rent received by them from the tenant, this claim was allowed in the courts below on the footing that the Ghana Bank had no interest at all in the property. Their Lordships having now decided that the Ghana Bank are in fact interested as equitable mortgagees, it is clear that the Ghana Bank must account to the purchaser for all rent received by them from the tenant since Apr. 16, 1955, in the ascertainment of the amount owing to the Ghana Bank on the security of the equitable mortgage, and their Lordships consider that a declaration to this effect should be substituted for the award of mesne profits so far as the Ghana Bank is concerned, provided they take proceedings to enforce the equitable mortgage within a reasonable time. As to the order for possession against the Ghana Bank, it would seem that the Ghana Bank, as equitable mortgagees, are, prima facie, not entitled to possession or receipt of the rents and profits except under an order of the court. This matter of possession as between the Ghana Bank and the purchaser will, their Lordships think, best be dealt with by a declaration to the effect that the purchaser is to be entitled as against the Ghana Bank to possession or receipt of the rents and profits of the premises unless and until otherwise ordered in any further proceedings taken to enforce the equitable mortgage. The tenant has not been represented in the appeal, but their Lordships see no sufficient justification for the order for possession and mesne profits made against him, which, in their judgment, cannot stand. The tenant must, however, pay all arrears of rent not accounted for by payment to the Ghana Bank. It is clear that, if the Ghana Bank pay or account to the purchaser for the rent received by them in accordance with the present judgment, an order on the tenant to pay the same rent in respect of the same period to the purchaser would, in effect, result in the purchaser receiving it twice over, which could not be right.

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(2) (1865), L.R. 1 P.C. at pp. 75, 76.

(3) [1910] 2 Ch. at pp. 282, 283.

(4) [1910] 2 Ch. 277.

(5) [1899] 1 Ch. 353.

(6) See p. 868, letter G, ante.

In all the circumstances of this somewhat unsatisfactory case, it appears to their Lordships that the proper course to be taken will be as follows: (i) The judgments and decrees of the Land Court and the Court of Appeal should be discharged; (ii) The rent paid by the tenant to the Ghana Bank since Apr. 16, 1955, should be taken to have been paid in or towards satisfaction of the rent payable by the tenant to the purchaser since the same date. As regards any rent not so satisfied, the tenant should be ordered to pay the same down to the date of the commencement of the action, and will thenceforth be liable for all further rent accruing during the continuance of the tenancy; (iii) It should be declared that, as between himself and the Ghana Bank, the purchaser is absolutely entitled to the premises, subject to the charge thereon created by the equitable mortgage of July 16, 1954, to the benefit of which the Ghana Bank became entitled on Oct. 27, 1954; (iv) The Ghana Bank should be ordered to pay to the purchaser all rent received by them from the tenant in respect of the premises since Apr. 16, 1955, but such order should be suspended for six weeks from the date of Her Majesty's Order in Council herein and should not take effect if the Ghana Bank within that period commence proceedings for the enforcement of the equitable mortgage and submit to account in those proceedings for the rent received as aforesaid; (v) It should be declared that, as against the Ghana Bank, the purchaser is entitled to possession or receipt of the rents and profits of the premises unless and until otherwise ordered in proceedings taken to enforce the equitable mortgage. Their Lordships will humbly advise Her Majesty accordingly. Their Lordships make no order as to the costs of the proceedings below or of the present appeal.

Appeal allowed.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk* (for the appellants); *T. L. Wilson & Co.* (for the first respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

POPE AND OTHERS *v.* D. MURPHY & SON, LTD.

[BRISTOL ASSIZES (Streatfeild, J.), June 30, July 1, 1959.]

Negligence—Damages—Personal injury—Measure of damages—Loss of future earning capacity—Whether assessment to be based on plaintiff's shortened expectation of life or on what should have been his normal working life.

The plaintiff, a man fifty-two years of age, was seriously injured in a motor accident for which the defendants admitted liability. Before the accident he had carried on his own business as a master builder. As the result of the accident he had become a permanent invalid. According to the medical evidence he would probably live another five years and might live ten years. On the question of the damages to which he was entitled in regard to loss of future earning capacity,

Held: the plaintiff was entitled to be compensated for what he had in fact lost through the defendants' negligence, and, therefore, the period to be considered in assessing damages for loss of earning capacity was the period during which, apart from the accident, he might reasonably have expected to work, not the period of life left to him as a result of the accident.

Dicta of SLESSER, L.J., in *Roach* v. *Yates* ([1937] 3 All E.R. at p. 447) applied.

Harris v. *Bright's Asphalt Contractors, Ltd.* ([1953] 1 All E.R. 395) not followed.

Richards v. *Highway Ironfounders* (*West Bromwich*), *Ltd.* ([1955] 3 All E.R. 205) considered.

[As to damages for loss of earnings owing to personal injuries, see 11 HALSBURY'S LAWS (3rd Edn.) 258, para. 430; and for cases on the subject, see 36 DIGEST (Repl.) 200, *1053-1056*.]

Cases referred to:

Benham v. *Gambling*, [1941] 1 All E.R. 7; [1941] A.C. 157; 110 L.J.K.B. 49; 164 L.T. 290; 36 Digest (Repl.) 231, *1227*.

Harris v. *Bright's Asphalt Contractors, Ltd.*, [1953] 1 All E.R. 395; [1953] 1 Q.B. 617; [1953] 1 W.L.R. 341; 3rd Digest Supp.

Phillips v. *London & South Western Ry. Co.*, (1879), 5 Q.B.D. 78; 41 L.T. 121; 43 J.P. 749; *subsequent proceedings*, 5 C.P.D. 280; 17 Digest (Repl.) 190, *860*.

Richards v. *Highway Ironfounders* (*West Bromwich*), *Ltd.*, [1955] 3 All E.R. 205; [1955] 1 W.L.R. 1049; 24 Digest (Repl.) 1072, *313*.

Roach v. *Yates*, [1937] 3 All E.R. 442; [1938] 1 K.B. 256; 107 L.J.K.B. 170; 36 Digest (Repl.) 200, *1056*.

Action.

In this action the plaintiffs, Ivor Pope, Grace Elizabeth Pope (the first plaintiff's wife) and Florence Travers (the second plaintiff's mother), claimed damages against the defendants, D. Murphy & Son, Ltd., for personal injuries suffered by the plaintiffs as the result of a road accident on Jan. 1, 1956, when a collision occurred between a motor car driven by the first plaintiff, with the second and third plaintiffs as passengers therein, and a motor car belonging to the defendants. The driver of the defendants' car died as a result of the accident. Liability for the collision was now admitted by the defendants, and the claims of the second and third plaintiffs had been settled. The claims of the first plaintiff (referred to hereinafter as "the plaintiff") remained to be considered by the court, and, as the question of his special damage was very complicated and would involve prolonged examination of documents and accounts, HIS LORDSHIP, STREATFEILD, J., intimated (and counsel agreed) that that part of the plaintiff's claim should be the subject of an inquiry by an official referee or some other tribunal agreed by the parties.

At the time of the accident the plaintiff was an active man, fifty-two years of A
age. He was, and had always been, in the building trade, and for the last few years before the accident he had been a master builder, trading under the name of "Travers and Pope". He employed seven skilled men and two labourers, and his work included private surveys for clients, decorations, and ordinary maintenance. His firm was well run, the work was well done, and he enjoyed the estimation of other persons in the building trade. His profits were about B
£750 a year. Before the accident, he had thought of selling his own business and taking up employment in the building trade as a foreman, or in a managerial capacity.

As a result of the accident the plaintiff was extremely seriously injured. His injuries included (i) a severe crush injury to the chest, causing fractures of several ribs and collapse of the lung; (ii) severe contusion of the cervical, dorsal and C
lumbar spine; and (iii) cerebral concussion. He was now a permanent invalid, was in constant pain, and had lost the ordinary amenities of life. Mr. Keith Lucas, the specialist in whose care the plaintiff had been, thought that he would live for another five years and that he might live for another ten years.

N. R. Fox-Andrews, Q.C., and *F. C. Williams* for the plaintiff.

D. P. Croom-Johnson, Q.C., and *John Rutter* for the defendants. D

STREATFEILD, J., stated the facts in regard to the accident, referred to the settlement of the claims of the second and third plaintiffs, and, after saying that the special damage of the first plaintiff (referred to hereinafter as "the plaintiff") was to be the subject of an inquiry into damages, continued: I am, therefore, concerned to consider what is the proper figure for general damage E
which the plaintiff has suffered by reason of his serious injuries. Counsel for the plaintiff has, I think, correctly analysed the position under different heads. The plaintiff is entitled to damages (i) for his actual physical injuries; (ii) for the pain and suffering which he has already endured, and also for the pain and suffering which he is likely to have to endure in the future for such time as he may remain alive; (iii) for loss of the normal amenities and enjoyment of life; and F
(iv) for future medical expenses, as to which I have little evidence, and I shall have to do my best by way, almost, of guesswork. I also added a head of damage, which counsel for the plaintiff accepted, namely, that the plaintiff was entitled to claim for loss of expectation of life under the principles laid down in *Benham* v. *Gambling* (1). The last head of damage is the loss of future earning capacity and that is the one which has given rise to considerable controversy in this case. G
I shall deal later with the submission of counsel for the plaintiff that the damages under that head are the appropriate figure representing the court's estimate of what the plaintiff would have earned for the rest of his working life but for this accident.

[HIS LORDSHIP reviewed the relevant facts in regard to the first four heads of damage and continued:] Then there is the head of loss of expectation of life, H
which, in my view, is quite a different thing from loss of future earning capacity. It is, within the principle of *Benham* v. *Gambling* (1), simply the loss of enjoying a happy life. In accordance with that decision, it is not a head of damage which in these days demands a very high figure.

The damages under the last head of damage, so counsel for the plaintiff submits, is the appropriate figure representing the court's estimate of what the plaintiff I
would have earned for the rest of his working life but for the accident. Counsel for the defendants, on the other hand, contends that the court is entitled only to measure the plaintiff's loss of earning capacity by the amount of working life which is left to him. First, it is necessary for me to come to some conclusion as to what the plaintiff's business was worth to him and what any change in the business might have been worth to him if there had not been an accident. [HIS LORDSHIP reviewed the evidence on this point, and on a question whether

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(1) [1941] 1 All E.R. 7; [1941] A.C. 157.

the plaintiff might not have disposed of his business and obtained more income by being employed in some one else's business, and continued:] I think that this matter must be approached on the basis that the plaintiff would have been more likely to have retained his business and carried on on the same lines as before.

The question is: Over what period of time must his earning capacity be measured? Is it to be measured over the period of time during which he would reasonably have expected to earn if there had not been an accident, or is it to be said that a wrongdoer, a tortfeasor, is enabled to say: "I have reduced your expectation of life from, say, twenty years down to five. You are entitled to a nominal sum for loss of expectation of life as such, but, with regard to your prospective loss of earnings, you are entitled to claim them only over the period of time that I, the wrongdoer, have left for you. You are not entitled to claim in respect of the period which, but for my wrong, you would reasonably have expected to earn that income?" If that be the law, then I respectfully suggest that it would be very unjust, because after all the object of awarding damages, as I understand it, is to do the best one can to compensate a man who has been injured for what he has lost. What he has lost, as it seems to me, is not only the ability to earn £x a year, but the ability to earn it over the period of time during which he might reasonably expect to do so.

Counsel for the defendants submitted, and I think rightly, that it was wrong to assess damages on a purely annuity basis, although that was often rightly regarded as being the springboard, subject to adjustments. In the ordinary way, assuming that a man's expectation of life has not been reduced, the court makes up its mind what the man would be likely to earn over the period of time. It takes his earning capacity, his wages, his emoluments, and it may start by multiplying by the number of years over which he is likely to earn it, or, alternatively, by looking up the tables of annuities according to the expectation of life and seeing what is the sum, not as the final figure but as the jumping-off point. I agree with counsel for the defendants that it would be wrong to accept any annuity basis as the final figure, because I would then have to take into account, first, that the plaintiff would be receiving in a lump sum what otherwise he would be receiving week by week, or month by month, over a long period of time, so that there would have to be a discount for that reason. I would also have to discount it because of the ordinary changes and chances of life. The plaintiff might suffer some other accident or disaster, not by reason of any tort of the defendants but possibly by reason of somebody else's tort or by his own misfortune, or he might die. I would have to take all of those matters into account in discounting a figure which otherwise might have given him an annuity. The result would be compensation for what the plaintiff himself had lost, that is to say, a reasonable figure for his diminished earning capacity over the period of time during which otherwise he would reasonably expect to earn, having regard to all those changes and chances of life. But it is one thing to take into account those changes and chances of life, namely, his death or disablement by some other injury, and quite another thing to say that I must take into account the changes and chances of life brought about by this very accident, namely, the reduction of his earning capacity and his expectation of life. I am bound to say that that is how it appears to me. The question is: Is that the law?

My attention has been drawn particularly to the judgment of SLADE, J., in *Harris* v. *Bright's Asphalt Contractors, Ltd.* (2). In that case SLADE, J., came to the conclusion, for the reasons which he set out, that damages for future prospective loss of earnings could be based only on the expectation of life which was left to the man as a result of the particular injuries. Counsel for the defendants relied on that case and submitted, quite rightly, that the court did not compensate a dead man; and I agree that it does not. What I am here doing is to compensate a live man for what he has now lost. The question is: What has he lost?

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(2) [1953] 1 All E.R. 395; [1953] 1 Q.B. 617.

A Has he lost whatever was his normal expectation of life, possibly twenty years, or is he entitled to it only over five or ten years? The decision of SLADE, J., being that of a court of first instance of co-ordinate jurisdiction, is not, of course, binding on me.

There is a useful discourse on this part of the law in KEMP AND KEMP ON THE QUANTUM OF DAMAGES (Vol. 1, PERSONAL INJURY CLAIMS) (1954), beginning at p. 78. I think that the first case which has any bearing on the matter is B *Phillips* v. *London & South Western Ry. Co.* (3). It was a case which was twice tried and it appears in other reports. At the first trial FIELD, J., in directing the jury, said, among other things (4):

> " . . . how are you to deal with the loss of future income? . . . I say . . . that you are not to give the value of an annuity of the same amount as the C plaintiff's average income for the rest of the plaintiff's life. If you gave that you would be disregarding some of the contingencies. You must take all things into consideration, and endeavour to see if you can what is the proper mode of dealing with them. An accident might have taken the plaintiff off within a year. He might have lived, on the other hand, for the next twenty years, and yet many things might have happened to prevent his continuing D his practice. If it had been a question of trade or business, bankruptcy might have supervened. That does not come into account here, and I only give it by way of illustration of what must pass through your minds for the purpose of seeing what sum is to be given. It is given, recollect, once for all, and once only, you must not forget that, and it must be given on the fairest estimate you can make of what the probable continuance of the plaintiff's professional E income would have been."

I draw attention to these words (5):

> " The damages to which a man is entitled are the consequences of a wrongful act by which he suffers. The consequences of the wrongful act here are undoubtedly that Dr. Phillips has been and is prevented from earning such a F sum of money as you think he would have been likely to earn if this accident had not happened."

There is not a trace, in that direction to the jury, of an indication that the jury are entitled only to consider the income which he would have earned during a shorter period of life.

In the Court of Appeal in the same case (6), JAMES, L.J., said (7):

> G " That comes to this, you are to consider what his income would probably have been, how long that income would probably have lasted, and you are to take into consideration all the other contingencies to which a practice is liable. I do not know how otherwise the case could be put."

Then there was *Roach* v. *Yates* (8), which SLADE, J., in *Harris's* case (9), analysed with great care. In *Roach* v. *Yates* (10) SLESSER, L.J., said:

> H " As to [the plaintiff's] wages, criticism has been made of the suggestion that one method of estimating his loss under that head is to consider what he would have earned during his normal life, if he had lived. Speaking for myself, I see no justification for approaching that problem by starting with the assumption that he would have lived only so long as the accident has now allowed him to live."

I Those words seem to be the very reverse of the submission of counsel for the defendants in the present case. SLESSER, L.J., went on to say (10):

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(3) (1879), 5 Q.B.D. 78.

(4) (1879), 5 Q.B.D. at p. 81.

(5) (1879), 5 Q.B.D. at p. 82.

(6) The decision of the Court of Appeal was on an appeal by the defendants from a decision of the Queen's Bench Division ((1879), 4 Q.B.D. 406), directing a new trial.

(7) (1879), 5 Q.B.D. at p. 87.

(8) [1937] 3 All E.R. 442; [1938] 1 K.B. 256.

(9) [1953] 1 All E.R. 395; [1953] 1 Q.B. 617.

(10) [1937] 3 All E.R. at p. 447; [1938] 1 K.B. at p. 268.

> "I think the proper way of approaching the problem—as I understand the case of *Phillips* v. *London & South Western Ry. Co.* (11), which is the leading case on this matter—is first to consider what would have been the sum which he would have been likely to have made during his normal life if he had not met with the accident."

Thus at least SLESSER, L.J., in that case came firmly down on the side of *Phillips* v. *London & South Western Ry. Co.* (11), holding that the measure of damages is the probable income that the plaintiff would have had during his normal earning life, subject of course to the ordinary deductions in respect of the ordinary changes and chances of life. I have looked at the judgments of the other two members of the Court of Appeal, and, although they do not in terms state so, it does not appear from their judgments that they are in fact dissenting in any way from the proposition of SLESSER, L.J., which I have just read.

Then came the decision of SLADE, J., and my attention has been drawn to various criticisms which are respectfully made in KEMP AND KEMP ON THE QUANTUM OF DAMAGES. The criticism which is adopted by counsel for the plaintiff appears at p. 91, and, in my view, it is a very forcible criticism:

> "The first reason given [by the learned judge] is that it cannot be right to award damages for loss of earnings for a period during which ex hypothesi the plaintiff is not alive to earn them. In earlier passages in his judgment SLADE, J., expresses much the same sentiment when he speaks of 'imaginary earnings' after the plaintiff's death. But all awards for loss of earnings are in respect of imaginary earnings in the sense that as a result of his injuries the plaintiff cannot earn these earnings. It is the power to earn what he earned before the accident which has been taken away from him. If he had not been injured the plaintiff could reasonably expect to earn money for the rest of his working life; his pecuniary loss is that he cannot earn money for that period. Why should the wrongdoer be freed from compensating the plaintiff for the pecuniary loss which he has caused him just because, at the same time, he has also shortened the plaintiff's life? SLADE, J., speaks of restitutio being impossible in the sense that nothing can lengthen the plaintiff's life by the period by which it has been shortened by the accident. We entirely agree. But why should not the wrongdoer make restitution where it is possible? He can easily make restitution for the pecuniary loss which he has inflicted on the plaintiff. General principles require that a wrongdoer should compensate his victim for the injuries caused to him, and that, where the injury results in a pecuniary loss to the injured person, that person should be compensated in full for such loss."

Unless there is good reason for my rejecting that criticism, I am bound to say that I fully agree with it, because, if I were to accede to the argument of counsel for the defendants on this point, the result would obviously be that the tortfeasor here would be taking advantage of his own wrong. He would be saying: "I reduced your working life to only five years, and you shall have compensation only for those five years", quite forgetting that a much longer period was the true reduction in earning capacity.

Lastly, I have to consider the decision of the Court of Appeal in *Richards* v. *Highway Ironfounders* (*West Bromwich*), *Ltd.* (12), which, of course, is binding on me. In that case LORD EVERSHED, M.R., as it seems to me, was considering the judgment of SLADE, J., in *Harris* v. *Bright's Asphalt Contractors, Ltd.* (13) from an entirely different point of view. He was not considering the question over what period of time a man might be losing his earnings and the case was not concerned with that question; it was concerned entirely with the question whether a man could claim compensation in respect of the loss of his opportunity of providing for his family, of saving for his family. On reading the last two pages of the judgment of Lord Evershed, M.R., it does not appear to me that the matters of criticism, which I have referred to, in Kemp and Kemp, which prima facie strike me as being correct, were ever brought to the notice of the Court of Appeal or were ever considered by it. *Richards* v. *Highway Ironfounders* (*West Bromwich*), *Ltd.* (14) is on quite a different point, and in so far as Lord Evershed, M.R., said that he thought that Slade, J., had decided rightly, it seems that the rightness of his decision was from an entirely different point of view from that which is presented to the court in the present case. I do not think, therefore, that *Richards* v. *Highway Ironfounders* (*West Bromwich*), *Ltd.* (14) operates as a confirmation by the Court of Appeal of the judgment of Slade, J. Possibly the present case will give the Court of Appeal the opportunity of further considering it.

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(11) (1879), 5 Q.B.D. 78.

(12) [1955] 3 All E.R. 205.

(13) [1953] 1 All E.R. 395; [1953] 1 Q.B. 617.

Having regard to the criticisms of the judgment of Slade, J., in *Harris* v. *Bright's Asphalt Contractors, Ltd.* (15) set out in Kemp and Kemp—and not only in the passage which I have actually read, which seems to me to be the most forcible—I have come to the conclusion, with great regret, that I cannot find myself, on principle, in agreement with Slade, J. In my view, the proper approach to this question of loss of earning capacity is to compensate the plaintiff, who is alive now, for what he has in fact lost. What he has lost is the prospect of earning whatever it was that he did earn from his business over the period of time during which he might otherwise, apart from the accident, have reasonably expected to earn it. For that reason, therefore, I do not think that it is right for me to say, as counsel for the defendants invites me to, that the plaintiff's damages can be measured only over a matter of five years or possibly a little more. I think that, apart from the accident, and again, of course, subject to the ordinary changes and chances of life, he is entitled to claim damages over his normal expectation of life. If I were to find anything else, I feel very strongly that I should be giving the tortfeasor here the benefit of his own wrong, and that I decline to do.

On those principles I have the very difficult task, as it always is, of assessing the damages under the different heads, and I feel that, in order that the parties may understand how I have set about it, it would be right for me to give separate figures for the different heads of damage on which counsel for the plaintiff has based his case. I am not going to give a separate figure for the plaintiff's injuries, pain and suffering, and loss of amenities; those I take all together. I have already dealt with that. He has, in fact, endured this pain for three and a half years, and according to Mr. Lucas (16) he has certainly got to face another five years, possibly more; of course, Mr. Lucas may be wrong and it may be less. For those three items, the figure of damages which I fix is the sum of £9,500; for future medical expenses, the sum of £250; and for loss of expectation of life under the principle of *Benham* v. *Gambling* (17), £250. For his loss of earning capacity over the period of time during which he otherwise might reasonably have expected to earn, I fix the sum of £5,000. On the other hand, if I am wrong as to that last matter and counsel for the defendants is right, that last figure would have been £2,500 instead. But as it is, the total sum which I award as general damages is the sum of £15,000.

Judgment for the plaintiff.

Solicitors: *Wansbroughs, Robinson, Tayler & Taylor*, Bristol (for the plaintiff); *Cartwright, Taylor & Corpe*, Bristol, agents for *S. Garelick & Co.*, Cardiff (for the defendants).

[*Reported by* Deirdre McKinney, *Barrister-at-Law.*]

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(14) [1955] 3 All E.R. 205.

(15) [1953] 1 All E.R. 395; [1953] 1 Q.B. 617.

(16) The specialist under whose care the plaintiff had been.

(17) [1941] 1 All E.R. 7; [1941] A.C. 157.

WOYNO *v.* WOYNO.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Mr. Commissioner Edgedale, Q.C.), May 16, 30, 1960.]

Marriage—Validity—Declaratory decree—R.S.C., Ord. 25, *r.* 5.

The petitioner, who was Polish by birth, went through a ceremony of marriage with the respondent in England in 1948. In 1957 the petitioner became a naturalised British subject but the respondent was refused registration as a citizen of the United Kingdom and Colonies pursuant to the British Nationality Act, 1948, s. 6 (2), on the ground that the marriage in 1948 was not valid. The petitioner, who was domiciled in England, now sought by virtue of R.S.C., Ord. 25, r. 5, a declaration that he and the respondent were lawfully married.

Held: the petitioner was entitled to the declaration sought.

[**Editorial Note.** In *Har-Shefi* v. *Har-Shefi*, [1953] 1 All E.R. 783, the Court of Appeal held that under R.S.C., Ord. 25, r. 5, the court had jurisdiction to make a declaratory order even though no other relief was sought. In that case a declaration was made ([1953] 2 All E.R. 373) that the marriage there in question had been validly dissolved. The present case is the first, so far as is known, in which the court has declared a marriage to be valid.

As to declaratory decrees, see 12 HALSBURY'S LAWS (3rd Edn.) 223, para. 417, note (i), and 22 HALSBURY'S LAWS (3rd Edn.) 747, para. 1610, note (g); and for cases on the subject, see 3rd DIGEST Supp.]

Petition.

This was a petition for a declaration as to the validity of a marriage. The petitioner was born in Poland in 1898 and by his petition he alleged that on Aug. 7, 1948, he was lawfully married to the respondent Jozefa Zajac, spinster, at the Chelsea Register Office, that he was domiciled in England and:

> " 6. That the said marriage between the petitioner and the respondent was lawful and is a valid and subsisting marriage.
>
> Particulars
>
> " (a) Prior to the said marriage the petitioner was a bachelor and the respondent a spinster . . . and there was no impediment to the said marriage.
>
> " (b) From about 1932 until 1939 the petitioner lived and cohabited with one Bronislawa Bujnicka, widow . . . in Poland but has never gone through any form or ceremony of marriage with her.
>
> " (c) In about 1939 the petitioner and the said Mrs. Bujnicka were deported to Russia. In about 1941 the petitioner was released by the Russians and joined the Polish Army. The said Mrs. Bujnicka was at that time . . . in a forced labour camp in Russia and in order to secure her release and to enable her to join the petitioner he made a false declaration to the Polish Army authorities stating that she was his wife.
>
> " (d) The said Mrs. Bujnicka never joined the petitioner and remained in Russia but by reason of the aforesaid false declaration the petitioner was described in the Polish Army records as a married man.
>
> " (e) On Dec. 17, 1947, by an order in writing of the Polish Records Office, Polish Re-settlement Corps, the petitioner's civil status was changed in the records from that of a married man to bachelor.
>
> " (f) On Aug. 12, 1957, the petitioner . . . was granted a certificate of naturalisation by Her Majesty's Secretary of State.
>
> " (g) The Secretary of State has refused to register the respondent as a citizen of the United Kingdom and Colonies pursuant to the British Nationality Act, 1948, s. 6 (2), on the ground that the said marriage between

the petitioner and the respondent is not a valid and subsisting marriage and that the petitioner is married to the said Mrs. Bujnicka." A

The petition concluded with a prayer that the court would decree and declare that the petitioner and the respondent were lawfully married on Aug. 7, 1948.

On May 16, 1960, the matter came before Mr. Commissioner EDGEDALE, Q.C., as an undefended suit. B Counsel for the petitioner submitted that the court had jurisdiction to entertain the petition and referred to *Har-Shefi* v. *Har-Shefi* ([1953] 1 All E.R. 783) and to RAYDEN ON DIVORCE (7th Edn.) at p. 200, para. 196. Counsel also submitted that since Mrs. Bujnicka was at an unknown address in Russia it was impossible to give her notice of the present proceedings. In evidence the petitioner stated that when he applied for naturalisation in 1957, he told the police officer who interviewed him that he had lived with Mrs. Bujnicka C in Poland but not that he had married her and that the police officer had misunderstood him. The learned commissioner then adjourned the case to enable the police officer to be called to give evidence and to invite the Home Office to assist the court on this point.

G. Dobry for the petitioner.

A. T. Hoolahan for the Secretary of State for the Home Department. D

The respondent did not appear and was not represented.

MR. COMMISSIONER EDGEDALE, Q.C.: I think that the petitioner has told me a truthful and consistent story. The police officer has now given evidence. He got the impression that the petitioner was telling him that he did contract a civil marriage in Poland in 1932, but he has frankly explained to me E that it is possible that there was some misunderstanding. When the petitioner was speaking in English I found him almost unintelligible.

In those circumstances I am asked to declare that this marriage is valid. I am satisfied that I have got power to make such a declaration and I do make that declaration.

Declaration accordingly. F

Solicitors: *S. L. Karpinski* (for the petitioner); *Treasury Solicitor* (for the Secretary of State for the Home Department).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

HORWITZ *v.* ROWSON AND ANOTHER.

[QUEEN'S BENCH DIVISION (Havers, J.), May 23, 24, 25, June 3, 1960.]

Town and Country Planning—Development—Use classes—Industrial building—Basement used in connexion with business of horticulture carried on in shop opposite—In summer basement used for storing plants and bulbs and for sorting and grading bulbs for display in the shop and in winter for making and repairing boxes and trays which were used for displaying goods in the shop—In 1955 *use of basement changed to that of printers' engineers' workshop which was user as a light industrial building—Whether material change in user—Whether on appointed day basement used as " industrial building ", " shop " or " repository "—Town and Country Planning* (*Use Classes*) *Order*, 1950 (*S.I.* 1950 *No.* 1131), *art.* 2 (2), *schedule, class* I, *class* III, *class* X.

By art. 3 of the Town and Country Planning (Use Classes) Order, 1950, change in the use of a building from a purpose specified in any class in the schedule* to the Order of 1950 to any other purpose within the same class is not a material change in use within the Town and Country Planning Act, 1947†.

From 1939 to 1954, the basement of premises was used by the M. company in connexion with their retail business as horticulturists, the company occupying, opposite to the basement, a shop where they sold flowers, bulbs, seeds, etc. In summer, the M. company used the basement for storing bulbs and plants; for sorting and grading bulbs into trays ready for display and sale in the shop, and for packing and despatching bulbs ordered from them. No retail sale took place in the basement. Out of season, in winter, the M. company used the basement for making boxes and seed trays for displaying goods in their shop and repairing damaged boxes and trays, and for this purpose they used wood and a handsaw in the basement but no machinery. By a lease dated Oct. 18, 1954, the plaintiff demised the basement to the defendants who covenanted (in cl. 2 (15) of the lease) not to suffer any material change in the use of the basement without the written consent of the plaintiff and without applying for planning permission. The lease contained a proviso for re-entry on breach of covenant by the defendants. From Mar. 25, 1955, for a term of twenty-one years, the defendants sub-let the basement to the E. company for use as a workshop in the course of the E. company's business as printers' engineers. The defendants did not get the plaintiff's consent or apply for planning permission for user of the basement by the E. company as their workshop (which was user as a light industrial building within class III of the schedule to the Order of 1950). In an action by the plaintiff to recover possession of the basement for breach of covenant by the defendants in that they had suffered a material change in the use of the basement within the meaning of the Town and Country Planning Act, 1947, the plaintiff alleged that from 1939 to 1954 the basement was used either as a shop within class I of the schedule to the order or as a repository within class X.

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* The schedule includes class I, use as a shop for any purpose; class III, use as a light industrial building for any purpose, and class X, use as a " repository " for any purpose, and in art. 2 (2) of the order there are the following definitions: " shop " means a building used for carrying on any retail trade or business wherein the primary purpose is the selling of goods by retail and includes . . . a building used for the reception of goods to be . . . repaired, or for any other purpose appropriate to a shopping area . . .; " industrial building " means a building . . . used for carrying on any process for or incidental to (a) the making of any article . . . or (b) the . . . repairing . . . or adapting for sale . . . of any article . . . being a process carried on in the course of trade or business other than agriculture; and " light industrial building " means an industrial building in which the processes carried on could be carried on in a residential area without detriment to . . . amenity . . .

† See s. 12 (2) of the Act, the relevant terms of which are set out at p. 884, letter B, post.

Held: (i) the use of the basement by the M. company had been user as a light industrial building, and, therefore, there had not been a material change in use within cl. 2 (15) of the lease, because the user of the basement by the M. company was for the carrying on of a process incidental to the adapting of bulbs for sale by grading and sorting and to making or repairing boxes and trays in the course of a business, so as to be within the definition of " industrial building " in art. 2 (2) of the Order of 1950.

(ii) either considered alone or together with the shop opposite to it, the basement was not used as a " shop " within the meaning of art. 2 (2) of the order, as no retail trade was carried on in it; for it was not used for the reception of " goods " to be repaired, as the boxes and trays were not goods repaired for the purpose of sale by retail, and it was not used for " any other purpose appropriate to a shopping area " as it came within another class of user in the schedule, viz., user as a light industrial building (see (i) above).

(iii) the basement was not used as a " repository " within the meaning of class X of the schedule to the order since the main, if not the exclusive, use of the basement in winter was for making and repairing trays and boxes.

[For the Town and Country Planning (Use Classes) Order, 1950, art. 2 (2) and Schedule, see 21 HALSBURY'S STATUTORY INSTRUMENTS 177, 179.]

Action.

From before 1939 until 1954 the basement of premises situated at 5, Farringdon Road, Holborn, in the county of London, was occupied by J. J. Mack, Ltd., in connexion with their business as horticulturists. During this period, J. J. Mack, Ltd., also occupied a shop on the other side of Farringdon Road where they sold flowers, bulbs, seeds, etc., in the course of their business. In summer, J. J. Mack, Ltd. had used the basement for storing bulbs and plants. The bulbs, some of which were imported from Holland, were delivered to the basement and unloaded and unpacked and were then sorted and graded in the basement and put into trays ready for display and sale in the shop over the road; in the basement bulbs were also packed and despatched in accordance with orders received by the company. No retail sales took place in the basement, all the sales taking place in the shop over the road. In winter, J. J. Mack, Ltd. had used the basement for making boxes and seed trays, for which purpose they bought wood, and also for repairing damaged boxes and trays; no machinery was used in the basement but a handsaw was used.

By an underlease dated Oct. 18, 1954, the plaintiff, David Horwitz, demised to the defendants, Benjamin Rowson and Margarita Rowson, the ground floor and basement of 5, Farringdon Road for a term of twenty-two and three-quarter years less three days from June 24, 1954, at the yearly rent of £600 payable by four equal quarterly payments on the usual quarter days. By cl. 2 (15) of the underlease the defendants covenanted that during the term they would not, without the written consent of the plaintiff, make or suffer to be made any material change in or to the use of the land demised or in the use of any building erected on the land and that, if the plaintiff consented in writing to any such material change in user, they would duly apply to the local planning authority as defined by the Town and Country Planning Act, 1947, for any necessary permission and would give the plaintiff notice of any permission granted within three months of receiving it from the local planning authority. The underlease contained a proviso for forfeiture of the term in the event of breach of covenant by the defendants. By a further underlease dated May 9, 1955, made between the defendants of the one part and Excelsior Printers Supply Co., Ltd. (hereafter referred to as " the Excelsior Company ") of the other part, the defendants sublet the basement of 5, Farringdon Road to the Excelsior Company for twenty-one years from Mar. 25, 1955, and the company covenanted to use the basement as a store, workshop and warehouse in connexion with their business of printers'

A engineers. The Excelsior Company in fact used the basement as a workshop for the purposes of their business. By notice dated Nov. 20, 1958, served on the defendants under s. 146 of the Law of Property Act, 1925, the plaintiff alleged (inter alia) that the defendants had broken the covenant contained in cl. 2 (15) of the underlease dated Oct. 18, 1954, by not obtaining the plaintiff's consent, written or unwritten, to the user of the basement by the Excelsior Company for B cleaning printers' type, machinery and other equipment and for keeping tanks containing caustic acid, which user involved a material change in the use of the basement within cl. 2 (15), and by not applying to the local planning authority for permission to make such a change in use. The notice required the defendants to remedy the breach within twenty-one days from the date of the notice. The defendants having failed to remedy the breach within the required time or at C all, by writ dated Dec. 24, 1958, the plaintiff commenced the present action claiming possession of the ground floor and basement of 5, Farringdon Road; £150 arrears of rent due from the defendants on Sept. 29, 1958, and mesne profits of £600 per annum from Sept. 29, 1958, to the date of possession. By their defence the defendants denied breach of cl. 2 (15); alternatively they alleged that the plaintiff had waived his right to rely on any breach by accepting rent under D the underlease dated Oct. 18, 1954, with full knowledge of the breach. By his reply the plaintiff denied accepting rent with full knowledge of the breach and alleged that in any event the breach of cl. 2 (15) was a continuing one. The case is primarily reported on the question whether the user of the basement by the Excelsior Company amounted to a material change in the user existing on July 1, 1948, (1), i.e., in the user of the basement by J. J. Mack, Ltd., within the E meaning of the Town and Country Planning Act, 1947 and the Town and Country Planning (Use Classes) Order, 1950.

David Hirst for the plaintiff.

R. J. S. Thompson for the defendants.

Cur. adv. vult.

F June 3. **HAVERS, J.**, having referred to the purposes for which J. J. Mack, Ltd. used the basement from 1939 to 1954 (for which see p. 882, letter E, ante), read the following judgment: That was the user on the material date, July 1, 1948 (1). The plaintiff alleges that there has been since the date of the underlease to the Excelsior Company (2), and at the date of the writ (3), a material G change in user, in that the user by the Excelsior Company (4) was that of a light industrial building, whereas it was contended that the user by J. J. Mack, Ltd. was either that of a shop or a repository, or that it did not come within any of the classes within the order (5) which has been made by the Minister.

According to the covenant (in cl. 2 (15) of the underlease), the duty of the defendants as under-lessees, if a material change was made, was to ask the H lessor, the plaintiff, for consent, and not to make a material change in use without the previous consent in writing of the plaintiff. If the plaintiff gave his consent, then there was a duty to apply to the local planning authority for permission. The question, therefore, that I have got to decide is this: Was there a material change of user within the meaning of the Town and Country Planning Act, 1947? As I have said, the material date is July 1, 1948, and I have referred to the evidence I (which is really undisputed evidence) which was given as to the user by J. J. Mack,

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(1) The appointed day for the purposes of the Town and Country Planning Act, 1947; see Town and Country Planning Act, 1947 (Appointed Day) Order, 1948 (S.I. 1948 No. 213). (2) Oct. 18, 1954. (3) Dec. 24, 1958.

(4) The Excelsior Company used the basement as a workshop in their business as printers' engineers.

(5) The Town and Country Planning (Use Classes) Order, 1950, made by the Minister of Town and Country Planning under the powers conferred on him by s. 12 (2) of the Town and Country Planning Act, 1947.

Ltd. It is agreed for the purpose of this case by both counsel that the user by the Excelsior Company was that of a light industrial building.

It is necessary to refer briefly to the Town and Country Planning Act, 1947. Section 12 (1) provides:

> " Subject to the provisions of this section and to the following provisions of this Act, permission shall be required under this Part of this Act in respect of any development of land which is carried out after the appointed day."

Then sub-s. (2):

> " In this Act, except where the context otherwise requires, the expression ' development ' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

Then sub-s. (2) goes on to say:

> " Provided that the following operations or uses of land shall not be deemed for the purposes of this Act to involve development of the land, that is to say:—[then there are specified a number of cases, and the only one with which I am concerned is] (f) in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Minister under this section, the use thereof for any other purpose of the same class."

The Minister made an order, which is the Town and Country Planning (Use Classes) Order, 1950, which came into operation on July 21, 1950. The effect of this is that a person is entitled to change his actual user if he keeps within a certain class (6). If he makes a change within that class, it is not a material change and does not require permission. It is necessary to refer to the definition article of the order, art. 2 (2), which says:

> " In this order unless the context otherwise requires, the following expressions have the meanings respectively assigned to them . . . ' shop ' means a building used for the carrying on of any retail trade or retail business wherein the primary purpose is the selling of goods by retail, and includes a building used for the purposes of a hairdresser, undertaker or ticket agency or for the reception of goods to be washed, cleaned or repaired, or for any other purpose appropriate to a shopping area, but does not include a building used as a funfair, garage, petrol filling station, office, or hotel or premises (other than a restaurant) licensed for the sale of intoxicating liquors for consumption on the premises; . . .
>
> " ' office ' includes a bank, but does not include a post office; . . .
>
> " ' industrial building ' means a building (other than a building in or adjacent to and belonging to a quarry or mine and other than a shop) used for the carrying on of any process for or incidental to any of the following purposes, namely:—(a) the making of any article or of part of any article, or (b) the altering, repairing, ornamenting, finishing, cleaning, washing, packing or canning, or adapting for sale, or breaking up or demolition of any article, or (c) without prejudice to the foregoing paragraphs, the getting, dressing or treatment of minerals, being a process carried on in the course of trade or business other than agriculture, and for the purposes of this definition the expression ' article ' means an article of any description, including a ship or vessel."

Then there are definitions in art. 2 (2) of three types of industrial building, " light industrial building ", " general industrial building " and " special industrial building ":

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(6) By art. 3 (1) of the Town and Country Planning (Use Classes) Order, 1950: " Where a building or other land is used for a purpose of any class specified in the schedule to this order, the use of such building or other land for any other purpose of the same class shall not be deemed for the purposes of the [Town and Country Planning Act, 1947] to involve development of the land."

> " 'light industrial building' means an industrial building (not being a special industrial building) in which the processes carried on or the machinery installed are such as could be carried on or installed in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit;
>
> " 'general industrial building' means an industrial building other than a light industrial building or a special industrial building;
>
> " 'special industrial building' means an industrial building used for one or more of the purposes specified in classes V, VI, VII, VIII and IX referred to in the schedule to this order "

and those are the classes of special user which one might say are of an offensive type: smelting and so on, burning of building bricks, production of calcium carbide, production of sulphur chlorides, and the like.

The schedule to the order contains a number of classes. Class I is " Use as a shop for any purpose except as : (i) a fried fish shop; (ii) a tripe shop; (iii) a shop for the sale of pet animals or birds; (iv) a cats-meat shop; " class II is " Use as an office for any purpose "; class III, " Use as a light industrial building for any purpose "; and class IV, " Use as a general industrial building for any purpose ". Then the schedule goes on to the classes of what I have described as the offensive type. Then there is a " Special Industrial Group E," which has a number of classes, and class X is " Use as a wholesale warehouse or repository for any purpose ".

It is common ground that the user by the Excelsior Company is that of a light industrial building, and the problem, therefore, which I have to determine is this: What was the user by J. J. Mack, Ltd. on July 1, 1948? If there was a material change of user, then, of course, there has been a breach of the covenant, for it is common ground that there has been a suffering by the defendants.

It was contended by counsel for the plaintiff, first of all, that this basement, if regarded alone without regard to the shop on the other side of the road, was a shop inasmuch as it was used for carrying on the retail trade of horticulture. I am unable to accept that argument, because on the facts no retail trade was carried on in the basement. The retail trade was carried on exclusively by J. J. Mack, Ltd. in a shop over the other side of the road. The second point that was taken by counsel for the plaintiff was this, that if the basement alone was not a shop, the shop over the way plus the basement were together a shop within the meaning of the definition in art. 2 of the order. As I said, " shop " means " a building used for the carrying on of any retail trade or retail business wherein the primary purpose is the selling of goods by retail "—and the shop over the way was obviously that—" and includes a building used for the purposes of a hairdresser, undertaker or ticket agency or for the reception of goods to be washed, cleaned or repaired ". As has been said by Mr. Lartice (7), there were goods that were brought in here to be repaired. Goods were repaired. It was used partly for the reception of things to be repaired, and for boxes and trays; but I have to consider whether the boxes and trays that were repaired in the basement come within the definition of " the reception of goods to be . . . repaired " within the meaning of this order. The word " goods " must have an analogous meaning to the meaning which it bears in the earlier part of the definition, " 'shop' means a building . . . wherein the primary purpose is the selling of goods by retail ". These boxes and trays which were repaired were not repaired for the use or the benefit of customers; they were repaired where necessary for the purpose of displaying the goods.

The only question that remains, therefore, is whether the plaintiff can bring himself within the words " or for any other purpose appropriate to a shopping area ". I assume for the purpose of this argument that these words are not to be construed ejusdem generis, if there is a genus hairdresser, undertaker and ticket agency. I find this question difficult to determine. The test is not whether the purpose is ordinarily incidental to the carrying on of a retail trade. It is something entirely different. The test is, user for a purpose appropriate to a shopping area. As that is the test, I have got to have regard to the object of the Act of 1947 and of the classification of the uses in this order. The Act, as is well known, was an Act to control development all over this country. The idea was that in future all sorts of buildings of different characters should not be built up all over the country without any sort of control, but that each planning authority should prepare a development plan and should allocate areas for the different kinds of user and development, agriculture, residential, industrial buildings, shops, offices, and so on. If one looks at the order itself, it does appear that there are really some broad distinctions between user. There is a user for shop, user for office and user for industrial building, and industrial buildings are classified within themselves as light, general and special. It seems to follow from that that if a building is used either for an office or an industrial building, it would not be deemed to be appropriate for a shopping area.

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(7) The proprietor of J. J. Mack, Ltd.

The main test, really, for considering whether a building is an industrial building is whether there is any process carried on therein for or incidental to the making of any article or part of an article, or the altering, repairing or adapting for sale of any article being a process carried on in the course of a trade or business other than agriculture. It is to be observed that horticulture has not been excluded from that. This basement, as I find—indeed, there is no dispute on the evidence—was used for making boxes and trays in the winter. It was also used for adapting bulbs for sale, and grading and sorting them out. Those, in my view, within the tenor of this order, are not purposes which are appropriate to a shopping area. They are purposes which are appropriate to user as an industrial building. I hold, therefore, that this basement alone was not a shop, nor was it a shop if included with the shop over the road, within the meaning of this order.

Then it was contended that the basement was a repository. As I have said, there is in the order a Special Industrial Group E, and class X of that group is: " Use as a wholesale warehouse or repository for any purpose ". It is clearly not a wholesale warehouse. Whether the word " wholesale " qualifies " repository " is not, perhaps, very clear. If it does, then this obviously was not a wholesale repository. I will assume that the word " wholesale " does not qualify the word " repository ", and consider whether or not the basement was a repository within the meaning of the order. " Repository ", I think, means a building wherein goods are kept or stored, and I think that the keeping or storing must be in the course of a trade or business. In this particular case, the basement was used in the season partly, but not exclusively, for this purpose. In the winter it was not used for this purpose at all. The main, if not the exclusive, user in the winter was for making and repairing boxes and trays. I hold, therefore, that it was not a repository within the meaning of class X of the order.

It was contended also by counsel for the plaintiff that if the basement did not fit into either of those two classes, it did not come within the order at all, and then I should have to decide as best I could whether or not there had been a material change of user. There is one more class which I have got to consider, however, and that is the one to which counsel for the defendants says that the basement belongs, namely, that of a light industrial building. By art. 2 (2) of the order

> " ' industrial building ' means a building (other than a building in or adjacent to and belonging to a quarry or mine and other than a shop) used for the carrying on of any process for or incidental to any of the following purposes, namely:—(a) the making of any article or of part of any article, or (b) the altering repairing . . . cleaning . . . packing . . . or adapting for sale . . . of any article . . . being a process carried on in the course of trade or business other than agriculture . . ."

A I have come to the conclusion that this is the right class, that the user of this basement on July 1, 1948, was that of an industrial building, and it came within the definition of a light industrial building, which is

> " an industrial building (not being a special industrial building) in which the processes carried on or the machinery installed are such as could be carried on or installed in any residential area without detriment to the
> B amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit."

The basement on July 1, 1948, was used for carrying on a process for or incidental to the making of an article, namely, boxes and trays, also for repairing boxes and trays, also for adapting for sale bulbs. They were sorted and graded and
C prepared for display. That, in my view, was a process carried on in the course of a trade or business. It is quite clear that, if the basement was an industrial building, it came within the term " light industrial building " within the meaning of the order. In those circumstances, it being common ground that the user between 1955 and the date of the writ was as a light industrial building, I hold that there has not been any material change of user within the meaning of the
D covenant and, therefore, there has been no breach of covenant.

[HIS LORDSHIP said that other questions had been ventilated before him. One was whether, assuming that there had been a breach, there had been a waiver in this case by reason of the fact that the plaintiff, with knowledge of the facts—and it was contended that he had full knowledge of the facts—had demanded rent and had been paid and accepted payment of rent. Attention was called to
E some authorities under which it had been held that the mere demand for rent or the mere acceptance of rent by itself is not conclusive of the matter; that one had to look at all the circumstances of the case and consider the question, quo animo was the rent demanded or received. If, however, HIS LORDSHIP had had to decide that point, he would have held that there was no waiver by the acceptance of rent in this case, on the short ground that the burden rests on the
F defendants to prove that the plaintiff had knowledge of all the material facts which constituted the breach but that it was not proved that the plaintiff had any knowledge of the user of the basement on July 1, 1948, and, therefore, he could not possibly have known whether there was a material change of user in respect of the user from 1955 onwards. HIS LORDSHIP would also have held that this breach was a continuing breach.]

Judgment for the defendants.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk* (for the plaintiff); *Braund & Hill* (for the defendants).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

AIRPORT RESTAURANTS, LTD. *v.* SOUTHEND-ON-SEA CORPORATION.

[Court of Appeal (Hodson, Ormerod and Harman, L.JJ.), June 20, 1960.]

Landlord and Tenant—New tenancy—Business premises—County court application—High Court action by tenant for declaration of invalidity of landlord's notice to terminate tenancy—Whether county court hearing should be adjourned till after High Court proceedings.

Tenants who had been given notice in the form prescribed by the Landlord and Tenant Act, 1954, s. 25 (1) and the regulations made thereunder* to terminate their " tenancy " of business premises of which the rateable value did not exceed £500 applied to the county court for a new lease. Subsequently the tenants were advised that the premises might in law be held by them under two tenancies, and that the notice to terminate their " tenancy " might therefore be invalid. The tenants immediately issued a writ in the High Court claiming a declaration to this effect, and then applied to the county court to adjourn the hearing of their application for a new lease until after the conclusion of the High Court proceedings. On appeal against a refusal of this application for adjournment,

Held: the further hearing of the county court proceedings would be adjourned until judgment in the High Court proceedings, because otherwise there would be a grave risk of injustice to the tenants who, if they were forced to prosecute their application for a new lease and failed thereon, might be held in the High Court to have thereby estopped themselves from contending that the notice to terminate the tenancy was invalid.

Appeal allowed.

[As to landlord's notice to terminate business tenancy, see 23 Halsbury's Laws (3rd Edn.) 889, para. 1711; and as to procedure in the county court on an application for a new tenancy, see ibid., 897, para. 1722.

For the Landlord and Tenant Act, 1954, s. 25, see 34 Halsbury's Statutes (2nd Edn.) 410.]

Cases referred to:

Davis (W.) (Spitalfields), Ltd. v. *Huntley*, [1947] 1 All E.R. 246; *affd.* C.A., [1947] 2 All E.R. 371; 31 Digest (Repl.) 496, *6219*.

Osenton (Charles) & Co. v. *Johnston*, [1941] 2 All E.R. 245; [1942] A.C. 130; 110 L.J.K.B. 420; 165 L.T. 235; 2nd Digest Supp.

Tennant v. *London County Council*, (1957), 121 J.P. 428; 3rd Digest Supp.

Interlocutory Appeal.

The tenants of the Southend-on-Sea Airport Restaurant appealed against the refusal of His Honour Judge Conolly Gage at Southend County Court, on May 30, 1960, to adjourn the hearing of their application under the Landlord and Tenant Act, 1954, for a new lease of the restaurant. The facts are stated in the judgment of Hodson, L.J.

A. E. Holdsworth for the tenants.

M. Mann for the landlords.

HODSON, L.J.: The circumstances of this case are somewhat complicated and various considerations have been discussed before us which it is very undesirable, I think, that I should pursue, because, having come to the conclusion that this appeal should be allowed, it is very undesirable that anything should be said by this court which may in any way tend to colour or attempt to influence any decision which may have to be made hereafter. The position is that, an application for a new lease having been made, the landlords having given notice of termination of the "tenancy"—it has been conceded for the purposes of this application that there is either one tenancy or two tenancies of the premises here in question—the tenants at a late stage decided to challenge the validity of the notice after they had themselves made their application for a new lease, and, being unable to do that in the county court proceedings (1), as soon as their attention was drawn to this point by counsel they issued a writ in the High Court claiming a declaration that the notice was bad, having regard to the fact that the notice on the face of it only referred to one tenancy whereas in fact, according to their contention, there were two. The defence put in in the High Court action was inter alia that the tenants had waived their right to take this point by making the application for a new lease. The plea was drawn in that form because of statements made at first instance by HENN COLLINS, J., in a case to which we have been referred, *W. Davis* (*Spitalfields*), *Ltd.* v. *Huntley* (2) where what he said was, I think, an integral part of his judgment, and of dicta in the Court of Appeal in *Tennant* v. *London County Council* (3), which cited with approval what HENN COLLINS, J., had said. The decision of HENN COLLINS, J., went to the Court of Appeal, but there is no decision on the point of waiver. In the Court of Appeal in *Tennant* v. *London County Council* (3) it was pointed out by ROMER, L.J., that the question whether or not there has been a waiver must depend in each case on the facts of that particular case.

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* I.e., Form No. 7 in the appendix to the Landlord and Tenant (Notices) Regulations, 1957 (S.I. 1957 No. 1157).

I have said enough to indicate that in my view it is right that the county court proceedings should be adjourned until the High Court proceedings have been determined. Counsel for the landlords has naturally tried to insist on the position which he now holds, namely, that the hearing which began on May 31, should be continued next Friday, because of the provisions of the Act, which give a tenant three months' security of tenure after the conclusion of the proceedings. It seems to me, however, that, having regard to the way in which this court deals with matters of discretion, the overriding consideration in this case is that there is a grave risk of an injustice to the tenants unless an adjournment is granted. They did go on with their proceedings for a short time after their application for an adjournment had been refused, and if they are forced to continue with them and to prosecute their application for a new lease before judgment is given in the High Court proceedings and if they fail, they may well be estopped in the High Court proceedings from claiming that the notice was bad. For that reason, I am persuaded that there would be, if not a certainty, at any rate a grave risk, of injustice if the county court proceedings were not adjourned until the High Court proceedings are determined.

I know that there is risk of delay in the High Court proceedings, but this is a short matter, a matter largely of construction of the notice and of the two documents called "licences" with which that notice is concerned. There is no reason why an application—in which both parties are prepared to concur—should not be made to the Queen's Bench Division to accelerate the trial of that action in order that the delay may be as little as possible.

This situation seems to me inevitable having regard to the way in which the Landlord and Tenant Act, 1954, has been constructed, which does undoubtedly lean, on the face of it, heavily in favour of the tenant, because tenancies of business premises cannot be brought to an end unless the landlords fulfil the requirements of the Act. They have relied on their intention to carry on the catering business in their airport at Southend, which the tenants have hitherto been carrying on: then they can get possession, but only if they fulfil the rigid requirements of this Act, one of which is that a notice in prescribed form is to be given.

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(1) Because the tenants' action for a declaration was not within the jurisdiction over applications for new tenancies of business premises conferred on the county court by s. 24 (1) and s. 63 (2) (a) of the Landlord and Tenant Act, 1954.

(2) [1947] 1 All E.R. 246; *affd.* C.A., [1947] 2 All E.R. 371.

(3) (1957), 121 J.P. 428.

In my opinion the only course which this court can properly take is to allow the appeal.

ORMEROD, L.J.: I agree. Counsel for the landlords has submitted that the reason why the learned county court judge exercised his discretion as he did was, in the first place that he was influenced by what he regarded, on the authorities, as the likely outcome of the High Court proceedings, and secondly that he thought that on the balance of the prejudice which might be occasioned to the parties the discretion ought to be exercised in favour of rejecting the application for an adjournment. In view of the fact that the High Court proceedings are pending, it is not advisable, as my Lord has said, for anything more to be said in this court than is necessary; and I for my part would go no further than to say that, on consideration of the authorities and of the facts as we know them, there is plainly room for argument.

So far as the balance of prejudice is concerned, I find it hard, and I have found it hard throughout the hearing, to understand why there should be any considerable prejudice against the landlords if this adjournment is allowed. True, it may be some considerable time before the matters are finally disposed of and either a new tenancy is granted or the landlords are able to take possession; but it appears to me that delay is bound to happen in almost any event, having regard to the fact that High Court proceedings are pending and that there may possibly be an appeal from the decision of the High Court, whatever that decision may be.

Although it may very well be that there might be a further delay of three months at the end of those proceedings, as counsel for the landlords has said, if the matter cannot be decided now in the county court, that does not appear to me to amount to the grave prejudice which the learned county court judge seems to have had in mind when he was considering this matter. In all the circumstances I agree that this appeal should be allowed and that there should be an adjournment of the matter pending the hearing of the High Court proceedings, as otherwise it does seem possible that serious injustice may be done to the tenants.

HARMAN, L.J.: I agree. This was, of course, primarily a matter in the learned judge's discretion, but if we come to the clear conclusion that he wrongly exercised that discretion—that is to say, that he did not take the right matters into account or give them the right weight—it is our duty to exercise our discretion in this case. The authority for that proposition is *Charles Osenton & Co.* v. *Johnston* (4) in LORD WRIGHT'S speech. It does seem to me that to allow two sets of proceedings to go on about the same, or practically the same, matter, in two different courts at one and the same time must prima facie be a course which the court should avoid. If the county court judge resumes the hearing while the High Court action is undecided he may very well be deciding a matter which is purely of academic interest—in fact sitting to hear a moot and not a judicial case at all. For this reason, in addition to those given by my brethren, in my judgment it is our duty to say that until the High Court proceedings are determined the county court should hold its hand.

The court, I take it, will accept the undertaking of counsel for the tenants that he will co-operate in every way in accelerating the High Court proceedings.

HODSON, L.J.: I should like to emphasise that.

HARMAN, L.J.: I suggest that the order might contain that—"The appellants stating by their counsel that they will concur in the taking of every step reasonably required to expedite the hearing of the High Court proceedings."

A. E. Holdsworth agreed to give that undertaking and said: The result will be

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(4) [1941] 2 All E.R. 245 at p. 257; [1942] A.C. 130 at p. 147.

A that the county court proceedings will be adjourned until judgment in the High Court proceedings, but I am concerned whether that will cover an appeal.

HARMAN, L.J.: It does not.

A. E. Holdsworth: Possibly your Lordships would say, " until any appeal is determined " ?

B

HODSON, L.J.: Until judgment, but with liberty to apply to this court.

Appeal allowed: liberty to the tenants to apply to the Court of Appeal.

Solicitors: *Gibson & Weldon*, agents for *H. Maxwell Lewis*, Southend-on-Sea (for the tenants); *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Southend-on-Sea (for the landlords). C

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

D

R. v. DUFFY AND OTHERS, *Ex parte* NASH.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Hilbery, Cassels, Donovan and Davies, JJ.), June 15, 21, 1960.]

Contempt of Court—Publications concerning legal proceedings—Pending proceedings—Criminal appeal—Publication of matter after trial and before application for leave to appeal—Proceedings sub judice—Whether publication was intended or calculated to prejudice fair hearing of appeal. E

The test determining whether an article published in a newspaper, while criminal proceedings are sub judice, amounts to a contempt of court is whether in all the circumstances existing at the date of publication the article was intended or calculated to prejudice the fair hearing of the proceedings (see p. 894, letter H, post).

F *R.* v. *Parke* ([1903] 2 K.B. 432); *R.* v. *Payne* ([1896] 1 Q.B. 577); and *R.* v. *Odhams Press, Ltd., Ex p. A.-G.* ([1956] 3 All E.R. 494) considered.

If the article is published after trial, and is not published with intent to prejudice the hearing of an appeal, the publication is a contempt of court only if there is real risk (as opposed to remote possibility) that a fair hearing will be prejudiced; but if an article so published merely imposes on the G judges, unnecessarily, the task of dismissing it from their minds, and is not such as to affect impartiality, it does not amount to a contempt of court (see p. 896, letters E and F, post).

Dicta of HUMPHREYS and OLIVER, JJ., in *Delbert-Evans* v. *Davies and Watson* ([1945] 2 All E.R. at p. 172 and p. 174) considered and qualified.

H On May 9, 1960, the applicant was convicted of a charge of causing grievous bodily harm and was sentenced to five years' imprisonment. On May 10 an article was published in a national daily newspaper, which included the following—" A C.I.D. officer pointed a finger in an East End pub and said ' That man will end up in the dock on a charge of violence '. That was a year ago and the finger pointed to a vicious-looking man who I was sipping a grapefruit and was surrounded by admiring young tear-aways and adoring street-girls. Jimmy Nash was his name—the twenty-eight year-old muscle-man jailed for five years yesterday for causing grievous bodily harm to Soho club manager Selwyn Keith Cooney . . . It was a woman—and a personal challenge to pride and passion—that led Nash to the dock at the Old Bailey . . . Honour, however, played little part in the life of James Nash, a small-time hooligan with big ideas . . . But, somehow, somewhere, James Nash picked up a strange idea: he believed that ' No one, not even the police, can touch me '. This, then, is the villain of the piece. A man who, until he stepped into the Pen Club just after midnight on Feb. 6, was just an obscure thug." On May 18 the applicant applied for leave to appeal against conviction and sentence. On motion on his behalf for writs of attachment on the ground that the article was, or might be, prejudicial to him on the hearing of his appeal, it was not suggested that the article was published with any intention of prejudicing the fair hearing of any appeal.

Held: (i) for the purposes of proceedings for contempt of court a criminal case remained sub judice at any rate until the time within which notice of appeal might be given had expired or, if appeal were brought, until the appeal had been heard and determined (see p. 893, letter I, post).

Delbert-Evans v. *Davies and Watson* ([1945] 2 All E.R. 167) followed.

(ii) the article, although published while the case was sub judice, was not a contempt of court because there was no real risk that a fair hearing of the appeal would be prejudiced.

[**Editorial Note.** It was intimated that, although the application for writ of attachment was refused, it should not be thought that the court in any way approved of such articles as that in the present case (see p. 896, letter G, post).

As to contempt of court by comment on pending proceedings, see 8 HALSBURY'S LAWS (3rd Edn.) 7, para. 11; and for cases on the subject, see 16 DIGEST 22, *169* et seq.]

Cases referred to:

Delbert-Evans v. *Davies and Watson*, [1945] 2 All E.R. 167; 173 L.T. 289; sub nom. *R.* v. *Davies, Ex p. Delbert-Evans*, [1945] K.B. 435; 114 L.J.K.B. 417; 2nd Digest Supp.

R. v. *Parke*, [1903] 2 K.B. 432; 89 L.T. 439; 67 J.P. 421; sub nom. *R.* v. *Parke, Ex p. Dougal*, 72 L.J.K.B. 839; 16 Digest 22, *179*.

R. v. *Payne*, [1896] 1 Q.B. 577; 65 L.J.Q.B. 426; 74 L.T. 351; 16 Digest 23, *190*.

R. v. *Odhams Press, Ltd., Ex p. A.-G.*, [1956] 3 All E.R. 494; [1957] 1 Q.B. 73; [1956] 3 W.L.R. 796; 3rd Digest Supp.

Motion for writs of attachment.

This was a motion on behalf of James Lawrence Nash (herein called "the applicant"), who, on May 9, at the Central Criminal Court had been convicted on a charge of causing grievous bodily harm and sentenced to five years' imprisonment. The motion was for writs of attachment against Peter Duffy, John Kirk, Joseph Gillin, Colin Gordon Valdar and the Daily Sketch and Daily Graphic, Ltd. on the grounds that an article published in the "Daily Sketch" on May 10 purporting to describe the applicant's criminal background was, or might be, prejudicial to him on the hearing of his appeal to the Court of Criminal Appeal. On May 18 the applicant applied for leave to appeal against conviction and sentence. The first three defendants were alleged to be the authors of the article, the fourth defendant was the editor, and the fifth defendants were the owners and publishers of the "Daily Sketch".

Elson Rees for the applicant.

Neville Faulks, Q.C., and *David Hirst* for the defendants.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*), and *J. R. Cumming-Bruce* as amici curiae.

Cur. adv. vult.

June 21. **LORD PARKER, C.J.**, read the following judgment of the court: The applicant, together with two other men, was tried at the Central Criminal Court in May, 1960, on a charge of causing grievous bodily harm with intent to one Selwyn Keith Cooney. The trial, which attracted considerable publicity, concluded on May 9, when the applicant was found guilty and sentenced to five years' imprisonment. Apart from two previous convictions, namely, a conviction in November, 1949, when he was seventeen years of age, for stealing cash from an automatic machine for which he was put on probation, and a conviction in March, 1951, when he was fined £3 for stealing poultry from a hen house, he bore a good character. His military record as given at the trial was:

> " Military conduct very good. Since this man has been in the army he has shown continued improvement and I have a high opinion of him. He is smart, hard working and well disciplined. Is a boxer of some merit, a good sportsman and physically keeps himself very fit. Had he elected to serve on I should have considered him for N.C.O. rank."

In addition, his employers certified that he had been continuously in their employment from May 17, 1954, until his arrest in February, 1960, and that they found him to be

> " reliable, industrious and honest, popular with his workmates, and . . . of a quiet and peaceable disposition."

On the next day, May 10, 1960, there appeared the article in question. It is unnecessary to read the article in full, but it stated, inter alia, as follows:

> " A C.I.D. officer pointed a finger in an East End pub and said: ' That man will end up in the dock on a charge of violence '. That was a year ago and the finger pointed to a vicious-looking man who was sipping a grapefruit and was surrounded by admiring young tear-aways and adoring street-girls. Jimmy Nash was his name—the twenty-eight year-old muscle-man jailed for five years yesterday for causing grievous bodily harm to Soho club manager Selwyn Keith Cooney . . . It was a woman—and a personal challenge to pride and passion—that led Nash to the dock at the Old Bailey . . . Honour, however, played little part in the life of James Nash, a small-time hooligan with big ideas . . . But, somehow, somewhere, James Nash picked up a strange idea: he believed that ' No one, not even the police, can touch me '. This, then, is the villain of the piece. A man who, until he stepped into the Pen Club just after midnight on Feb. 6, was just an obscure thug."

Logically, the first question is whether on May 10, when the article was published the proceedings against the applicant were still sub judice or pending, so that the publication of improper matter might amount to a contempt of court. As to this it is clear on the authorities that proceedings are pending in this sense from the time that a person is charged even though he has not been committed for trial: cf. *R.* v. *Parke* (1). When proceedings cease to be pending is not clear on the authorities, though in *Delbert-Evans* v. *Davies and Watson* (2) HUMPHREYS, J., said:

> " . . . I think a criminal case may be said to be finally over when the Court of Criminal Appeal has heard and determined the appeal, and after that time they are in no peril of being dealt with for contempt of court."

It may well be, however, that that is too restricted a view, for it could be said that the publication of improper matter thereafter might constitute contempt since the proceedings might on the grant of the Attorney-General's fiat go to the House of Lords. That, however, remains for decision in some other case. *Delbert-Evans* v. *Davies and Watson* (3), however, is clearly authority for the proposition that a criminal case remains sub judice at any rate until the time has expired within which notice of appeal to the Court of Criminal Appeal may be given, or, in the event of such notice being given, until the appeal has been heard and determined. In the present case the article was published the day after the trial and in fact an application for leave to appeal against both conviction and sentence was received by the court on May 18.

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(1) [1903] 2 K.B. 432. (2) [1945] 2 All E.R. at p. 174; [1945] K.B. at p. 444.
(3) [1945] 2 All E.R. 167; [1945] K.B. 435.

The next question is what matter constitutes a contempt of court and in what circumstances a writ of attachment will issue. In *R.* v. *Parke* (4), Wills, J., who delivered the judgment of the court consisting of Lord Alverstone, C.J., Channell, J., and himself, said:

> " The reason why the publication of articles like those with which we have to deal is treated as a contempt of court is because their tendency and sometimes their object is to deprive the court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. Their tendency is to reduce the court which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned."

At the same time it has been emphasised in a number of cases that it is only in clear cases that the writ will issue. Thus in *R.* v. *Payne* (5) Lord Russell of Killowen, C.J., said:

> " . . . I wish to express the view which I entertain, that applications of this nature have in many cases gone too far. No doubt the power which the court possesses in such cases is a salutary power, and it ought to be exercised in cases where there is real contempt, but only where there are serious grounds for its exercise. Every libel on a person about to be tried is not necessarily a contempt of court; but the applicant must show that something has been published which either is clearly intended, or at least is calculated, to prejudice a trial which is pending."

In the same case Wright, J., in agreeing with the Lord Chief Justice, said (6):

> " I agree with all that the Lord Chief Justice has said, and I only wish to add that, in my opinion, in order to justify an application to the court the publication complained of must be calculated really to interfere with a fair trial, and, if this is not the case, the question does not arise whether the publication is so objectionable in its terms as to call for the interference of the court. If the publication is found to be likely to interfere with a fair trial, a second question arises, whether, under the circumstances of the case, the jurisdiction which the court in that case possesses ought to be exercised, not so much for punishment as for preventing similar conduct in the future. That is the rule which I wish to adopt with regard to applications of this nature."

Words to much the same effect were used by Lord Goddard, C.J., in *R.* v. *Odhams Press, Ltd., Ex p. A.-G.* (7) where he said:

> " The test is whether the matter complained of is calculated to interfere with the course of justice . . ."

Accordingly, the question in every case is whether, in all the circumstances existing at the date of publication, including the content and form of the article, the circulation of the paper in which it appears, and the state of the proceedings, the article was intended or calculated to prejudice the fair hearing of the proceedings. In the present case the article in question was published at a time when the trial before a jury was completed but when the time in which to apply for leave to appeal against conviction and sentence had not elapsed. It was therefore published at a time when the proceedings were pending in the sense used by the authorities, and it is clear that improper matter published at that time might constitute a contempt of court. This might well occur if, for instance, the article in question formed part of a deliberate campaign to influence the decision of the appellate tribunal. In the present case there is no suggestion of any such intention, and the sole question is whether the article when published on May 10 was

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(4) [1903] 2 K.B. at pp. 436, 437.

(5) [1896] 1 Q.B. at p. 580.

(6) [1896] 1 Q.B. at p. 581.

(7) [1956] 3 All E.R. at p. 497; [1957] 1 Q.B. at p. 80.

A in all the circumstances calculated to interfere or calculated really to interfere with the hearing of the appeal, should one be brought. Looking at it in that way and in the absence of authority, we should have thought that the answer was plainly: " No ". Even if a judge who eventually sat on the appeal had seen the article in question and had remembered its contents, it is inconceivable that he would be influenced consciously or unconsciously by it. A judge is in a very B different position to a juryman. Though in no sense superhuman, he has by his training no difficulty in putting out of his mind matters which are not evidence in the case. This indeed happens daily to judges on Assize. This is all the more so in the case of a member of the Court of Criminal Appeal, who in regard to an appeal against conviction is dealing almost entirely with points of law and who in the case of an appeal against conviction is considering whether or not the C sentence is correct in principle.

Great reliance has, however, been placed by the applicant on certain passages in the decision of this court in *Delbert-Evans* v. *Davies and Watson* (8). Thus, in considering whether proceedings were pending when the time for appeal had not elapsed, HUMPHREYS, J., referred to the fact that the Court of Criminal Appeal had power in certain circumstances to award a venire de novo, and he D added (9):

> " . . . any matter which is published between the date of a conviction and the date of the hearing by the Court of Criminal Appeal may come to the attention of a juryman who has to try the question of the guilt or innocence of some person on the indictment in respect of which venire de novo has been awarded."

E Whether this is a relevant consideration is open to doubt, since it may be that the proper test is whether the article is calculated to interfere with the hearing of the pending proceedings, that is proceedings in the Court of Criminal Appeal rather than some fresh proceedings resulting from an award of venire de novo. Be that as it may, nothing occurred on May 10 which would suggest that there F was any mis-trial such as would justify the court in awarding a venire de novo. Such an award is only made in very rare circumstances and where it can be said that there has been a mis-trial from the beginning. In fact, though of course this is not conclusive, there is no suggestion in the grounds of appeal that have been submitted that any mis-trial took place. Further, it is not without interest to observe that in *Delbert-Evans* v. *Davies and Watson* (8) the article in question, though more likely to be prejudicial than the article in the present case, G was not held to be a contempt of court on the ground that a venire de novo might conceivably be awarded. It is true that in that case, as HUMPHREYS, J., emphasised, the appeal had been heard and dismissed, but the test is not whether harm has resulted but whether at the date of publication the article in question was calculated to prejudice the fair hearing of the proceedings.

HUMPHREYS, J., further, however, considered the matter from the point of H view of a judge who might sit in the Court of Criminal Appeal on the hearing of any appeal. He said (10):

> " He is a human being, and while I am not saying for a moment that it is likely that any judge would give a decision which he would not have given but for information which had been improperly conveyed to him, it is I embarrassing to the judge that he should be told matters which he would much rather not hear and which make it much more difficult for him to do . . . his duty . . ."

Again, he said (11):

> " It seems to me that the bringing before . . . the minds of judges who

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(8) [1945] 2 All E.R. 167; [1945] K.B. 435.
(9) [1945] K.B. at p. 442; [1945] 2 All E.R. at p. 171.
(10) [1945] 2 All E.R. at p. 172; [1945] K.B. at p. 442.
(11) [1945] 2 All E.R. at p. 172; [1945] K.B. at p. 443.

> have to try an appeal in a criminal case matter which they do not desire to know, and which, if it is forcibly brought to their attention, is likely to prejudice them in the fair and impartial consideration of the case, is wrong. Whether that is right or not, I cannot say; it is my own opinion and I express it as such and no judge with long criminal experience, I venture to think, will fail to be able to recall instances in which it has had the effect of making the task of a judge extremely difficult, and no one has the right to publish matter which will make the task of a judge more difficult."

Again, OLIVER, J., said this (12):

> " I fully agree with my Lord (and . . . I share his view as to its importance), that jurors are not the only people whose minds can be affected by prejudice . . . One of the evils of inadmissible matter being disseminated is that no one can tell what effect a particular piece of information may have upon his mind . . . why should one be embarrassed by having matter such as this put into one's mind, the effect of which it is impossible to estimate or assess? "

Both of the judges, moreover, in refusing the writ emphasised that the appeal in that case was against conviction only, whereas the matters published were only relevant on sentence. The inference accordingly was that if in that case the appeal had been against sentence the article might well have constituted a contempt of court.

It is by no means clear what the judges in that case intended to convey by the word " embarrassed ". If, in its context, the word means no more than this, namely, that the article had put on the judge, quite unnecessarily, the task of dismissing the offending matter from his mind, then we think that the dicta we have quoted go too far. Embarrassment which has no effect on impartiality is not necessarily contempt of court. The question always is whether a judge would be so influenced by the article that his impartiality might well be consciously, or even unconsciously, affected. In other words, was there a real risk, as opposed to a remote possibility, that the article was calculated to prejudice a fair hearing? In the present case we have come to the clear conclusion that there was obviously no such risk; and that therefore the article did not constitute a contempt of court.

We would only add this. We hope that nothing that we have said will lead newspapers to think that the court approve in any way of an article such as this. Not only do newspapers publish such articles at their peril in regard to proceedings for contempt of court or for libel, but the effect of such an article may well be that the prisoner will, however wrongly, think that he will be or has been prejudiced in his appeal. That, however, is not a relevant consideration for this court, which is only concerned with whether a contempt of court has been committed.

Application refused.

Solicitors: *Sampson & Co.* (for the applicant); *Swepstone, Walsh & Son* (for the defendants); *Treasury Solicitor.*

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

[END OF VOLUME TWO.]

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(12) [1945] 2 All E.R. at p. 174; [1945] K.B. at p. 445.